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Administrative Law

Cases and Materials

Eighth Edition

2023-2024 Cumulative Supplement

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Chapter 1 Administrative Law: An Introduction and Structural Constitutional Issues

At p. 44, add to end of note 1 in Part 1C.1:

We may learn more about the vulnerability of the nondelegation doctrine in the Court's upcoming term. It has agreed to address a nondelegation challenge to the power of the Securities and Exchange Commission (SEC) to choose whether to bring enforcement actions for alleged securities fraud in an agency proceeding or in a federal district court. *See SEC v. Jarkesy*, No. 22-859. Challengers, citing the court of appeals decision below, argued that Congress cannot give the agency power to make that decision because the decision as to which tribunals have jurisdiction over enforcement actions is an exercise of legislative power that cannot be delegated to the agency. The SEC responded by distinguishing between the legislative decision to allow a category of cases, like SEC enforcement actions, to be heard in various tribunals, with an agency's executive decision to bring a specific action in one of the tribunals approved by the legislature. *Jarkesy* represents the latest in a series of cases seeking to limit agency power through expansion of various constitutional doctrines, in this instance the nondelegation doctrine. How do you think *Jarkesy* fits within the existing intelligible principle standard from *Whitman*? Are you persuaded by arguments for shifting responsibility for agency actions back to Congress, or are you sympathetic to the idea that Congress should be allowed to empower agencies to act within their areas of expertise? How do constitutional arguments against delegation compare with statutory interpretation arguments designed to limit agency power (see note 3, below).

At p. 62, insert before last paragraph of note 4 in Part 1C.2:

The public rights doctrine will again be front and center during the Court's 2023 term in *SEC v. Jarkesy*, No. 22-859. Jarkesy argues, *inter alia*, that the SEC's statutory authority to impose civil penalties violates the right to trial under the Seventh Amendment. The case is significant because it asks the Court to constrain (for the first time) agencies' power to adjudicate cases in which the agency is a party.

At pp. 64-95, replace existing Part 1C.3 with the following:

3. Political Branch Control of Agency Power

For whom do agencies work? Congress has the Article I legislative power to create agencies, define their missions, and fund them. Article II, however, vests the executive power in the president and charges that officer to "take Care that the Laws be faithfully executed." It should come as no surprise that this constitutional division has given rise to centuries of competition between the branches for control of agency power. "Personnel is policy," as the saying goes, so much of this competition has focused on control of the power to appoint and remove agency officers.

Obviously, those who appoint the officers who directly control an agency can have vast impact on how that agency actually implements its statutory missions. The Constitution provides an express legal framework for competition over this power in the Appointments Clause, Art. II, § 2, cl. 2.

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It is equally obvious that agency officers will tend to listen rather well to those with power to fire them. The Constitution provides for impeachment by Congress, Art. I, § 2, cl. 5; Art. I § 3, cl. 6–7, but does not otherwise expressly govern removal of agency officials. The absence of a "Removals Clause" has left room for unending debate regarding whether Congress can legally impose "good cause" requirements on presidential removal of agency officials, insulating them to some degree from presidential control. Agencies headed by officials enjoying such tenure protections are commonly called "independent" agencies and distinguished from "executive" agencies, which are run by officials who lack them. Independent agencies have been a prominent fixture of the federal government since the creation of the (now defunct) Interstate Commerce Commission in 1887. They include, among many others, the Federal Trade Commission, the Federal Reserve Board, the Federal Communications Commission, the Federal Energy Regulatory Commission, and the National Labor Relations Board. Independent agencies are usually headed by multi-member boards or commissions, with members serving staggered, fixed-year terms. They are often subject to partisan balance requirements to ensure that, at least when all positions are filled, no major party controls more than a bare majority of them. The president generally has power to select one member to serve as chair. Proponents of independent agencies contend that their design enhances governance by promoting agency expertise and by minimizing political interference.

Through much of the twentieth century, a broad consensus existed that the Constitution leaves space for Congress to use tenure protections to insulate at least some types of agencies from some degree of presidential control. Adherents of a strong version of the "unitary executive theory" reject this claim. Broadly speaking, they argue that removal authority is an incident of the "executive power" that Article II of the Constitution vests solely in the president. Congress cannot restrict the president's authority to remove agency officials (principal officials, at least) without infringing on this executive power. As you will read below, the Supreme Court's most recent discussion of removal authority, *Seila Law LLC v. Consumer Financial Protection Bureau* (2020), indicates that a narrow majority of the Supreme Court now adheres to a strong version of the unitary executive theory. The continued "independence" of independent agencies is therefore in some doubt.

The materials below introduce you to constitutional doctrines that have evolved to govern competition between the political branches to control who runs the agencies. These materials are structured a little differently than other readings with the thought that this will help you make sense of *Seila Law* when you get to it. Below, you will find:

- Lesson 1C.3, which has questions about both appointments and removals.
- Notes about appointments.
- Notes about removals as background for *Seila Law.*
- An excerpt from *Seila Law LLC,* along with a few questions to ponder.
- A few more notes briefly introducing you to some additional means the political branches use to control agency power.

Lesson 1C.3. Could Congress vest in itself the power to appoint WTC Commissioners? Could it leave this power in the president but eliminate the requirement of Senate confirmation? What policies underlie the constitutional answers to these questions?

Ben, an attorney at the WTC, is no fan of Commissioners Fred and Barney, whom he regards as political hacks. For a moment he takes solace in the idea that, if and when a new administration comes to town, it will install its own people in place, and they might even have relevant expertise. But then Ben snapped to his senses after recalling § 1 of the WTCA. Why is removing Fred and Barney not so simple a matter as Ben had thought?

Suppose that Congress got tired of paying for five commissioners and amended the WTCA so that its

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head is a single director, and Fred was chosen. Does this change in agency structure alter your removal analysis?

Suppose for the sake of argument that the WTCA creates the position of General Counsel and grants this officer the sole power to determine whether to initiate administrative enforcement actions against regulated entities under §§ 7 and 11 of the Act. The Act also specifies that the president shall appoint the General Counsel for a four-year term subject to removal for good cause by the Commission. The Act does not require Senate confirmation. Are these appointment and removal provisions constitutional?

NOTES ABOUT APPOINTMENT

1. The Appointments Clause. The Appointments Clause provides 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, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, cl. 2. This provision contains two distinctions that are especially important for us to figure out. First, we have to determine who counts as "Officers of the United States" subject to the Appointments Clause's provisions and who does not (*e.g.*, employees). Second, we need to figure out who counts as "inferior Officers" (as opposed to principals) who need not be appointed through the default method of presidential nomination with Senate confirmation.

One structural element of the Appointments Clause may have leapt out at you: Congress cannot, by itself, appoint any officer of the United States—*e.g.*, Congress cannot assign to itself the power to appoint the Secretary of State. Why is this limitation critical to separation of powers?

2. Who are "Officers of the United States"? And who else is there? In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court addressed a challenge to the constitutionality of provisions governing appointment of members of the Federal Election Commission. At the time of this challenge, the Commission had what the Court called "extensive rulemaking and adjudicative powers" as well as "direct and wide ranging" powers to enforce the requirements of the Federal Election Campaign Act. The power to appoint FEC Commissioners was distributed as follows:

> The Secretary of the Senate and the Clerk of the House of Representatives are *ex officio* members of the Commission without the right to vote. Two members are appointed by the President *pro tempore* of the Senate "upon the recommendations of the majority leader of the Senate and the minority leader of the Senate." Two more are to be appointed by the Speaker of the House of Representatives, likewise upon the recommendations of its respective majority and minority leaders. The remaining two members are appointed by the President. Each of the six voting members of the Commission must be confirmed by the majority of both Houses of Congress, and each of the three appointing authorities is forbidden to choose both of their appointees from the same political party.

Id. at 113. A moment's reflection may suggest why Congress designed this particular structure for officials with jurisdiction over congressional elections.

Whatever the wisdom of Congress's plan, the Court deemed it unconstitutional because of the role it gave Congress in appointing "Officers of the United States." The Court vaguely explained that this phrase, as used by the Appointments Clause, captures "any appointee exercising significant authority pursuant to the laws of the United States." It attempted to give some flesh to this standard by noting precedents that had treated postmasters first class and clerks of district courts as "inferior officers."

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The Court also distinguished "officers of the United States" from two other kinds of functionary—"employees" and what might be termed "officers of Congress." "Employees" are "lesser functionaries subordinate to officers of the United States . . . ." "Officers of Congress" are persons whom Congress may properly appoint to "perform duties only in aid of those functions that Congress may carry out itself or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'" For example, Congress may grant to "officers of Congress" powers of "an investigative or informative nature" because they fall into the "same general category as those powers which Congress might delegate to one of its own committees."

Given their "significant" authority, it was plain that FEC Commissioners were not "employees." Also, they possessed many powers that could not be exercised by an "officer of Congress." In this regard, the Commissioners' powers to seek discretionary judicial relief to enforce the Act were particularly problematic given the executive nature of prosecution. More broadly:

> All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress or the Executive Branch, are more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. While the President may not insist that such functions be delegated to an appointee of his removable at will, none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States."

It followed that the FEC Commissioners were "Officers of the United States" within the meaning of the Appointments Clause. Given that they were, identify two ways in which their appointments technically violated that clause.

3. "Officers of the United States" or employees?—the ALJs. You may recall earlier references in the casebook to "administrative law judges" (ALJs). We discuss their functions in Chapter 4 on administrative adjudications. The important thing to know about them for the moment is that the APA authorizes these agency functionaries to act as front-line decisionmakers for "formal" adjudications by agencies. During these formal adjudications, an ALJ functions much like a judge running a bench trial. Unlike an Article III judge, however, their decisions are typically subject to plenary review by their employing agencies—*e.g.*, the FTC can overrule decisions by its ALJs that it does not like. Seventy years after adoption of the APA, a circuit split developed regarding whether ALJs are "Officers of the United States" subject to Article II's Appointments Clause, or simply "employees" whose appointment is not governed by Article II. The Supreme Court decided that the SEC's ALJs are such officers in *Lucia v. SEC,* 138 S. Ct. 2044 (2018).

Justice Kagan, writing for the Court, relied on two Supreme Court precedents to articulate a two-part test for whether someone is an "officer" within the meaning of the Appointments Clause. She explained that "an individual must occupy a 'continuing' position established by law to qualify as an officer," *id.* at 2051 (quoting *United States v. Germaine*, 99 U.S. 508, 510, 511 (1879)), and must "exercis[e] significant authority pursuant to the laws of the United States." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). Everyone involved in the litigation agreed that SEC ALJs satisfy the first part of this test given that they hold career appointments in posts created by statute. *Id.* at 2053.

Turning to the second part, Justice Kagan declined to elaborate on the meaning of "significant authority." Instead, she resolved the issue on the narrow ground that SEC ALJs should be regarded as

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"officers" because their powers are virtually indistinguishable from those of Special Trial Judges (STJs) of the United States Tax Court, whom the Court had determined were "officers" in *Freytag v. Commissioner*, 501 U.S. 868 (1991). Justice Kagan explained:

> [T]he Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. 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." More precisely, they "[r]eceiv[e] evidence" and "[e]xamine witnesses" at hearings, and may also take pre-hearing depositions. Second, the ALJs (like STJs) "conduct trials." . . . [T]hey 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." . . . 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.

Justices Sotomayor and Ginsburg dissented, reasoning that SEC ALJs did not exercise the significant authority required for "officer" status given that their decisions were subject to de novo review by agency heads.

4. Who are you calling "inferior"? In *Edmond v. United States*, 520 U.S. 651 (1997), the Supreme Court addressed the problem of distinguishing principal and inferior officers within the meaning of the Appointments Clause. The petitioners in this case sought to overturn their court-martial convictions on the ground that the judges of the Coast Guard Court of Criminal Appeals (CGCCA) who had affirmed their convictions had been appointed by the Secretary of Transportation, which was improper because they were principal officers who should have been appointed by the president with the advice and consent of the Senate. Justice Scalia authored an 8-1 opinion rejecting this claim. He explained:

> Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

Judges of the CGCCA turn out to be "inferior" because they are subject to joint supervision by the Judge Advocate General of the Coast Guard and the Court of Appeals for the Armed Forces (CAAF). The Judge Advocate General may not attempt to influence the decisions of the CGCCA, but she may "remove a [CGCCA] judge from his judicial assignment without cause." CGCCA decisions are subject to review by the CAAF. The scope of review as to fact is limited, checking only to ensure that "there is some competent evidence in the record to establish each element of the offense beyond reasonable doubt." This limited scope of review did not stop the Supreme Court from concluding that judges of the CGCCA are not principal officers as they "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id*. at 665.

5. Remedying an appointment problem by making principal officers into inferior officers. In *Intercollegiate Broadcasting System, Inc. (IBS) v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), the D.C. Circuit faced a constitutional challenge to the power of the Librarian of Congress to appoint Copyright Royalty Judges (CRJs). The court concluded that CRJs are, as defined by statute, principal officers, and, as such, could not be constitutionally appointed by the Librarian. Rather than toss out the

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entire CRJ scheme as unconstitutional, the court instead transformed them into inferior officers by making them easier to remove.

CRJs have authority to set "reasonable" copyright royalty rates where negotiations among the interested parties fail. As a practical matter, CRJs have considerable discretion in determining what is "reasonable." The Librarian of Congress, an officer appointed by the president with the advice and consent of the Senate, appoints the three CRJs to staggered six-year terms. The Librarian approves the CRJ's procedural regulations, issues ethical rules governing CRJs, and provides CRJs with logistical support. The Register of the Library of Congress is appointed by the Librarian and subject to his direction. The Register has authority to issue interpretations of law that bind the CRJs and to review their decisions for legal error. Subject to this caveat, CRJ decisions are not subject to correction by any other entity within the executive branch.

The D.C. Circuit applied three factors drawn from *Edmond v. United States*, 520 U.S. 651 (1997), bearing on the principal-inferior divide: (1) the degree of supervision and control exercised by higher executive authorities; (2) removability; and (3) power to render final decisions uncorrectable by other executive authorities. The first factor suggested that CRJs are principal officers given that the real heart of their power lies in their control over discretionary, fact-bound royalty determinations. The Register's authority over legal determinations does little to check this practical power. The second factor, removability, favored principal officer status because the Librarian could remove a CRJ only for cause. (The court conceded, however, that an officer protected by a for-cause restriction on removal could, under some circumstances, be considered an inferior officer given that, in *United States v. Morrison*, 487 U.S. 654 (1988), the Supreme Court had determined that independent counsels, who had such protection, were inferior officers. For discussion of *Morrison,* see note 5 below in Notes About Removal.) As for the third factor, no executive authority could review the CRJs' rate determinations to the degree they rested on facts.

The court concluded that the Librarian could not constitutionally appoint CRJs insofar as they are principal officers. To remedy this problem, the court did not throw out the entire CRJ statutory scheme as unconstitutional. Instead, the court followed the lead of the Supreme Court in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). In that case, the Supreme Court concluded that for-cause removal protections of members of the Public Company Accounting Oversight Board were unconstitutional. Rather than throw out the entire agency as unconstitutional, however, the Court instead severed the for-cause removal protection but otherwise left the agency intact. (For more discussion of *Free Enterprise,* see note 6 on Notes About Removal.) In just the same way, the D.C. Circuit severed the for-cause limitation on removal of CRJs by the Librarian. Subjecting CRJs to plenary removal authority by the Librarian transformed them into inferior officers whom the Librarian could appoint consistent with the Appointments Clause.

6. Updating *Edmond* and courts' choice of remedy for unconstitutional appointments. In *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), a closely divided Court relied heavily on *Edmond v. United States*, 520 U.S. 651 (1997), to conclude that the appointment of Administrative Patent Judges (APJs) by the Secretary of Commerce was unconstitutional insofar as APJs were exercising the powers of principal officers. The Court remedied this violation by altering APJs powers.

The Patent and Trademark Office (PTO) is an executive agency within the Department of Commerce that is responsible "for the granting and issuing of patents." 35 U.S.C. §§ 1(a), 2(a)(1). The PTO is headed by a Director who is appointed by the president with the advice and consent of the Senate. Within the PTO, the Patent Trial and Appeal Board (PTAB) is an adjudicatory body that consists of the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and more than 200 APJs. All PTAB members except the Director—including all APJs—are appointed by the Secretary of Commerce.

Among its many responsibilities, the PTAB conducts inter partes review proceedings, in which it evaluates the validity of existing patents in adversarial proceedings. Inter partes review is conducted by three-member panels of the PTAB, which may be composed solely of APJs, and is not subject to review by

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another executive officer—although the PTAB itself "may grant rehearings." 35 U.S.C. § 6(c). Moreover, the Secretary may only remove APJs from office "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a).

Arthrex appealed an inter partes review of its '907 patent by a panel of three APJs on the ground that the APJs were principal officers within the meaning of Article II, and thus may only be appointed by the president with the advice of consent of the Senate. The Federal Circuit held for Arthrex and applied a remedy similar to that in *Intercollegiate Broadcasting*, *supra*—it invalidated the APJs' statutory removal protections, making them removable at will by the Secretary and thus inferior officers for purposes of Article II.

The Supreme Court agreed with Federal Circuit that Congress violated the Appointments Clause, but disagreed as to the remedy. Like in *Edmond*, the Court's decision did not "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." 141 S. Ct. at 1985. The Court held that because APJs exercise "significant authority" free from adequate supervision by other members of the executive branch, their appointment by the Secretary is unconstitutional. *Id.* at 1986. In support of its decision, the Court distinguished APJs' circumstances from those of the CGCCA judges in *Edmond*. The "significant" factor in *Edmond* was that CGCCA judges had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 1980 (quoting *Edmond*, 520 U.S. at 665). APJs, by contrast, do have "'power to render a final decision on behalf of the United States' without any … review by their nominal superior or any other principal officer in the Executive Branch." *Id.* at 1981 (quoting *Edmond*, 520 U.S. at 665). According to the Court, this greater authority for APJs "conflicts with the design of the Appointments Clause 'to preserve political accountability,'" and thus renders their appointment unconstitutional. *Id*. at 1982 (quoting *Edmond*).

As to the remedy, however, the Court rejected Arthrex's bid to invalidate the entire inter partes review regime and focused instead on a "more tailored declaration"—blocking enforcement of § 6(c) insofar as it prevented the Director from reviewing PTAB decisions. *Id.* at 1986. In reaching this conclusion, the Court also rejected the Federal Circuit's decision to strike APJs' removal protections because, regardless of whether this remedy "would cure the constitutional problem, review by the Director better reflects the structure of supervision within the PTO and the nature of APJs' duties." *Id*. at 1987. The Court then remanded the case to the PTAB for review by the Acting Director.

Arthrex's legacy is of course still unclear, but at least three features appear immediately significant. First, it suggests a movement away from removability as the primary distinction between principal and inferior officers in favor of the scope of an officer's authority to make final, unreviewable decisions on behalf of the United States. Second, it confirms the Court's reluctance to invalidate entire agency programs based on unconstitutional appointments, preferring instead to alter or invalidate individual statutory provisions to "fix" the perceived constitutional problem. Finally, the Court's decision to alter the statute to permit review of APJ decisions by the Director, rather than to make APJs removable at will, reflects an acknowledgement that participation by agency heads in administrative decision making is more important to the constitutionality of agency action than mere power over individual decision makers.

7. Recess appointments. At the founding of the Republic, travel and communications were slow, and the President needed a means of appointing officers while the Senate was not in session. The Constitution solved this problem by providing that "[t]he President shall have 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." U.S. Const., art. II, § 2, cl. 3. This power also, of course, can enable the president to avoid the political difficulties of Senate confirmation where the Senate is controlled by the opposing party. (It also enabled the president to avoid filibusters by a minority before the Senate eliminated filibusters for executive confirmations.)

To prevent the president from exploiting this power, the Senate began holding "pro forma" sessions during periods of adjournment during which no business would be conducted. The Office of Legal Counsel,

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an office within the Department of Justice, concluded that these pro forma sessions did not block the recess-appointment power because, during these sessions, the Senate could not "receive communications from the President or participate as a body in making appointments." This conflict came to a head in *Noel Canning v. NLRB*, 573 U.S. 513 (2014). The petitioner challenged the authority of the National Labor Relations Board to act on the ground that it lacked its required quorum of three members. The Senate had confirmed two members of the Board in 2010. President Obama, to avoid a filibuster, had invoked the recess-appointment power to appoint three other members without Senate confirmation on January 4, 2012. At that time, the Senate was holding periodic pro forma sessions but was otherwise adjourned.

The Supreme Court agreed unanimously that the President had exceeded his recess-appointment power, but the justices split 5-4 in terms of how they reached this conclusion. Justice Breyer's majority opinion essentially boiled down to the propositions that: (a) the pro forma sessions counted as periods when the Senate was not in recess; and (b) the recesses between the pro forma sessions were too short to permit recess appointments. Justice Scalia's concurrence would have permitted recess appointments only during "intersession recesses" and only for vacancies that arise during them. The upshot is that the Senate can generally block the president from using the recess appointment power by making formalistic adjustments to its calendar.

8. A quick word about acting officials. There are over 1200 agency positions that require presidential nomination and Senate confirmation ("PAS offices"). Delays in both nominations and confirmations result in many of these offices being vacant for considerable periods of time. Some agencies have provisions in their enabling acts that specify who should fill such vacancies in an "acting" capacity. Other single-headed agencies handle succession through the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 et. seq. The default rule under this statute is that, where a PAS office is unfilled, the first assistant to that office will temporarily serve in an acting capacity. The president may, however, direct a senior employee of the agency or another PAS official to take this role instead. A person whom the president has nominated to hold an office permanently may not serve in an acting role unless this person served as first assistant for the office for 90 or more days during the 365-day period that preceded the office becoming open. Complying with these statutory requirements can be tricky, and the consequence of a violation may be that an agency action taken by an improperly appointed official lacks legal force and effect. § 3348(d)(1). For much more about acting officials, see Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

NOTES ABOUT REMOVAL

1. There is no Removals Clause. Our opening note about appointments quoted the Constitution's Appointments Clause and identified certain key phrases that require elucidation. We cannot start out the notes on removal authority the same way because there is no "Removals Clause" in the Constitution—unless one counts the clauses dealing with the specialized removal process of impeachment. In part as a result of this gap, people have been arguing over the scope of congressional and presidential powers to control removals since the very first Congress in 1789.

More specifically, argument has commonly focused on whether Congress can impose "good cause" limits on the president's authority to remove agency officials. Proponents of this power contend that Congress can use its power under the Necessary and Proper Clause to structure the operations of the offices that it creates and funds, and this power generally should extend to granting limited tenure protections to agency officials. (It is generally conceded, however, that there are some agency officials, e.g., the Secretary of State, whom Congress cannot protect with good-cause restrictions on removal as doing so would interfere with the president's discharge of her independent constitutional powers over matters such as foreign affairs and defense.)

Adherents of the unitary executive theory counter that the Vesting Clause of Article II vests all of the executive power of the federal government in the president, without exception. Also, the Take Care Clause

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imposes a duty on the president to "take Care that the Laws be faithfully executed." To execute the laws (and ensure that others execute them faithfully), the president must control who remains in office. Therefore, Congress cannot restrict the president's removal authority. For a seminal article on the unitary executive theory, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

2. The "Decision" of 1789. As you will see when you read Chief Justice Roberts's majority opinion in *Seila Law LLC v. Consumer Financial Protection Bureau* (2020), proponents of the unitary executive theory sometimes rely heavily on the "Decision of 1789" as supporting evidence for their view. It is not all that clear, however, just what the Decision of 1789 decided.

One of the many pressing orders of business for the First Congress was to create the first great departments of government. To this end, the House took up legislation to establish a Department of Foreign Affairs headed by a Secretary to be appointed by the president and confirmed by the Senate, but "to be removable by the president." Days of debate followed as members of the House argued over whether the Constitution lodged power to remove Senate-confirmed officials in the president alone, required the president to seek Senate approval, required impeachment, or instead left questions regarding control of removals to legislative discretion. After a majority of the House had already approved the original statutory language, Representative Benson objected that the phrase stating that the Secretary was "to be removable by the president" suggested that the president's removal power came from a legislative grant from Congress, rather than from the Constitution itself. Purportedly to avoid this inference, he proposed striking this direct reference to presidential removal authority and amending a related provision so that it presupposed the existence of presidential removal authority without suggesting a congressional source for it. The House adopted Benson's proposal in a three-vote process involving shifting majority coalitions that have complicated interpretation of the House's intent ever since. The Senate later approved the measure by the narrowest of margins, with the Vice President providing the tie-breaking vote.

Based upon what the First Congress actually did, we can say that the Decision of 1789 decided that the Constitution does not require the president to obtain Senate approval to remove Senate-confirmed officials. To go further and claim that the Decision of 1789 decided that Congress cannot regulate the president's removal authority is to enter onto highly contested ground. For deep dives, see Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PENN. L. REV. 753 (2023);, and Saikrishna Prakash, *New Light on the Decision of 1789,* 91 CORNELL L. REV. 1021 (2006).

3. The Tenure-in-Office Act and *Myers v. United States*. The Decision of 1789 settled that the Constitution does not require Senate approval for presidential removal of Senate-confirmed officials. In 1867, however, Congress, after coming into sharp conflict with President Johnson over Reconstruction, imposed this requirement by statute via the Tenure in Office Act, which generally provided that Senate-confirmed appointees were entitled to hold their offices until replaced by a new Senate-confirmed appointee. Passage required Congress to override a veto by Johnson, who condemned the Act as an unconstitutional infringement of the president's "executive power" and a violation of both the Decision of 1789 as well as eighty years of judicial, executive, and legislative practice. He later violated the Act by removing the Secretary of War; the House impeached him for it, and the Senate came within one vote of removing him. Two decades after its enactment, the Act was repealed in 1887.

This repeal did not, however, end Congress's efforts to condition removal of Senate-confirmed officials on Senate permission. During the 1870s, Congress enacted a series of statutes, all signed by President Grant, that required Senate approval of presidential removal of various classes of postmaster. Presidents put up with this requirement for about fifty years. Then, in 1920, President Wilson ordered the firing of Frank Myers, the postmaster first-class of Portland, Oregon, before the end of his four-year term. Myers sued for his lost salary, which ultimately led the Supreme Court to issue one of the great milestones in the history of the debate over the president's executive power, *Myers v. United States*, 272 U.S. 52 (1926).

It turned out that Chief Justice Taft, the author of the majority opinion and a former president, had quite

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a bit to say on the subject. After discussing the Decision of 1789, many other precedents and notable secondary authorities, and the history of the Tenure in Office Act, he held that requiring Senate approval for removal of Senate-confirmed officials constituted a clear infringement on the executive power that Article II vests in the president. In support of this conclusion, Taft contended that strong presidential control over removals was necessary to protect the president's executive power to direct agency actions. In other words, the president must be able to fire agency officials to control what they do.

Taft also conceded, however, that there could be certain types of decisions that an agency official should make independently, free of immediate presidential control. Taft observed, "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control." He also added, without further explanation, "[o]f course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." Taft added, however, that although the president might not be able to control these decisions in particular instances, she could consider them in determining whether to remove an agency official—*i.e.*, even though the president might lack authority to revise an adjudication, she could fire the adjudicator for doing a bad job.

4. *Humphrey's Executor* and the quasi-categories. Nine years after the Supreme Court narrowly upheld a claim of improper removal brought on behalf of a dead postmaster in *Myers v. United States* (1926), it unanimously rejected a claim of improper removal brought on behalf of a dead commissioner of the Federal Trade Commission in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Humphrey, a Hoover appointee, was, to say the least, hostile to the Roosevelt administration's approach to governance. President Roosevelt removed him from office, and Humphrey filed suit, claiming that his removal violated a provision of the FTC Act that provided that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." Along the way to agreeing with Humphrey's claim, the Court upheld the constitutionality of this restriction on removal authority.

The Court narrowed *Myers*, explaining that its "actual decision" was based on the principle that "a postmaster is an executive officer restricted to the performance of executive functions" and is therefore "inherently subject to the exclusive and illimitable power of removal by the Chief Executive." *Myers*' holding regarding "purely executive officers" had no application to "an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the president."

To a modern eye, this conclusion that *Myers* does not apply to non-executive officials might not seem very helpful to Humphrey's cause given that the FTC's basic job is to carry out the "executive" task of implementing the FTC Act. That was not how the Supreme Court in 1935 characterized matters, however. According to the Court, the FTC could not "in any proper sense be characterized as an arm or an eye of the executive." Instead, as the agency carries out Congress's statutory command to root out "unfair methods of competition" by "filling in and administering the details embodied by that general standard," the Commission acts "in part quasi legislatively and in part quasi judicially." More specifically, when the Commission uses its authority under § 6 of the Act to investigate corporations and make reports to Congress, it acts quasi-legislatively "in aid of the legislative power." When it uses its authority under § 7 to act as a "master in chancery" to determine relief in an antitrust suit, it acts quasi-judicially, "as an agency of the judiciary."

As the Commission's work, properly understood, was "wholly disconnected from the executive department," it followed that separation-of-powers principles, far from demanding absolute presidential control of the Commission, instead demanded agency decisional independence. Good-cause limits on removal were necessary to block improper presidential control.

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5. *Morrison v. Olson* reframes the test. In May 1973, Attorney General Elliot Richardson appointed Archibald Cox to serve as a special prosecutor to investigate the Watergate scandal that eventually led to the fall of President Richard Nixon. After Cox subpoenaed Nixon to obtain copies of taped conversations in the Oval Office, Nixon ordered Richardson to fire Cox. Rather than follow this order, Richardson resigned, as did Deputy Attorney General William Ruckelshaus. This left the task of firing Cox to Solicitor General Robert Bork. This series of events became known as the "Saturday Night Massacre." In the aftermath of the Saturday Night Massacre and Watergate, Congress enacted the Ethics in Government Act of 1978, which included provisions creating the office of independent counsel for the investigation and prosecution of high-level government officials. To create insulation between the executive branch and independent counsels, the Act included provisions for a panel of judges to appoint these officers at the request of the Attorney General; it also provided that independent counsels could be removed by the Attorney General only for cause.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the defendants argued that the provisions governing appointment and removal of independent counsels were unconstitutional. The Court rejected these arguments in a 7-1 decision authored by Chief Justice Rehnquist, with Justice Scalia dissenting. Upholding the good-cause restriction on removal under *Humphrey's Executor*, however, was problematic for two reasons. First, in the intervening decades, the Court had reached a consensus that any duties properly assigned to an executive official were necessarily executive in nature. Second, it is difficult to identify any function more clearly "executive" in nature than prosecution, and the precedent controlling removal of "purely executive" officers was still *Myers*.

Chief Justice Rehnquist avoided *Myers* by characterizing its holding not as a condemnation of limits on presidential removal authority, but rather as a condemnation of efforts by Congress to "draw to itself . . . the power to remove or the right to participate in the exercise of that power." *Id.* at 686 (quoting Myers v. United States, 272 U.S. 52, 161 (1926) (citing also Bowsher v. Synar, 478 U.S. 714 (1986)). In other words, the key to *Myers* was that Congress had "aggrandized" itself by giving the Senate a veto in the removal process. The Ethics in Government Act required the Attorney General to have good cause to fire an independent counsel, but it did not give Congress power over removals. *Myers* therefore did not control.

After disposing of *Myers,* the Chief Justice turned his revisionist eye toward *Humphrey's Executor*. He conceded that this opinion had characterized agency powers as "quasi-legislative" and "quasi-judicial" to distinguish the Court's treatment of the "purely executive" postmaster in *Myers*. The Court's "present considered view," however, was that deciding the constitutionality of a restriction on presidential removal authority "cannot be made to turn on whether or not that official is classified as 'purely executive.'" One reason to abandon this categorical approach was that the lines dividing the legislative, executive, and judicial functions can be obscure. In this vein, the Court noted in particular that the FTC's powers discussed in *Humphrey's Executor* would, in more modern parlance, be regarded as "executive" in nature.

The real import of the Court's earlier removal cases was "to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." In assessing whether removal restrictions are consistent with separation of powers, the "real question" revolves around "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."

After announcing this new framework, the Court opined that it "simply d[id] not see how the President's need to control the exercise of [an independent counsel's] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the president." It was enough that the president "retain[ed] ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act." In short, the Court indicated that it is constitutionally permissible for at least some agencies to enjoy limited decisional independence so long as the president retains sufficient control to ensure that they

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exercise their powers within the bounds of the law. The Court added the qualification, however, that it is "undoubtedly correct . . . that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role."

Justice Scalia's blistering dissent is one of the foundational documents of unitary executive theory. In his view, the majority was correct to abandon the analytic framework of *Humphrey's Executor*, which he condemned for "gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70–page opinion" from *Myers*. (It might be fair to note that the dissents in *Myers* added up to over 100 pages.) The majority's new don't-impede-the-president-too-much framework was, however, a separation-of-powers abomination. By insulating some executive decisions from presidential control, it violated Article II's Vesting Clause, which vests not "*some* of the executive power, but *all* of the executive power" in the president. The majority's new "rule" was no rule at all but instead an invitation to standardless discretion.

Aftermath: The statutory provisions authorizing independent counsels were subject to sunset provisions requiring periodic reauthorization. In 1999, after high-ranking executive officials of both parties had been targets of independent counsels, Congress declined to reauthorize their existence. The DOJ responded to the demise of independent counsels authorized by statute by adopting a set of regulations authorizing special counsels. 28 C.F.R. §§ 600.1-10. These regulations provide for the appointment of a special counsel where the Attorney General determines that the "investigation or prosecution of . . . [a] person or matter by a United States Attorney's Office or litigating division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances." *Id.* at § 600.1(a). You no doubt recall the most famous Special Counsel investigation of recent years—Special Counsel Robert Mueller's investigation of the Trump campaign for conspiracy and obstruction of justice.

6. *Free Enterprise Fund* and double "for-cause" protections. In response to spectacular accounting scandals around the turn of the millennium, Congress created the Public Company Accounting Oversight Board to "oversee the audit of public companies that are subject to the securities laws." 15 U.S.C. § 7211(a). Willful violation of a Board rule is a federal crime, and the Board has authority to issue severe sanctions in its own disciplinary proceedings (e.g., revoking a firm's registration, banning a person from associating with a firm, money penalties). The Board's actions are, however, subject to review by the Securities and Exchange Commission, which appoints Board members and can remove them "for good cause shown." § 7211(e)(6).

In *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010), the plaintiffs (FEF) challenged the constitutionality of the statutory provisions governing appointment and removal of Board members. Regarding appointments, FEF contended: (a) Board members were not "inferior" officers and therefore needed to be appointed by the president; (b) even if Board members were inferior, the SEC could not appoint them because it is not a "department" within the meaning of the Appointments Clause; and (c) the Commissioners as a group could not exercise appointment power because its true head is its Chairman. The justices made speedy work of rejecting these arguments. Following *Edmond*, they held that Board members are "inferior" as they are subject to extensive control by the SEC. The SEC is a "department" because it is "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component." Lastly, the Court rejected the argument that the Chairman is the sole head of the SEC, noting that its powers "are generally vested in the Commissioners jointly."

Removal presented a thornier problem. As the situation was characterized by the Chief Justice's majority opinion, two layers of for-cause protection insulated Board members from presidential control—the president could remove SEC Commissioners for cause, and the SEC Commissioners could remove Board members for cause. According to the majority, this double insulation weakened presidential control of Board members too much to be constitutional:

> This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may

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> review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws — by holding his subordinates accountable for their conduct — is impaired.
>
> That arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."

To remedy this problem, the Court invalidated the for-cause restriction on removal of Board members by Commissioners, but, to FEF's disappointment, otherwise left the Board intact.

The four-justice dissent, led by Justice Breyer, strongly disagreed on a number of levels. Most striking of all, Justice Breyer observed that SEC Commissioners are not in fact protected by any express statutory restriction on their removal! (This fact is not so surprising once one realizes that Congress created the SEC between issuance of *Myers* and *Humphrey's Executor* — a time when congressional authority to restrict presidential removal authority was in doubt.)

Justice Breyer contended: (a) in the absence of clearly controlling constitutional text, history, or precedent, the Court should have deferred to the shared judgments of the political branches on structuring of the Board; (b) as a practical matter, the for-cause limitation on removal of Board members was unlikely to matter much given the Commission's statutory controls over Board functions; and (c) the majority's rule was sufficiently murky that it might "sweep[ ] hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security and their administrative actions and decisions constitutionally at risk."

Justice Breyer also explained that agency independence, rather than turning solely on whether an agency head enjoys for-cause protection from removal, is in a reality a complex phenomenon that depends on many factors:

> In practical terms no "for cause" provision can, in isolation, define the full measure of executive power. This is because a legislative decision to place ultimate administrative authority in, say, the Secretary of Agriculture rather than the President, the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency's budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress' ability to assert influence) are more likely to affect the President's power to get something done. That is why President Truman complained . . . "'the powers of the President amount to'" bringing "'people in and try[ing] to persuade them to do what they ought to do without persuasion.'" C. Rossiter, *The American Presidency* 154 (2d rev. ed. 1960).

Understood in the context of these underlying realities, Justice Breyer insisted that the for-cause restriction on removal of Board members by Commissioners was constitutionally unobjectionable. *Cf.* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (explaining that, although removal restrictions are regarded as the "touchstone" of independent status, functional agency independence depends on many factors—notably including control of funding).

7. Does the double for-cause bar apply to administrative law judges? As the title suggests, administrative law judges (ALJs) adjudicate in administrative proceedings, including enforcement actions brought by certain agencies against regulated parties. It is important to our system of justice that adjudicators conduct impartial proceedings, free from political pressure. Accordingly, an agency head

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unhappy with an ALJ's decisions cannot remove that ALJ. Removals of ALJs are instead controlled by an independent agency, the Merit Systems Protection Board (MSPB), which can remove an ALJ for good cause. MSPB members similarly enjoy for-cause protection from presidential removal.

In footnote 10 of *Free Enterprise Fund*, Chief Justice Roberts expressly noted that the Court had not resolved the question of whether its bar on double for-cause removal restrictions applied to ALJs, but the issue may now have come to a head. In its October 2023 term, the Supreme Court will review a Fifth Circuit decision holding that double-for-cause restrictions on removal of ALJs are unconstitutional. *Securities and Exchange Commission (SEC) v. Jarkesy*, No. 22-859 (reviewing *Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022)). In their briefs on the petition for certiorari, the parties focused on competing interpretations of *Free Enterprise Fund*. For the challengers, *Free Enterprise Fund* announced a categorical rule under Article II against all forms of double-for-cause removal. The SEC responded by relying on Chief Justice Roberts' qualification of *Free Enterprise Fund'*s holding in footnote 10 and on what the SEC described as a well-established distinction in the Court's removal precedents between protections for adjudicators (like ALJs) versus policymakers (like the Board members of the *PCAOB*). Which side do you think has the better argument? Is there a better reason to allow for double-for-cause removal of agency "judges" than other agency actors, or is double-for-cause removal of any member of the Executive Branch too much of an infringement on presidential control?

BACKGROUND OF *SEILA LAW, LLC v. CONSUMER FINANCIAL PROTECTION BUREAU*

Independent agencies are usually headed by a multi-member commission or board. Members are appointed for fixed, staggered terms and some version of good cause is required for their removal. When Congress created the Consumer Financial Protection Bureau (CFPB) as part of the Dodd-Frank Act in 2010, it departed from this usual model by providing that the Bureau would be headed by a single Director subject to presidential removal during a five-year term for "inefficiency, neglect of duty, or malfeasance in office."

In 2014, the CFPB brought an enforcement action against PHH Corporation for illegal mortgage insurance referrals. Among its other defenses, PHH Corp. argued that the CFPB's structure unconstitutionally infringed on the president's "executive power" by concentrating power in a single individual who was not fully accountable to the president. Unlike the head of an executive agency, the CFPB Director cannot be removed by the president at will, and unlike the members of other independent agencies, the Director is not constrained by other board members or commissioners. In an opinion authored by then-Judge Kavanaugh, a three-judge panel of the D.C. Circuit accepted this structural argument. PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016), but the D.C. Circuit reversed *en banc*. 881 F.3d 75 (D.C. Cir. 2018) and the Supreme Court denied certiorari, leaving the ultimate resolution of the constitutionality of the CFPB Director's removal protection for another day.

That day came in *Seila Law, LLC v. CFPB*. Seila Law ("Seila") was under investigation by the CFPB for allegedly violating telemarketing sales rules. As part of its investigation, the CFPB requested documents from the firm. Seila responded by challenging the CFPB's authority to issue such a request. Much like PHH before it, Seila claimed that the agency's structure—particularly the Act's requirement that its Director is removable by the president only "for cause"—rendered the CFPB unconstitutional.

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Seila Law LLC *v.* Consumer Financial Protection Bureau

591 U.S. __, 140 S. Ct. 2183 (2020)

Roberts, C. J., delivered the opinion of the Court with respect to Parts I, II, and III, in which Thomas, Alito, Gorsuch, and Kavanaugh, JJ., joined, and an opinion with respect to Part IV, in which Alito and Kavanaugh, JJ., joined. Thomas, J., filed an opinion concurring in part and dissenting in part, in which Gorsuch, J., joined. Kagan, J., filed an opinion concurring in the judgment with respect to severability and dissenting in part, in which Ginsburg, Breyer, and Sotomayor, JJ., joined.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III.

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy. The question before us is whether this arrangement violates the Constitution's separation of powers.

Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1; *id.*, §3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010), we reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties." "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."

The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers* v. *United States*, 272 U. S. 52 (1926). Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. And in *United States* v. *Perkins*, 116 U. S. 483 (1886), and *Morrison* v. *Olson*, 487 U. S. 654 (1988), we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.

We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the

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CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.

I

A

. . . In 2010, Congress acted on these proposals and created the Consumer Financial Protection Bureau (CFPB) as an independent financial regulator within the Federal Reserve System. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress tasked the CFPB with "implement[ing]" and "enforc[ing]" a large body of financial consumer protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U. S. C. §5511(a). . . .

Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. §§5562, 5564(a), (f). To remedy violations of federal consumer financial law, the CFPB may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day that a violation occurs. . . .

The CFPB's rulemaking and enforcement powers are coupled with extensive adjudicatory authority. The agency may conduct administrative proceedings to "ensure or enforce compliance with" the statutes and regulations it administers. 12 U. S. C. §5563(a). . . .

Congress's design for the CFPB differed from the proposals of Professor Warren and the Obama administration in one critical respect. Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director. 12 U. S. C. §5491(b)(1). The CFPB Director is appointed by the President with the advice and consent of the Senate. §5491(b)(2). The Director serves for a term of five years, during which the President may remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office." §§5491(c)(1), (3).

Unlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments. . . .

III

We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

A

Article II provides that "[t]he executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1; *id.*, §3. The entire "executive Power" belongs to the President alone. But because it would be "impossib[le]" for "one man" to "perform all the great business of the State," the Constitution assumes that lesser executive officers will "assist the supreme Magistrate in discharging the duties of his trust." 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939).

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These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 ANNALS OF CONG. 463 (1789). That power, in turn, generally includes the ability to remove executive officials, for it is "only the authority that can remove" such officials that they "must fear and, in the performance of [their] functions, obey." *Bowsher*, 478 U. S., at 726 (internal quotation marks omitted).

The President's removal power has long been confirmed by history and precedent. It "was discussed extensively in Congress when the first executive departments were created" in 1789. *Free Enterprise Fund*, 561 U. S., at 492. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." *Ibid.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 893 (2004)). The First Congress's recognition of the President's removal power in 1789 "provides contemporaneous and weighty evidence of the Constitution's meaning," *Bowsher*, 478 U. S., at 723 (internal quotation marks omitted), and has long been the "settled and well understood construction of the Constitution," *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The Court recognized the President's prerogative to remove executive officials in *Myers* v. *United States*. Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress's determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." Just as the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." "[T]o hold otherwise," the Court reasoned, "would make it impossible for the President . . . to take care that the laws be faithfully executed."

We recently reiterated the President's general removal power in *Free Enterprise Fund*. "Since 1789," we recapped, "the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to "a new situation not yet encountered by the Court"—an official insulated by *two* layers of for-cause removal protection. In the face of that novel impediment to the President's oversight of the Executive Branch, we adhered to the general rule that the President possesses "the authority to remove those who assist him in carrying out his duties."

Free Enterprise Fund left in place two exceptions to the President's unrestricted removal power. First, in *Humphrey's Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the FTC from removal except for "inefficiency, neglect of duty, or malfeasance in office." In reaching that conclusion, the Court stressed that Congress's ability to impose such removal restrictions "will depend upon the character of the office."

Because the Court limited its holding "to officers of the kind here under consideration," the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court. Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising "no part of the executive power." Instead, it was "an administrative body" that performed "specified duties as a legislative or as a judicial aid." It acted "as a legislative agency" in "making investigations and reports" to Congress and "as an agency of the judiciary" in making recommendations to courts as a master in chancery. "To the extent

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that [the FTC] exercise[d] any executive *function*[,] as distinguished from executive *power* in the constitutional sense," it did so only in the discharge of its "quasi-legislative or quasi-judicial powers."[2]

The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was designed to be "non-partisan" and to "act with entire impartiality." The FTC's duties were "neither political nor executive," but instead called for "the trained judgment of a body of experts" "informed by experience." And the Commissioners' staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a "complete change" in leadership "at any one time."

In short, *Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power. . . .

While recognizing an exception for multimember bodies with "quasi-judicial" or "quasi-legislative" functions, *Humphrey's Executor* reaffirmed the core holding of *Myers* that the President has "unrestrictable power . . . to remove purely executive officers." The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed "a field of doubt" that the Court left "for future consideration."

We have recognized a second exception for *inferior* officers in two cases, *United States* v. *Perkins* and *Morrison* v. *Olson*. In *Perkins*, we upheld tenure protections for a naval cadet-engineer. And, in *Morrison*, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. Backing away from the reliance in *Humphrey's Executor* on the concepts of "quasi-legislative" and "quasi-judicial" power, we viewed the ultimate question as whether a removal restriction is of "such a nature that [it] impede[s] the President's ability to perform his constitutional duty." Although the independent counsel was a single person and performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch," we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority."

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *PHH*, 881 F. 3d, at 196 (Kavanaugh, J., dissenting) (internal quotation marks omitted).

B

Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. Start with *Humphrey's Executor.* Unlike the New Deal-era FTC upheld there, the CFPB is led by a single Director who cannot be described as a "body of experts" and cannot be

[2] The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time. As we observed in *Morrison* v. *Olson,* "[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." . . .

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considered "non-partisan" in the same sense as a group of officials drawn from both sides of the aisle. Moreover, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB's single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise.

In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.

The logic of *Morrison* also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison* was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

In light of these differences, the constitutionality of the CFPB Director's insulation from removal cannot be settled by *Humphrey's Executor* or *Morrison* alone.

C

The question instead is whether to extend those precedents to the "new situation" before us, namely an independent agency led by a single Director and vested with significant executive power. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.

1

"Perhaps the most telling indication of [a] severe constitutional problem" with an executive entity "is [a] lack of historical precedent" to support it. *Id.,* at 505 (internal quotation marks omitted). An agency with a structure like that of the CFPB is almost wholly unprecedented.

After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and *amici* have identified "only a handful of isolated" incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. . . .

2

In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.

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"The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." Their solution to governmental power and its perils was simple: divide it. To prevent the "gradual concentration" of power in the same hands, they enabled "[a]mbition . . . to counteract ambition" at every turn. THE FEDERALIST NO. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). At the highest level, they "split the atom of sovereignty" itself into one Federal Government and the States. They then divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."

They did not stop there. Most prominently, the Framers bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate, each composed of multiple Members and Senators. Art. I, §§2, 3.

The Executive Branch is a stark departure from all this division. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that "differences of opinion" and the "jarrings of parties" would "promote deliberation and circumspection" and "check excesses in the majority." *See* THE FEDERALIST NO. 70, at 475 (A. Hamilton); *see also id.*, NO. 51, at 350. By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. *See id.*, NO. 70, at 475–478. As Madison put it, while "the weight of the legislative authority requires that it should be . . . divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.*, NO. 51, at 350.

The Framers deemed an energetic executive essential to "the protection of the community against foreign attacks," "the steady administration of the laws," "the protection of property," and "the security of liberty." *Id.*, NO. 70, at 471. Accordingly, they chose not to bog the Executive down with the "habitual feebleness and dilatoriness" that comes with a "diversity of views and opinions." *Id.*, at 476. Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man." *Id.*, at 472.

To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people." *Id.,* at 479. The President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community." 1 ANNALS OF CONG. 499 (J. Madison).

The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. *See* THE FEDERALIST NO. 58, at 394 (J. Madison) (describing the "power over the purse" as the "most compleat and effectual weapon" in representing the interests of the people). Yet the Director may *unilaterally*, without meaningful supervision,

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issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans. . . .

IV

Having concluded that the CFPB's leadership by a single independent Director violates the separation of powers, we now turn to the appropriate remedy. We directed the parties to brief and argue whether the Director's removal protection was severable from the other provisions of the Dodd-Frank Act that establish the CFPB. If so, then the CFPB may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal by the President. [The Court then concluded that the removal protection was severable and eliminated the Director's for-cause protection from removal.] . . .

A decade ago, we declined to extend Congress's authority to limit the President's removal power to a new situation, never before confronted by the Court. We do the same today. In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead. While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power. The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people.

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

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and dissenting in part. …

The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent. . . .

Humphrey's Executor relies on one key premise: the notion that there is a category of "quasi-legislative" and "quasi-judicial" power that is not exercised by Congress or the Judiciary, but that is also not part of "the executive power vested by the Constitution in the President." *Humphrey's Executor*, 295 U.S. at 628. Working from that premise, the Court distinguished the "illimitable" power of removal recognized in *Myers*, and upheld the FTC Act's removal restriction, while simultaneously acknowledging that the Constitution vests the President with the entirety of the executive power.

The problem is that the Court's premise was entirely wrong. The Constitution does not permit the creation of officers exercising "quasi-legislative" and "quasi-judicial powers" in "quasi-legislative" and "quasi-judicial agencies." No such powers or agencies exist. Congress lacks the authority to delegate its legislative power, and it cannot authorize the use of judicial power by officers acting outside of the bounds of Article III. Nor can Congress create agencies that straddle multiple branches of Government. The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial. See Art. I, §1; Art. II, §1, cl. 1; Art. III, §1. Free-floating agencies simply do not comport with this constitutional structure. . . .

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JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, concurring in the judgment with respect to severability and dissenting in part.

Throughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the Consumer Financial Protection Bureau (CFPB). . . .

In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American experience, from the 18th century to the present day. And it commits the Nation to a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again. Today's decision wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure. I respectfully dissent.

I

The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion. They point not to the majority's "general rule" of "unrestricted removal power" with two grudgingly applied "exceptions." Rather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And most relevant here, they give Congress wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies like the CFPB.

A

What does the Constitution say about the separation of powers—and particularly about the President's removal authority? (Spoiler alert: about the latter, nothing at all.) . . .

The problem lies . . . in failing to recognize that the separation of powers is, by design, neither rigid nor complete. Blackstone, whose work influenced the Framers on this subject as on others, observed that "every branch" of government "supports and is supported, regulates and is regulated, by the rest." 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 151 (1765). So as James Madison stated, the creation of distinct branches "did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other." THE FEDERALIST NO. 47, at 325 (emphasis deleted). . . .

One way the Constitution reflects that vision is by giving Congress broad authority to establish and organize the Executive Branch. Article II presumes the existence of "Officer[s]" in "executive Departments." §2, cl. 1. But it does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers—in what departments, with what responsibilities—the Executive Branch requires. See *ante* ("The entire 'executive Power' belongs to the President alone").

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Instead, Article I's Necessary and Proper Clause puts those decisions in the legislature's hands. Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not just its own enumerated powers but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." §8, cl. 18. Similarly, the Appointments Clause reflects Congress's central role in structuring the Executive Branch. Yes, the President can appoint principal officers, but only as the legislature "shall . . . establish[ ] by Law" (and of course subject to the Senate's advice and consent). Art. II, §2, cl. 2. And Congress has plenary power to decide not only what inferior officers will exist but also who (the President or a head of department) will appoint them. So as Madison told the first Congress, the legislature gets to "create[ ] the office, define[ ] the powers, [and] limit[ ] its duration." 1 ANNALS OF CONG. 582 (1789). The President, as to the construction of his own branch of government, can only try to work his will through the legislative process.

The majority relies for its contrary vision on Article II's Vesting Clause, but the provision can't carry all that weight. Or as Chief Justice Rehnquist wrote of a similar claim in *Morrison* v. *Olson*, 487 U. S. 654 (1988), "extrapolat[ing]" an unrestricted removal power from such "general constitutional language"—which says only that "[t]he executive Power shall be vested in a President"—is "more than the text will bear." . . .

Nor can the Take Care Clause come to the majority's rescue. . . . To be sure, the imposition of a duty may imply a grant of power sufficient to carry it out. . . . [But] the text of the Take Care Clause requires only enough authority to make sure "the laws [are] faithfully executed"—meaning with fidelity to the law itself, not to every presidential policy preference. As this Court has held, a President can ensure "'faithful execution' of the laws"—thereby satisfying his "take care" obligation—with a removal provision like the one here. *Morrison*, 487 U.S., at 692. A for-cause standard gives him "ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation's] provisions." *Ibid.*

Finally, recall the Constitution's telltale silence: Nowhere does the text say anything about the President's power to remove subordinate officials at will. . . .

B

History no better serves the majority's cause. . . .

1

Begin with evidence from the Constitution's ratification. And note that this moment is indeed the beginning: Delegates to the Constitutional Convention never discussed whether or to what extent the President would have power to remove executive officials. As a result, the Framers advocating ratification had no single view of the matter. In FEDERALIST NO. 77, Hamilton presumed that under the new Constitution "[t]he consent of [the Senate] would be necessary to displace as well as to appoint" officers of the United States. He thought that scheme would promote "steady administration": "Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained" from substituting "a person more agreeable to him." By contrast, Madison thought the Constitution allowed Congress to decide how any executive official could be removed. He explained in FEDERALIST NO. 39: "The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions." Neither view, of course, at all supports the majority's story.

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The second chapter is the Decision of 1789, when Congress addressed the removal power while considering the bill creating the Department of Foreign Affairs. Speaking through Chief Justice Taft—a judicial presidentialist if ever there was one—this Court in *Myers* v. *United States* read that debate as expressing Congress's judgment that the Constitution gave the President illimitable power to remove executive officials. The majority rests its own historical claim on that analysis (though somehow also finding room for its two exceptions). But Taft's historical research has held up even worse than *Myers*' holding (which was mostly reversed). As Dean Manning has concluded after reviewing decades' worth of scholarship on the issue, "the implications of the debate, properly understood, [are] highly ambiguous and prone to overreading." Manning, [*Separation of Powers as Ordinary Interpretation,*] 124 HARV. L. REV. [1942, 1965 n. 135 (2011)]; see *id.,* at 2030–2031.

The best view is that the First Congress was "deeply divided" on the President's removal power, and "never squarely addressed" the central issue here. *Id.,* at 1965, n. 135; Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1072 (2006). . . . The summer of 1789 thus ended without resolution of the critical question: Was the removal power "beyond the reach of congressional regulation?" Prakash, *supra,* at 1072. . . .

Contrary to the majority's view, then, the founding era closed without any agreement that Congress lacked the power to curb the President's removal authority. And as it kept that question open, Congress took the first steps—which would launch a tradition—of distinguishing financial regulators from diplomatic and military officers. . . .

2

As the decades and centuries passed, those efforts picked up steam. Confronting new economic, technological, and social conditions, Congress—and often the President—saw new needs for pockets of independence within the federal bureaucracy. And that was especially so, again, when it came to financial regulation. I mention just a few highlights here—times when Congress decided that effective governance depended on shielding technical or expertise-based functions relating to the financial system from political pressure (or the moneyed interests that might lie behind it). Enacted under the Necessary and Proper Clause, those measures—creating some of the Nation's most enduring institutions—themselves helped settle the extent of Congress's power. "[A] regular course of practice," to use Madison's phrase, has "liquidate[d]" constitutional meaning about the permissibility of independent agencies.

Take first Congress's decision in 1816 to create the Second Bank of the United States—"the first truly independent agency in the republic's history." Lessig & Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 30 (1994). Of the twenty-five directors who led the Bank, the President could appoint and remove only five. Yet the Bank had a greater impact on the Nation than any but a few institutions, regulating the Nation's money supply in ways anticipating what the Federal Reserve does today. Of course, the Bank was controversial—in large part because of its freedom from presidential control. Andrew Jackson chafed at the Bank's independence and eventually fired his Treasury Secretary for keeping public moneys there (a dismissal that itself provoked a political storm). No matter. Innovations in governance always have opponents; administrative independence predictably (though by no means invariably) provokes presidential ire. The point is that by the early 19th century, Congress established a body wielding enormous financial power mostly outside the President's dominion.

The Civil War brought yet further encroachments on presidential control over financial regulators. In response to wartime economic pressures, President Lincoln (not known for his modest view of executive power) asked Congress to establish an office called the Comptroller of the Currency. The statute he signed made the Comptroller removable only with the Senate's consent—a version of the old Hamiltonian idea,

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though this time required not by the Constitution itself but by Congress. A year later, Congress amended the statute to permit removal by the President alone, but only upon "reasons to be communicated by him to the Senate." . . .

And then, nearly a century and a half ago, the floodgates opened. In 1887, the growing power of the railroads over the American economy led Congress to create the Interstate Commerce Commission. Under that legislation, the President could remove the five Commissioners only "for inefficiency, neglect of duty, or malfeasance in office"—the same standard Congress applied to the CFPB Director. More—many more—for-cause removal provisions followed. In 1913, Congress gave the Governors of the Federal Reserve Board for-cause protection to ensure the agency would resist political pressure and promote economic stability. The next year, Congress provided similar protection to the FTC in the interest of ensuring "a continuous policy" "free from the effect" of "changing [White House] incumbency." 51 Cong. Rec. 10376 (1914). The Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission. In the financial realm, "independent agencies have remained the bedrock of the institutional framework governing U. S. markets." Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327, 331 (2013). By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause. See *Free Enterprise Fund*, 561 U. S., at 541 (Breyer, J., dissenting). So year by year by year, the broad sweep of history has spoken to the constitutional question before us: Independent agencies are everywhere.

C

What is more, the Court's precedents before today have accepted the role of independent agencies in our governmental system. To be sure, the line of our decisions has not run altogether straight. But we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance. In those decisions, we sounded a caution, insisting that Congress could not impede through removal restrictions the President's performance of his own constitutional duties. (So, to take the clearest example, Congress could not curb the President's power to remove his close military or diplomatic advisers.) But within that broad limit, this Court held, Congress could protect from at-will removal the officials it deemed to need some independence from political pressures. Nowhere do those precedents suggest what the majority announces today: that the President has an "unrestricted removal power" subject to two bounded exceptions.

The majority grounds its new approach in *Myers*, ignoring the way this Court has cabined that decision. *Myers*, the majority tells us, found an unrestrained removal power "essential to the [President's] execution of the laws." What the majority does not say is that within a decade the Court abandoned that view (much as later scholars rejected Taft's one-sided history). In *Humphrey's Executor* v. *United States,* the Court unceremoniously—and unanimously—confined *Myers* to its facts. "[T]he narrow point actually decided" there, *Humphrey's* stated, was that the President could "remove a postmaster of the first class, without the advice and consent of the Senate." Nothing else in Chief Justice Taft's prolix opinion "c[a]me within the rule of *stare decisis*." (Indeed, the Court went on, everything in *Myers* "out of harmony" with *Humphrey's* was expressly "disapproved.") Half a century later, the Court was more generous. Two decisions read *Myers* as standing for the principle that Congress's own "participation in the removal of executive officers is unconstitutional." *Bowsher* v. *Synar*, 478 U. S. 714, 725 (1986); see *Morrison*, 487 U. S., at 686 ("As we observed in *Bowsher*, the essence" of "*Myers* was the judgment that the Constitution prevents Congress from draw[ing] to itself" the power to remove (internal quotation marks omitted)). *Bowsher* made clear that *Myers* had nothing to say about Congress's power to enact a provision merely "limit[ing] the President's powers of removal" through a for-cause provision. That issue, the Court stated, was "not presented" in "the *Myers* case." Instead, the relevant cite was *Humphrey's*.

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And *Humphrey's* found constitutional a statute identical to the one here, providing that the President could remove FTC Commissioners for "inefficiency, neglect of duty, or malfeasance in office. The *Humphrey's* Court, as the majority notes, relied in substantial part on what kind of work the Commissioners performed. (By contrast, nothing in the decision turned—as the majority suggests—on any of the agency's organizational features.) According to *Humphrey's*, the Commissioners' primary work was to "carry into effect legislative policies"—"filling in and administering the details embodied by [a statute's] general standard." In addition, the Court noted, the Commissioners recommended dispositions in court cases, much as a special master does. Given those "quasi-legislative" and "quasi-judicial"—as opposed to "purely executive"—functions, Congress could limit the President's removal authority. Or said another way, Congress could give the FTC some "independen[ce from] executive control." . . .

. . . *Morrison* both extended *Humphrey's* domain and clarified the standard for addressing removal issues. The *Morrison* Court, over a one-Justice dissent, upheld for-cause protections afforded to an independent counsel with power to investigate and prosecute crimes committed by high-ranking officials. The Court well understood that those law enforcement functions differed from the rulemaking and adjudicatory duties highlighted in *Humphrey's* and *Wiener*. But that difference did not resolve the issue. An official's functions, *Morrison* held, were relevant to but not dispositive of a removal limit's constitutionality. The key question in all the cases, *Morrison* saw, was whether such a restriction would "impede the President's ability to perform his constitutional duty." Only if it did so would it fall outside Congress's power. And the protection for the independent counsel, the Court found, did not. Even though the counsel's functions were "purely executive," the President's "need to control the exercise of [her] discretion" was not "so central to the functioning of the Executive Branch as to require" unrestricted removal authority. True enough, the Court acknowledged, that the for-cause standard prevented the President from firing the counsel for discretionary decisions or judgment calls. But it preserved "ample authority" in the President "to assure that the counsel is competently performing" her "responsibilities in a manner that comports with" all legal requirements. That meant the President could meet his own constitutional obligation "to ensure 'the faithful execution' of the laws."

The majority's description of *Morrison* is not true to the decision. (Mostly, it seems, the majority just wishes the case would go away.) First, *Morrison* is no "exception" to a broader rule from *Myers*. *Morrison* echoed all of *Humphrey's* criticism of the by-then infamous *Myers* "dicta." It again rejected the notion of an "all-inclusive" removal power. It yet further confined *Myers*' reach, making clear that Congress could restrict the President's removal of officials carrying out even the most traditional executive functions. And the decision, with care, set out the governing rule—again, that removal restrictions are permissible so long as they do not impede the President's performance of his own constitutionally assigned duties. Second, as all that suggests, *Morrison* is not limited to inferior officers. In the eight pages addressing the removal issue, the Court constantly spoke of "officers" and "officials" in general. By contrast, the Court there used the word "inferior" in just one sentence (which of course the majority quotes), when applying its general standard to the case's facts. Indeed, Justice Scalia's dissent emphasized that the counsel's inferior-office status played no role in the Court's decision. See *id.,* at 724 ("The Court could have resolved the removal power issue in this case by simply relying" on that status, but did not). As Justice Scalia noted, the Court in *United States* v. *Perkins* (1886), had a century earlier allowed Congress to restrict the President's removal power over inferior officers. Were that *Morrison*'s basis, a simple citation would have sufficed. . . .

II

. . . The question here, which by now you're well equipped to answer, is whether including that for-cause standard in the statute creating the CFPB violates the Constitution.

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A

Applying our longstanding precedent, the answer is clear: It does not. . . .

First, the CFPB's powers are nothing unusual in the universe of independent agencies. The CFPB, as the majority notes, can issue regulations, conduct its own adjudications, and bring civil enforcement actions in court—all backed by the threat of penalties. But then again, so too can (among others) the FTC and SEC, two agencies whose regulatory missions parallel the CFPB's. . . . And if influence on economic life is the measure, consider the Federal Reserve, whose every act has global consequence. The CFPB, gauged by that comparison, is a piker.

Second, the removal protection given the CFPB's Director is standard fare. The removal power rests with the President alone; Congress has no role to play, as it did in the laws struck down in *Myers* and *Bowsher*. The statute provides only one layer of protection, unlike the law in *Free Enterprise Fund*. And the clincher, which you have heard before: The for-cause standard used for the CFPB is identical to the one the Court upheld in *Humphrey's*. Both enable the President to fire an agency head for "inefficiency, neglect of duty, or malfeasance in office." A removal provision of that kind applied to a financial agency head, this Court has held, does not "unduly trammel[ ] on executive authority," even though it prevents the President from dismissing the official for a discretionary policy judgment. *Morrison*, 487 U. S., at 691. Once again: The removal power has not been "completely stripped from the President," providing him with no means to "ensure the 'faithful execution' of the laws." Rather, this Court has explained, the for-cause standard gives the President "ample authority to assure that [the official] is competently performing his or her statutory responsibilities in a manner that comports with" all legal obligations. . . .

The analysis is as simple as simple can be. The CFPB Director exercises the same powers, and receives the same removal protections, as the heads of other, constitutionally permissible independent agencies. How could it be that this opinion is a dissent?

B

The majority focuses on one (it says sufficient) reason: The CFPB Director is singular, not plural. "Instead of placing the agency under the leadership of a board with multiple members," the majority protests, "Congress provided that the CFPB would be led by a single Director." And a solo CFPB Director does not fit within either of the majority's supposed exceptions. He is not an inferior officer, so (the majority says) *Morrison* does not apply; and he is not a multimember board, so (the majority says) neither does *Humphrey's*. Further, the majority argues, "[a]n agency with a [unitary] structure like that of the CFPB" is "novel"—or, if not quite that, "almost wholly unprecedented." Finally, the CFPB's organizational form violates the "constitutional structure" because it vests power in a "single individual" who is "insulated from Presidential control."

I'm tempted at this point just to say: No. All I've explained about constitutional text, history, and precedent invalidates the majority's thesis. But I'll set out here some more targeted points, taking step by step the majority's reasoning.

First, as I'm afraid you've heard before, the majority's "exceptions" (like its general rule) are made up. To begin with, our precedents reject the very idea of such exceptions. "The analysis contained in our removal cases," *Morrison* stated, shuns any attempt "to define rigid categories" of officials who may (or may not) have job protection. Still more, the contours of the majority's exceptions don't connect to our decisions' reasoning. The analysis in *Morrison*, as I've shown, extended far beyond inferior officers. And of course that analysis had to apply to *individual* officers: The independent counsel was very much a person,

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not a committee. So the idea that *Morrison* is in a separate box from this case doesn't hold up. Similarly, *Humphrey's* and later precedents give no support to the majority's view that the number of people at the apex of an agency matters to the constitutional issue. Those opinions mention the "groupness" of the agency head only in their background sections. The majority picks out that until-now-irrelevant fact to distinguish the CFPB, and constructs around it an until-now-unheard-of exception. So if the majority really wants to see something "novel," it need only look to its opinion.

By contrast, the CFPB's single-director structure has a fair bit of precedent behind it. The Comptroller of the Currency. The Office of the Special Counsel (OSC). The Social Security Administration (SSA). The Federal Housing Finance Agency (FHFA). Maybe four prior agencies is in the eye of the beholder, but it's hardly nothing. . . .

And Congress's choice to put a single director, rather than a multimember commission, at the CFPB's head violates no principle of separation of powers. The purported constitutional problem here is that an official has "slip[ped] from the Executive's control" and "supervision"—that he has become unaccountable to the President. So to make sense on the majority's own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily "slip" from the President's grasp. But the majority has nothing to offer. In fact, the opposite is more likely to be true: To the extent that such matters are measurable, individuals are easier than groups to supervise.

To begin with, trying to generalize about these matters is something of a fool's errand. Presidential control, as noted earlier, can operate through many means—removal to be sure, but also appointments, oversight devices (*e.g.,* centralized review of rulemaking or litigating positions), budgetary processes, personal outreach, and more. See *Free Enterprise Fund*, 561 U. S., at 524 (Breyer, J., dissenting). The effectiveness of each of those control mechanisms, when present, can then depend on a multitude of agency-specific practices, norms, rules, and organizational features. In that complex stew, the difference between a singular and plural agency head will often make not a whit of difference. . . .

But if the demand is for generalization, then the majority's distinction cuts the opposite way: More powerful control mechanisms are needed (if anything) for commissions. Holding everything else equal, those are the agencies more likely to "slip from the Executive's control." Just consider your everyday experience: It's easier to get one person to do what you want than a gaggle. . . .

Because it has no answer on that score, the majority slides to a different question: Assuming presidential control of any independent agency is vanishingly slim, is a single-head or a multi-head agency more capable of exercising power, and so of endangering liberty? The majority says a single head is the greater threat because he may wield power "*unilaterally*" and "[w]ith no colleagues to persuade." So the CFPB falls victim to what the majority sees as a constitutional anti-power-concentration principle (with an exception for the President).

If you've never heard of a statute being struck down on that ground, you're not alone. It is bad enough to "extrapolat[e]" from the "general constitutional language" of Article II's Vesting Clause an unrestricted removal power constraining Congress's ability to legislate under the Necessary and Proper Clause. It is still worse to extrapolate from the Constitution's general structure (division of powers) and implicit values (liberty) a limit on Congress's express power to create administrative bodies. And more: to extrapolate from such sources a distinction as prosaic as that between the SEC and the CFPB—*i.e.,* between a multi-headed and single-headed agency. . . . In deciding for itself what is "proper," the Court goes beyond its own proper bounds. . . .

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QUERIES ABOUT *SEILA LAW*

1. What happened? People have been arguing about the scope of the presidential power to control agency action for nearly a quarter of a millennium, so it should not be surprising that the debate between Chief Justice Roberts and Justice Kagan in *Seila Law* is complex and maybe not so easy for someone new to the material to follow. To understand the contours of this debate, it is helpful to break down the opinions in terms of their use of constitutional text, history, and precedent.

Constitutional text: The Chief Justice contends that the good-cause restriction on removal of the CFPB Director unconstitutionally infringed on the "executive power" that Article II vests in the president alone. What purposes does allocation of "all" of the executive power to the president serve? How does he justify the conclusion that removal power is an element of the executive power? It seems to be common ground that the president would have good cause to fire an agency head for violating the law or serious abuses of discretion. A critical question: Why, for the Chief Justice, isn't this enough authority to satisfy the Constitution?

Turning to Justice Kagan, what constitutional provision, in her view, grants Congress power to impose good cause restrictions on removal of at least some agency heads? Would Justice Kagan agree that there are some agency heads whom the president must be able to fire at will? If so, why? The good cause restriction, while in effect, would have blocked the president from getting rid of the Director of the CFPB due to a policy disagreement. Another critical question: Why, in Justice Kagan's view, doesn't this interference violate the president's control of the executive power?

History: How did the Chief Justice and Justice Kagan deploy the Federalist Papers? The Decision of 1789? How did they characterize congressional practice leading up to the creation of the CFPB? Who, in your view, makes better use of this history?

The Big Three Precedents: To make sense of *Seila Law,* it is critical to understand how the Chief Justice and Justice Kagan characterized and deployed *Myers v. United States, Humphrey's Executor v. United States*, and *Morrison v. Olson*. What rules did the Chief Justice pull out of these three cases? How about Justice Kagan? Whose use of precedent seems truer to these sources?

2. Why care? According to Justice Kagan, why should we want to preserve agency decisional independence in some contexts? What positive values does it serve? For the Chief Justice, what positive values does presidential control promote?

3. What's next? In *Seila Law*, the majority opinion expressly declined to overrule the two foundational cases for agency independence, *Humphrey's Executor* and *Morrison*. Might you, however, use the majority's new reading of these cases to attack the constitutionality of current independent agencies? Recall that *Humphrey's Executor* upheld the independence of the FTC given the powers it possessed in 1935. How do the powers of modern agencies compare? Recall also that the Court limited *Morrison*'s application to "inferior" officers. Is *Morrison* still of any help to independent agencies?

4. Another shoe (i.e., removal restriction) drops. Okay, there is a lot going on in the *Seila Law* opinions, but you might recall that, towards the end of the excerpt from Justice Kagan's dissent, she mentioned that the Federal Housing Financial Agency (FHFA), like the CFPB, has a single Director protected by a for-cause limit on removal. Following hard on the heels of *Seila Law*, the Court in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), held that the FHFA Director's protection from removal was unconstitutional. Justice Alito's majority opinion rejected the argument that *Seila Law* should not control because the FHFA's powers are not as great as those of the CFPB. He instead stated that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head." *Id.* at 1784. Accountability to the president, and thus the electorate, is required wherever an agency does "important" work. *Id.* Also, courts "are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies," and "the constitutionality of removal restrictions" should not "hinge[] on such an inquiry." *Id.* at 1784–85.

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Justice Kagan concurred on stare decisis grounds but objected that the Court had gratuitously expanded *Seila Law* to require at-will removal for every single-member agency head, regardless of whether that agency head exercises "significant executive authority" as *Seila Law* had indicated. *Id.* at 1801 (Kagan, J., dissenting).

Justice Sotomayor, joined by Justice Breyer, dissented on the constitutional question. She asserted that "the FHFA does not wield significant executive power, the executive power it does wield is exercised over Government affiliates, and its independence is supported by historical tradition. All considerations weigh in favor of recognizing Congress's power to make the FHFA Director removable only for cause." *Id.* at 1808 (Sotomayor, J., dissenting).

NOTES ON OTHER POLITICAL BRANCH CONTROLS OF AGENCIES

1. The demise of the legislative veto. In theory, Congress can override administrative action by passing a statute, but doing so is notoriously hard given that it requires enactment by the House and Senate and either a presidential signature or an override of a presidential veto. In response to this problem, Congress included "legislative veto" provisions in hundreds of enactments since 1929 as the modern administrative state took shape. Such provisions authorize a portion of Congress (*e.g.*, just the House acting alone) to block administrative action without obtaining bicameral approval or undergoing presentment to the president as the Constitution requires for legislation. The legislative veto, in short, makes it cheaper for interested elements in Congress to block administrative actions they do not like.

In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court ruled that legislative vetoes are unconstitutional. The facts of the case were not good for fans of this device. Under the statutory scheme, the Attorney General had discretion to suspend the deportation of persons of good moral character who would suffer extreme hardship if deported; one house of Congress could by resolution block such suspension. An immigration judge determined that Chadha met these requirements and suspended deportation. Subsequently, Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced a resolution in the house to block suspension of deportation of a half-dozen aliens — one of them Chadha. The Supreme Court described the subsequent legislative process this way:

> On December 16, 1975, the resolution was discharged from further consideration by the House Committee on the Judiciary and submitted to the House of Representatives for a vote. 121 Cong.Rec. 40800. The resolution had not been printed and was not made available to other Members of the House prior to or at the time it was voted on. *Ibid*. So far as the record before us shows, the House consideration of the resolution was based on Representative Eilberg's statement from the floor that "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution … did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended."

Chief Justice Burger's majority opinion striking the legislative veto is often cited as an example of a formalistic approach to separation of powers. Simplifying somewhat, he reasoned: (a) when Congress alters legal rights it is passing a law; (b) when Congress passes a law, it needs to satisfy the constitutional requirements of bicameralism and presentment, which are designed to promote deliberation and protect liberty; and (c) these requirements hold regardless of whether the legislative veto is, from a functional point of view, a "useful political invention," which is a debatable point in any event.

Justice White's dissent is a classic opinion in the functionalist mold. He stressed in particular that the legislative veto was vital to Congress's ability to balance delegation of power and its control:

> Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the

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> requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. Accordingly, over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy.

He also observed that it was rather odd for the Court to take such a strict view of the procedural limits on congressional authority given that the Court had, in essence, allowed Congress to delegate to agencies the power to make laws without undergoing bicameralism and presentment.

2. Money. The Supreme Court's *Chadha* opinion did not alter the fundamental political fact that Congress has power to make life quite difficult for an agency and its officials. For instance, congressional oversight committees can require agencies to produce information and agency officials to testify — which can be quite time-consuming and unpleasant for the official. But even more to the point, Congress controls the purse strings. The significance of this power for the practical import of *Chadha* was revealed in a telling anecdote recounted by Fisher and Devins about NASA's abortive effort to make use of that decision:

> The agency contested a legislative veto provision in its appropriations act. Congress responded by providing insufficient funds and then requiring the agency to come back for supplemental appropriations. NASA quickly succumbed in this unequal contest. The unconditional surrender was executed by this letter from the NASA administrator to the congressional subcommittee controlling its appropriations:
>
>> As you are aware, the Supreme Court in 1983 held legislative vetoes to be unconstitutional, and the Department of Justice, in applying that decision to [our] appropriation act, has indicated that provisions for Committee approval to exceed ceilings on certain programs specified in the legislation are unconstitutional.
>>
>> … The House Committee on Appropriations has proposed … deletion of all Committee approval provisions, leaving inflexible, binding funding limitations on several programs. Without some procedure for adjustment, other than a subsequent separate legislative enactment, these ceilings could seriously impact the ability of NASA to meet unforeseen technical changes or problems that are inherent in challenging R&D programs. We believe that the present legislative procedure [providing for committee approval] could be converted by this letter into an informal agreement by NASA not to exceed amounts for Committee designated programs without the prior approval of the Committee on Appropriations. …
>>
>> We appreciate the support NASA has received from the Committees of both the House and the Senate, and wish to assure the Committees that NASA will comply with any ceilings imposed by the Committees without the need for legislative ceilings which could cause serious damage to NASA's ongoing programs.

L. FISHER & N. DEVINS, CONSTITUTIONAL LAW: READINGS IN INSTITUTIONAL DYNAMICS (1991).

3. The Congressional Review Act partially revives the legislative veto. In 1996, Congress enacted a partial substitute for the legislative veto in the Congressional Review Act (CRA), 5 U.S.C. §§ 801–08. The CRA provides that major rules cannot take effect until 60 days after they are submitted to Congress. It also provides streamlined procedures for Congress to consider and enact a joint resolution of disapproval for rules, which, unlike a legislative veto, must survive the presentment process to take effect. To prevent an agency from making an end run around the CRA, it provides that an invalidated rule "may not be reissued in substantially the same form, and a new rule that is substantially the same … may not be issued, unless the reissued or new rule is specifically authorized by law enacted after the date of the joint resolution

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disapproving the original rule." 5 U.S.C. § 801(b)(2). This is sometimes called the CRA's "salt the earth" provision.

As a CRA resolution must pass both houses and survive presentment, its provisions are likely to be useful only where control of the presidency has recently shifted to a party that also controls both houses of Congress. Prior to 2017, the stars had aligned for invoking the CRA just once. After Republicans took control of both houses of Congress and the White House in the 2000 election, they promptly invalidated a hotly contested OSHA regulation adopted late in the Clinton Administration to address repetitive motion injuries. The CRA then lay dormant for sixteen years, until 2017 when the presidency again switched from Democratic to Republican control while the Republicans controlled both houses of Congress. This time, the CRA carved a much broader swathe of regulatory destruction, eliminating fourteen of the fifteen regulations considered for repeal. In July 2021, President Biden signed three CRA disapprovals into law as Democrats finally had a chance to deploy the CRA against rules promulgated during a Republican administration.

4. Congressional oversight. In connection with its lawmaking power, Congress is responsible for investigating matters of public interest. Included in Congress's investigative power is the power to oversee the operation of the executive and judicial branches. In fact, each house of Congress has at least one committee with explicit responsibility for keeping an eye on the conduct of the other branches (*e.g.*, the House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs). Historically, Congress's oversight power has taken the form of hearings involving government officials, sometimes tied to the availability of funding, and subpoenas for records relating to official government action, which can be countered by claims of executive privilege or some other publicly relevant justification for withholding the requested materials. Almost always, disputes between Congress and the executive branch over access to information are resolved with some sort of compromise; there are only a handful of examples in American history when presidential challenges to congressional subpoenas have come before the courts.

It should come as no surprise, then, that the question of whether Congress may subpoena the personal (as opposed to public or official) records of a sitting president was an issue of first impression when the Supreme Court decided *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). *Mazars* was consolidated with three other cases involving congressional subpoenas of President Trump's personal financial records. Three different committees of the House of Representatives issued subpoenas for those records as part of the committees' investigations into money laundering, foreign interference in the U.S. financial system and elections, and government ethics laws. President Trump sued to enjoin enforcement of all three subpoenas, which were issued to an accounting firm (Mazars) and two banks (Deutsche Bank and Capital One).

Before the Court, the House committees argued that the subpoenas are enforceable as long as they address a "valid legislative purpose." This is the standard that has been applied to previous challenges of legislative subpoenas, and has generally been understood as a low bar for Congress to meet in compelling information. The president and Solicitor General (SG) countered that a subpoena for presidential records is only enforceable when the House establishes a "demonstrated, specific need" for information that is "demonstrably critical" to its legislative purpose. This heightened standard was derived from cases seeking production of official presidential records, and reflects concerns about Congress using its subpoena power to harass a sitting president or to otherwise expose materials that the national interest suggests must or should remain confidential.

Chief Justice Roberts, writing for a seven-justice majority, rejected both arguments. He explained that the SG and the President's "categorical approach would giv[e] short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively," and that the "House's approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." The better approach, according to the Court, was to balance the interests of Congress and the president in this unique exercise of legislative power against

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the chief executive. The Chief Justice set out a (non-exhaustive) list of relevant factors, including: the nature of the legislative purpose; the breadth of the subpoena; the strength of the evidence supporting Congress's purpose; and the "burdens imposed on the president by a subpoena." The Court remanded the case to allow the lower courts to consider these "special concerns."

It is unclear how strictly the lower courts will apply the Court's balancing test in *Mazars* in future cases (including on remand in *Mazars* itself). Do you think that the Chief Justice was correct to hold that legislative subpoenas of a president's personal (i.e. non-privileged) records must be justified more thoroughly than "ordinary" legislative subpoenas? Does allowing Congress to expose the personal information of a president create a dangerous incentive for future Congresses?

5. Centralized presidential control of rulemaking. Statutory delegations of rulemaking authority generally run to agency heads rather than to the president—*e.g.*, Congress delegates to the EPA administrator, not the president, the authority to promulgate national ambient air quality standards. Does the president nonetheless have legal authority to control how agency heads use their rulemaking discretion? The president's position at the apex of the executive branch suggests the existence of such authority. But then, the Constitution instructs the president to "take Care that the Laws be faithfully executed," and Congress generally has, by law, vested rulemaking authority in agency heads. Can Congress constitutionally limit the president's authority to control agency rulemaking? Or, given the level of informal presidential influence over even "independent" agencies, does the "legal" answer to this question matter?

These questions are prompted by presidential efforts over the last several decades to rationalize and centralize agency rulemaking through executive orders that require executive agencies to, among other things, conduct cost-benefit analyses of significant rules. These orders also subject significant agency rules to centralized review by the Office of Information and Regulatory Affairs, an agency within the Office of Management and Budget, which is part of the Executive Office of the President. An executive order issued by the Clinton administration over twenty-five years ago, E.O. 12,866, 58 Fed. Reg. 51, 735 (Sept. 30, 1993), has largely controlled this process. In 2017, the Trump administration issued E.O. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017), the most significant order governing centralized review since E.O. 12,866. Among other things, this more recent executive order requires agencies to follow a "regulatory budget" that limits the incremental costs that new regulations can impose and to remove two regulations for every one they promulgate. We will discuss these executive orders in greater detail as part of our treatment of agency rulemaking in Chapter 3. The Biden administration promptly rescinded E.O. 13771 and issued a memorandum instructing the Director of the Office of Management and Budget, in consultation with agencies, to develop recommendations for modernizing regulatory review.

For very different assessments of centralized review of rulemaking by two leading scholars of administrative law, *compare* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984 (1997) (contending that presidential control threatens to unduly politicize rulemaking); *with* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2252 (2001) (contending that "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").

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Chapter 2 The Basic Procedural Categories of Administrative Law

At p. 131, add new note 5.a. to Part 2A.4:

5a. The courts' job is to identify legal errors then remand for agencies to try again. *Chenery II*, which is excerpted above as a principal case, includes a rather lengthy discussion of its precursor, *Chenery I*, 318 U.S. 80 (1943). The Court in *Chenery I* held that "an order of the Securities and Exchange Commission could not be sustained on the grounds upon which that agency acted. We therefore directed that the case be remanded to the Commission for such further proceedings as might be appropriate." In the process, *Chenery I* articulated a foundational principle of administrative law, which is articulated in the excerpted portion of *Chenery II* above:

> When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

The Court affirmed this principal in *Calcutt v. FDIC*, 143 S. Ct. 1317 (2023), which involved judicial review of an FDIC enforcement action. Although the Sixth Circuit found that the FDIC Board had erred in two ways, it nevertheless affirmed the Board's decision on the grounds that it was supported by substantial evidence and that any further consideration by the Board would be a "useless formality." *Id.* at 1321. The Supreme Court reversed unanimously. It cited the "well-established maxim of administrative law that . . . if the grounds propounded by the agency for its decision 'are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.'" *Id.* at 1320-21 (quoting *SEC v. Chenery*, 332 U.S. 194, 196 (1947)). The "proper course" for the Sixth Circuit, according to the Court, was to remand to the Board for reconsideration of its decision in light of the errors identified by the reviewing court. In response to the Sixth Circuit's assertion that remand would be a "useless formality," the Court explained that the only exception to the *Chenery* rule is for instances where an agency was required to take a particular action, such that further consideration could not lead to a different result. Because the FDIC was not required to reach its conclusion in the enforcement action against petitioner, the Court held that the Sixth Circuit erred in failing to remand so that the FDIC could exercise its discretion in another proceeding untainted by legal error.

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Chapter 3 Rulemaking

At pp. 144-164, replace Part 3A:

A. Determining the Existence and Scope of Authority to Issue a Legislative Rule

Under the APA's broad definition, the term "rule" means "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency … ." 5 U.S.C. § 551(4).

Administrative law distinguishes among various types of rules that fall within this mouthful of a definition. One critical distinction is between "legislative" and "nonlegislative" rules. The latter category includes "interpretive rules" and "policy statements," which are often collectively referred to as "guidance documents." Nonlegislative rules, as the name indicates, lack the "force of law." To illustrate, our fictional friends at the WTC might issue an interpretive rule declaring that the term "wine," as defined by § 2(f) of the WTCA, includes alcoholic apple ciders. This rule would not create a new binding legal norm that alcoholic apple ciders are "wines." Instead, the interpretive rule would merely amount to a declaration by the agency that it thinks that the statutory provision that does provide the binding legal norm, § 2(f), properly understood, includes alcoholic apple ciders. The agency's view may have a lot of practical importance for regulated parties, but it does not change the "law."

Legislative rules (sometimes called "substantive rules," especially in older materials) create new legally binding norms. To examine what this might mean, note that § 5(b) of the WTCA makes it unlawful for a person "in connection with the purchase or sale of wine" to "make any untrue statement of material fact." Suppose a wine merchant includes a claim in its marketing materials that consumption of its wines will cure male pattern baldness. If the WTC brought an enforcement action against the wine merchant for violating § 5(b), the agency would need to prove that the claim was both untrue and material because the statute, the operative binding law, requires these elements on its face. But now suppose that the WTC, acting within its statutory authority, has promulgated a legislative rule that provides: "It is unlawful for wine merchants to make positive health claims for consumption of their products." If the WTC were to bring an enforcement action against the wine merchant for violating this rule, the agency would not need to prove that the claims were untrue or material—the central issues for finding a statutory violation of § 5(b). Instead, the question would simply be whether the wine merchant violated the legislative rule's own terms by including positive health claims in its marketing materials. The legislative rule provides binding "law."

An agency can promulgate legislative rules only if Congress has granted the agency that power. Courts, at least until recently, have long taken a very generous approach to finding such grants. For instance, § 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(g), grants the Commission power "to make rules and regulations for the purpose of carrying out the provisions of [the Act]." In a landmark decision, the D.C. Circuit in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), held that that this broad, generic delegation of rulemaking power authorized the FTC to issue legislative rules that could "put flesh" on underlying statutory

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standards. In support of this conclusion, the court emphasized the importance of recognizing, consistent with congressional intent, generous agency rulemaking authority to confront new problems with evolving expertise. Applying these principles to the FTC rule at issue in *National Petroleum*, the D.C. Circuit held that the agency had legislative rulemaking authority to declare that a failure to post octane rating numbers on gasoline pumps at service stations violated the Act's proscription of "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a). And this is why you have seen those yellow octane stickers at gas stations your whole life.

After determining the easy question of whether an agency possesses any legislative rulemaking power, one might face the problem of determining whether a particular rule falls within the scope of that power. As part of its extensive canvassing of case law in *National Petroleum*, the D.C. Circuit noted that the Supreme Court had declared that a rule will fall within a general grant of authority to make "such rules and regulations as may be necessary to carry out the provisions of" a statute so long as the rule is "reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973). The D.C. Circuit cited a series of reasons for concluding that the FTC's octane sticker rule satisfied this standard—e.g., the rule would make adjudication of enforcement actions against unfair trade practices more efficient while providing clearer, generally applicable notice to companies.

Still, even with this generous approach, an agency might go too far. In *Chrysler v. Brown*, 441 U.S. 281 (1979), the Court addressed the legality of a regulation that required disclosure of information related to compliance with affirmative action requirements. The Court concluded that none of the potential statutory sources of authority for this rule, which included various civil rights statutes, were in any way concerned with controlling "public disclosure of trade secrets or confidential business information." The disclosure rule therefore failed the requirement that a rule must be "reasonably within the contemplation of [a statutory] grant of authority." 441 U.S. at 305. The Court in *Chrysler* reiterated, however, that it was not holding that "any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding on courts in a manner akin to statutes."

As rulemaking is an exercise in statutory implementation, the scope of an agency's rulemaking authority must depend on the meaning of the agency's enabling act. For example, the WTC's rulemaking authority to regulate the wine industry must depend on what terms such as "wine" mean as used by the WTCA. We will be examining the problem of how courts review agency statutory interpretations in some detail later in the book. For the moment, we want to draw your attention briefly to the *Chevron* doctrine, which, skipping an alarming number of details, provides that a court should accept an agency's reasonable construction of a statute that it administers. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). Underlying *Chevron* deference are the ideas that Congress has put agencies, not courts, in primary charge of implementing agency enabling acts and that agencies should generally have greater expertise than courts when it comes to interpreting them. *Chevron* has been cited and applied many thousands of times, and its proper parameters have been the subject of endless commentary in cases and law review articles. It has also become increasingly controversial over the last decade as a strong conservative contingent on the Supreme Court, led by Justices Thomas and Gorsuch, has come to regard *Chevron* deference as violating separation of powers by conceding to the executive branch the judicial power to interpret law. (Matters may be coming to a head as the Court, in May 2023, granted certiorari on the question of whether to overrule *Chevron* in *Loper Bright Enterprises v. Raimondo*, No. 22-451, with an answer likely coming sometime in late spring 2024. So, bear in

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mind: *Chevron* remains, as of this writing, foundational to modern administrative law, and, by the time you read this material, *Chevron* may already be gone. Interesting times for administrative law.)

The flexible, deferential approach to agency authority of *Chevron* and *National Petroleum* is strikingly absent from a new, important doctrine that the Supreme Court has developed to determine the scope of agency powers. As explained by Chief Justice Roberts in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the "major questions doctrine" holds "that there are 'extraordinary cases' … in which the 'history and the breadth of the authority that the agency has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer" authority claimed by an agency. In such situations, courts should insist on "clear congressional authorization" for a claimed agency power rather than accept a mere "colorable textual basis." Thus, whereas *Chevron* would instruct a court to uphold an agency's construction of its own statutory authority so long as the court concludes it is reasonable, the major questions doctrine, where applicable, instructs that a court should uphold an agency's claim to statutory authority only where the court determines for itself that Congress has *clearly* granted the power in question.

Lesson 3A. Ben, who has been named Chief of the Rulemaking Division, is about to embark on the WTC's first major rulemaking using the agency's authority under § 8 of the WTCA. He is primarily interested in developing a comprehensive labeling rule to implement § 5 of the WTCA, which, among other things, proscribes schemes to defraud, omissions of material fact, etc. He thinks the WTC should require disclosure of the grape varieties and any artificial additives in all wines. He also has a personal interest in the health effects of wines because his sister is allergic to sulfites, which are in most wines. He would like to require disclosure of the health effects of all wine ingredients and of wine in general. He is also wondering if the agency has authority to ban ingredients that cause significant adverse health effects. Do these potential requirements fall within the scope of the WTC's legislative rulemaking authority?

BACKGROUND OF *WEST VIRGINIA V. EPA*

Petitioners, who included states and coal-mining interests, challenged an Obama-era rule, the Clean Power Plan (CPP), which was designed to curb carbon dioxide emissions from existing power plants. This rule invoked the agency's authority under § 111(d) of the Clean Air Act to set a "standard of performance" for emissions that, in the EPA Administrator's view, "reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* [BSER]." 42 U.S.C. § 7411(a)(1) (emphasis added). The CPP adopted a BSER that contemplated "generation-shifting"—moving power generation away from dirtier coal plants to cleaner natural gas and renewable plants. After a long and tortured history in which the Trump Administration repealed the CPP and replaced it with a new rule (ACE), only to have both actions rejected by the D.C. Circuit, *American Lung Association v. EPA*, 985 F.3d 914 (D.C. Cir. 2021), petitioners found themselves challenging the CPP's legality at the Supreme Court, which seized on the chance to elaborate on the Court's developing "major questions doctrine." As you parse the excerpt below, you might consider:

- How do you tell if a question is "major"?
- Who, the Chief Justice or Justice Kagan, had the better argument regarding the meaning of "system"?

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- More generally, who offered the more persuasive approach to statutory interpretation and the role of the major questions doctrine?
- Does the major questions doctrine have a constitutional basis?
- Does the major questions doctrine honor or defy congressional intent? Is it good for democracy?
- Is it a problem that hundreds of lower court judges will be deciding for themselves what “major” means?

West Virginia v. EPA

142 S. Ct. 2578 (2022).

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a “standard of performance” for their emission of certain pollutants into the air. 84 Stat. 1683, 42 U.S.C. § 7411(a)(1). That standard … must reflect the “best system of emission reduction” that the Agency has determined to be “adequately demonstrated” for the particular category. §§ 7411(a)(1), (b)(1), (d).

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the “best system of emission reduction” for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

I

A

[T]he New Source Performance Standards program of Section 111 [of the Clean Air Act Amendments] … directs EPA to … (1) “determine[ ],” taking into account various factors, the “best system of emission reduction which ... has been adequately demonstrated,” (2) ascertain the “degree of emission limitation achievable through the application” of that system, and (3) impose an emissions limit on new stationary sources that “reflects” that amount. *Ibid.* Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount “achievable through the application of the best system of emission reduction ... adequately demonstrated,” or the BSER. …

Although the thrust of Section 111 focuses on emissions limits for *new* and *modified* sources—as its title indicates—the statute also authorizes regulation of certain pollutants from *existing* sources. Under Section 111(d), EPA may regulate harmful emissions [from existing sources] not already controlled under the Agency's other authorities. …

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. …

B

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Things changed in October 2015, when EPA promulgated two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d) … through what it called the Clean Power Plan rule.

In that rule, EPA established "final emission guidelines for states to follow in developing plans" to regulate existing power plants within their borders. To arrive at the guideline limits, EPA … identified the BSER.

… The BSER for existing plants included three types of measures, which the Agency called "building blocks." The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal more efficiently. But such improvements, EPA stated, would "lead to only small emission reductions," because coal-fired power plants were already operating near optimum efficiency. On the Agency's view, "much larger emission reductions [were] needed from [coal-fired plants] to address climate change."

So the Agency included two additional building blocks in its BSER, both of which involve what it called "generation shifting from higher-emitting to lower-emitting" producers of electricity. Building block two was a shift in electricity production from existing coal-fired power plants to natural-gas-fired plants. Because natural gas plants produce "typically less than half as much" carbon dioxide per unit of electricity created as coal-fired plants, the Agency explained, "this generation shift [would] reduce[ ] CO_2 emissions." Building block three worked the same way, except that the shift was from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," mainly wind and solar. "Most of the CO_2 controls" in the rule came from the application of building blocks two and three.

The Agency identified three ways in which a regulated plant operator could implement a shift in generation to cleaner sources. First, an operator could simply reduce the regulated plant's own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there. Finally, operators could purchase emission allowances or credits as part of a cap-and-trade regime.

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables.

Having decided that the "best system of emission reduction ... adequately demonstrated" was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. The Agency settled on what it regarded as a "reasonable" amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014.

… The White House stated that the Clean Power Plan would "drive a[n] ... aggressive transformation in the domestic energy industry." EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. …

III

A

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The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the "best system of emission reduction" within the meaning of Section 111.

"It is a 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." Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *Id.*, at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." *Id.* at 160. In *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 141 S. Ct. 2485 (2021) (*per curiam*), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the ... spread of" disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic.

…

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, *Brown & Williamson*, 529 U.S. at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*, 531 U.S. at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994).
…

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *Utility Air*, 573 U.S. at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims. *Ibid.*

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air*, 573 U.S. at 324. It located that newfound power in the vague language of an "ancillary provision[ ]" of the Act, *Whitman*, 531 U.S. at 468, one that was designed to function

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as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*, 529 U.S. at 159–160; *Gonzales*, 546 U.S. at 267–268; *Alabama Assn.*, 594 U. S., at ——, ——, (slip op., at 2, 8). Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U.S. at 159–160.

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. … And as Justice Frankfurter has noted, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Brothers*, Inc., 312 U.S. 349, 352 (1941).

…

But, the Agency explained, in order to "control[ ] CO_2 from affected [plants] at levels ... necessary to mitigate the dangers presented by climate change," it could not base the emissions limit on "measures that improve efficiency at the power plants." *Id.*, at 64728. … Rather than focus on improving the performance of individual sources, it would "improve the *overall power system* by lowering the carbon intensity of power generation." *Ibid.* (emphasis added). And it would do that by forcing a shift throughout the power grid from one type of energy source to another. …

… On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably "exorbitant."

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide ... trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development." EPA, Fiscal Year 2016: Justification of Appropriation Estimates for the Committee on Appropriations 213 (2015) (emphasis added). "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so.

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal- based generation there should be over the coming decades. The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. …

…

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. …

C

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Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction ... adequately demonstrated." 42 U. S. C. § 7411(a)(1). As a matter of "definitional possibilities," *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011), generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction," Brief for Federal Respondents 31—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

The Government, points out that the [Clean Air] Act elsewhere uses the word "system" or "similar words" to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution. ... If the word "system" or similar words like "technique" or "means" can encompass cap-and-trade, the Government maintains, why not in Section 111?

But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111. Indeed, the Government's examples demonstrate why it is not.

First, unlike Section 111, the Acid Rain and NAAQS programs contemplate trading systems as a means of *complying* with an *already established emissions limit*, set either directly by Congress (as with Acid Rain, see 42 U. S. C. § 7651c) or by reference to the safe concentration of the pollutant in the ambient air (as with the NAAQS). In Section 111, by contrast, it is EPA's job to come up with the cap itself: the "numerical limit on emissions" that States must apply to each source. 80 Fed. Reg. 64768. We doubt that Congress directed the Agency to set an emissions cap at the level "which reflects the degree of emission limitation achievable through the application of [a cap-and-trade] system," § 7411(a)(1), for that degree is indeterminate. It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, such as the NAAQS. It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit.

Second, Congress added the above authorizations for the use of emissions trading programs in 1990, simultaneous with amending Section 111 to its present form. At the time, cap-and-trade was a novel and highly touted concept. … And Congress went out of its way to amend the NAAQS statute to make absolutely clear that the "measures, means, [and] techniques" States could use to meet the NAAQS included cap-and-trade. § 7410(a)(2)(A). Yet "not a peep was heard from Congress about the possibility that a trading regime could be installed under § 111." *Id.*, at 10309.

Finally, the Government notes that other parts of the Clean Air Act, past and present, have "explicitly limited the permissible components of a particular 'system'" of emission reduction in some regard. … The comparatively unadorned use of the phrase "best system of emission reduction" in Section 111, the Government urges, "suggest[s] a conscious congressional" choice *not* to limit the measures that may constitute the BSER to those applicable at or to an individual source. *Id.*, at 32.

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These arguments, however, concern an interpretive question that is not at issue. We have no occasion to decide whether the statutory phrase “system of emission reduction” refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. To be sure, it is pertinent to our analysis that EPA has acted consistent with such a limitation for the first four decades of the statute's existence. But the only interpretive question before us, and the only one we answer, is more narrow: whether the “best system of emission reduction” identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.

* * *

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible “solution to the crisis of the day.” *New York v. United States*, 505 U.S. 144, 187 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GORSUCH, with whom Justice ALITO joins, concurring.

To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to “‘clear congressional authorization’” when they claim the power to make decisions of vast “‘economic and political significance.’” Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees. I join the Court's opinion and write to offer some additional observations about the doctrine on which it rests. [Justice Gorsuch then explained that the clear statement rule of the major questions doctrine serves as a prophylactic to protect against potential violations of separation of powers and the nondelegation doctrine. In addition, he offered guidance for identifying “major questions” and for determining where Congress has supplied a clear statement sufficient for a delegation.]

…

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to “the most pressing environmental challenge of our time.” *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

…

Congress charged EPA with addressing those potentially catastrophic harms [of climate change], including through regulation of fossil-fuel-fired power plants. Section 111 of the Clean Air Act directs EPA to regulate stationary sources of any substance that “causes, or contributes significantly to, air pollution” and that “may reasonably be anticipated to endanger public health or welfare.” 42 U. S. C. § 7411(b)(1)(A). Carbon dioxide and other greenhouse gases fit that description. See *American Elec. Power*, 564 U.S. at 416–417; *Massachusetts*, 549 U.S. at 528–

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532. EPA thus serves as the Nation's "primary regulator of greenhouse gas emissions." *American Elec. Power*, 564 U.S. at 428. And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are responsible for about one quarter of the Nation's greenhouse gas emissions. …

The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. § 7411(a)(1). The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute. The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.

I

The Clean Air Act was major legislation, designed to deal with a major public policy issue. … As applied to existing (not new) sources, the [New Source Performance Standards] program mandates—via Section 111(d)—that EPA set emissions levels for pollutants not covered by [other] programs, including carbon dioxide.

Section 111(d) thus ensures that EPA regulates existing power plants' emissions of *all* pollutants. …

Section 111 describes the prescribed regulatory effort in expansive terms. EPA must set for the relevant source (here, fossil-fuel-fired power plants) and the relevant pollutant (here, carbon dioxide) an emission level—more particularly,

> "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." § 7411(a)(1).

… Taken as a whole, the section provides regulatory flexibility and discretion. It imposes, to be sure, meaningful constraints: Take into account costs and nonair impacts, and make sure the best system has a proven track record. But the core command—go find the best system of emission reduction—gives broad authority to EPA.

If that flexibility is not apparent on the provision's face, consider some dictionary definitions—supposedly a staple of this Court's supposedly textualist method of reading statutes. A "system" is "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." Webster's Third New International Dictionary 2322 (1971). Or again: a

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"system" is "[a]n organized and coordinated method; a procedure." American Heritage Dictionary 1768 (5th ed. 2018). The majority complains that a similar definition—cited to the Solicitor General's brief but originally from another dictionary—is just too darn broad. *Ante*, at ——; see Brief for United States 31 (quoting Webster's New International Dictionary 2562 (2d ed. 1959)). "[A]lmost anything" capable of reducing emissions, the majority says, "could constitute such a 'system'" of emission reduction. *Ante*, at ——. But that is rather the point. Congress used an obviously broad word (though surrounding it with constraints) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. (Once again, dictionaries would tell the tale.) So EPA was quite right in stating in the Clean Power Plan that the "[p]lain meaning" of the term "system" in Section 111 refers to "a set of measures that work together to reduce emissions." 80 Fed. Reg. 64762. Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there.

For generation shifting fits comfortably within the conventional meaning of a "system" of emission reduction." Consider one of the most common mechanisms of generation shifting: the use of a cap-and-trade scheme. Here is how the majority describes cap and trade: "Under such a scheme, sources that receive a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps." Does that sound like a "system" to you? It does to me too. And it also has to this Court. In the past, we have explained that "[t]his type of 'cap-and-trade' *system* cuts costs while still reducing pollution to target levels." *EPA v. EME Homer City Generation, L. P.*, 572 U.S. 489, 503, n. 10 (2014) (emphasis added). So what does the majority mean when it says that "[a]s a matter of definitional *possibilities*, generation shifting *can* be described as a 'system' "? Rarely has a statutory term so clearly applied.

Other statutory provisions confirm the point. The Clean Air Act's acid rain provision, for example, describes a cap-and-trade program as an "emission allocation and transfer *system*" § 7651(b) (emphasis added). So a "system," according to the statute's own usage, includes the kind of cap-and-trade mechanism that the Clean Power Plan relied on. … In arguing that EPA's claim of authority here would allow it to take the emissions limit as low as it wants, the majority ignores the varied constraints surrounding the "best system" language. See *supra*, at ——. And still more important for interpretive purposes, the distinction appears only in the majority's opinion, not in any statutory language. That text, to the contrary, says to EPA: Do as you would do under the NAAQS and Acid Rain programs—go ahead and use cap and trade.

There is also a flipside point: Congress declined to include in Section 111 the restrictions on EPA's authority contained in other Clean Air Act provisions. Most relevant here, quite a number of statutory sections confine EPA's emissions-reduction efforts to technological controls—essentially, equipment or processes that can be put into place at a particular facility. … But nothing like the language of those provisions is included in Section 111. That matters under normal rules of statutory interpretation. As Justice Scalia once wrote for the Court: "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005).

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Statutory history serves only to pile on: It shows that Congress has specifically declined to restrict EPA to technology-based controls in its regulation of existing stationary sources. …

"Congress," this Court has said, "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Arlington v. FCC*, 569 U.S. 290, 296 (2013). In Section 111, Congress spoke in capacious terms. It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts*, 549 U.S. at 532, 127 S.Ct. 1438. So the provision enables EPA to base emissions limits for existing stationary sources on the "best system." That system may be technological in nature; it may be whatever else the majority has in mind; or, most important here, it may be generation shifting. The statute does not care. And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ——, —— (2020). That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

II

The majority thinks not, contending that in "certain extraordinary cases"—of which this is one—courts should start off with "skepticism" that a broad delegation authorizes agency action. The majority labels that view the "major questions doctrine," and claims to find support for it in our caselaw. But the relevant decisions do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation's terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly—as I've just shown—with all the Clean Air Act's provisions. That the Plan addresses major issues of public policy does not upend the analysis. Congress wanted EPA to do just that. Section 111 entrusts important matters to EPA in the expectation that the Agency will use that authority to combat pollution—and that courts will not interfere.

A

"[T]he words of a statute," as the majority states, "must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). We do not assess the meaning of a single word, phrase, or provision in isolation; we also consider the overall statutory design. And that is just as true of statutes broadly delegating power to agencies as of any other kind. In deciding on the scope of such a delegation, courts must assess how an agency action claimed to fall within the provision fits with other aspects of a statutory plan.

So too, a court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate." *Brown & Williamson*, 529 U.S. at 133. Assume that a policy decision, like this one, is a matter of significant "economic and political magnitude." *Ibid.* We know that Congress delegates such decisions to agencies all the time—and often via broadly framed provisions like Section 111. But Congress does so in a sensible way. To decide whether an agency

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action goes beyond what Congress wanted, courts must assess (among other potentially relevant factors) the nature of the regulation, the nature of the agency, and the relationship of the two to each other. In particular, we have understood, Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise. So when there is a mismatch between the agency's usual portfolio and a given assertion of power, courts have reason to question whether Congress intended a delegation to go so far.

The majority today goes beyond those sensible principles. It announces the arrival of the "major questions doctrine," which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules. Apparently, there is now a two-step inquiry. First, a court must decide, by looking at some panoply of factors, whether agency action presents an "extraordinary case[ ]." If it does, the agency "must point to clear congressional authorization for the power it claims," someplace over and above the normal statutory basis we require. The result is statutory interpretation of an unusual kind. It is not until page 28 of a 31-page opinion that the majority begins to seriously discuss the meaning of Section 111. And even then, it does not address straight-up what should be the question: Does the text of that provision, when read in context and with a common-sense awareness of how Congress delegates, authorize the agency action here?

The majority claims it is just following precedent, but that is not so. The Court has never even used the term "major questions doctrine" before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency's view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience. In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design.

The key case here is *FDA* v. *Brown & Williamson*. There, the Food and Drug Administration (FDA) asserted that its power to regulate "drugs" and "devices" extended to tobacco products. Until the agency action at issue, tobacco products hadn't been spoken of in the same breath as pharmaceuticals (FDA's paradigmatic regulated product). And Congress had created in several statutes a "distinct regulatory scheme" for tobacco, not involving FDA. *Id.*, at 155–156. So all the evidence was that Congress had never meant for FDA to have any—let alone total—control over the tobacco industry, with its "unique political history." *Id.*, at 159. Again, there was "simply" a lack of "fit" between the regulation at issue, the agency in question, and the broader statutory scheme. *Id.*, at 143.

The majority's effort to find support in *Brown & Williamson* for its interpretive approach fails. It may be helpful here to quote the full sentence that the majority quotes half of. "In extraordinary cases," the Court stated, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." 529 U.S. at 159. For anyone familiar with this Court's *Chevron* doctrine, that language will ring a bell. The Court was saying only—and it was elsewhere explicit on this point—that there was reason to hesitate before giving FDA's position *Chevron* deference. And what was that reason? The Court went on to explain that it would not defer to FDA because it read the relevant statutory provisions as negating the agency's claimed authority. … In reaching that conclusion, the Court relied (as I've just explained) not on any special "clear authorization" demand, but on normal principles of statutory interpretation: look at the text, view

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it in context, and use what the Court called some "common sense" about how Congress delegates. …

The Court has applied the same kind of analysis in subsequent cases—holding in each that an agency exceeded the scope of a broadly framed delegation when it operated outside the sphere of its expertise, in a way that warped the statutory text or structure.

…

In each case, the Court thought, the agency had strayed out of its lane, to an area where it had neither expertise nor experience. The Attorney General making healthcare policy, [*Gonzales v. Oregon*, 546 U.S. 243 (2006),] the regulator of pharmaceutical concerns deciding the fate of the tobacco industry, [*FDA* v. *Brown & Williamson* 529 U.S. 120 (2000),] and so on. And in each case, the proof that the agency had roamed too far afield lay in the statutory scheme itself. The agency action collided with other statutory provisions; if the former were allowed, the latter could not mean what they said or could not work as intended. FDA having to declare tobacco "safe" to avoid shutting down an industry; or EPA having literally to change hard numbers contained in the Clean Air Act. [*Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).] There, according to the Court, the statutory framework was "not designed to grant" the authority claimed. *[Id.]* at 324. The agency's "singular" assertion of power "would render the statute unrecognizable to the Congress" that wrote it. *Ibid.* (internal quotation marks omitted).

B

The Court today faces no such singular assertion of agency power. As I have already explained, nothing in the Clean Air Act (or, for that matter, any other statute) conflicts with EPA's reading of Section 111. Notably, the majority does not dispute that point. Of course, it views Section 111 (if for unexplained reasons) as less clear than I do. But nowhere does the majority provide evidence from within the statute itself that the Clean Power Plan conflicts with or undermines Congress's design. That fact alone makes this case different from all the cases described above. As to the other critical matter in those cases—is the agency operating outside its sphere of expertise?—the majority at least tries to say something. It claims EPA has no "comparative expertise" in "balancing the many vital considerations of national policy" implicated in regulating electricity sources. But that is wrong.

***Congress specifically "entrust[ed] such complex balancing to EPA," because that "expert agency" has the needed "scientific, economic, and technological resources" to carry it out. [*American Elec. Power*,] 564 U.S. at 427–428. So the balancing—including of the Nation's "energy requirements"—that the majority says EPA has no "comparative expertise" in? § 7411(a)(1). We explained 11 short years ago, citing Congress, that it was smack in the middle of EPA's wheelhouse.

And we were right. *** This is not the Attorney General regulating medical care, or even the CDC regulating landlord-tenant relations. It is EPA (that's the Environmental Protection Agency, in case the majority forgot) acting to address the greatest environmental challenge of our time. So too, there is nothing special about the Plan's "who": fossil-fuel-fired power plants. In *Utility Air*, we thought EPA's regulation of churches and schools highly unusual. But fossil-fuel-fired plants? Those plants pollute—a lot—and so they have long lived under the watchful eye of EPA. That was true even before EPA began regulating carbon dioxide.

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Finally, the "how" of generation shifting creates no mismatch with EPA's expertise. As the Plan noted, generation shifting has a well-established pedigree as a tool for reducing pollution…. And that toolbox is the one EPA uses. So that Agency, more than any other, has the desired "comparative expertise." The majority cannot contest that point frontally: It knows that cap and trade and similar mechanisms are an ordinary part of modern environmental regulation. Instead, the majority protests that Congress would not have wanted EPA to "dictat[e]," through generation shifting, the "mix of energy sources nationwide." But that statement reflects a misunderstanding of how the electricity market works. *Every* regulation of power plants—even the most conventional, facility-specific controls—"dictat[es]" the national energy mix to one or another degree. That result follows because regulations affect costs, and the electrical grid works by taking up energy from low-cost providers before high-cost ones. Consider an example: Suppose EPA requires coal-fired plants to use carbon-capture technology. That action increases those plants' costs, and automatically (by virtue of the way the grid operates) reduces their share of the electricity market. So EPA is always controlling the mix of energy sources. In that sense (though the term has taken on a more specialized meaning), everything EPA does is "generation shifting." The majority's idea that EPA has no warrant to direct such a shift just indicates that courts sometimes do not really get regulation.

Why, then, be "skeptic[al]" of EPA's exercise of authority? When there is no misfit, of the kind apparent in our precedents, between the regulation, the agency, and the statutory design? Although the majority offers a flurry of complaints, they come down in the end to this: The Clean Power Plan is a big new thing, issued under a minor statutory provision. I have already addressed the back half of that argument: In fact, there is nothing insignificant about Section 111(d), which was intended to ensure that EPA would limit existing stationary sources' emissions of otherwise unregulated pollutants (however few or many there were). And the front half of the argument doesn't work either. The Clean Power Plan was not so big. It was not so new. And to the extent it was either, that should not matter.

As to bigness—well, events have proved the opposite: The Clean Power Plan, we now know, would have had little or no impact. …

The majority thus pivots to the massive consequences generation shifting *could* produce—but that claim fares just as poorly. On EPA's view of its own authority, the majority worries, some future rule might "forc[e] coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether." But looking at the text of Section 111(d) might here come in handy. For the statute imposes, as already shown, a set of constraints—particularly involving costs and energy needs—that would preclude so extreme a regulation. And if the majority thinks those constraints do not really constrain, then it has a much bigger problem. For "traditional" technological controls, of the kind the majority approves, can have equally dramatic effects. …The point is a simple one: If generation shifting can go big, so too can technological controls (assuming, once again, that the statute's text is ignored). The problem (if any exists) is not with the channel, but with the volume.

The majority's claim about the Clean Power Plan's novelty—the most fleshed-out part of today's opinion is also exaggerated. …

In any event, newness might be perfectly legitimate—even required—from Congress's point of view. … Congress makes broad delegations in part so that agencies can "adapt their rules and policies to the demands of changing circumstances." *Id.*, at 157. To keep faith with that congressional choice, courts must give agencies "ample latitude" to revisit, rethink, and revise

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their regulatory approaches. *Ibid.* So it is here. Section 111(d) was written, as I've shown, to give EPA plenty of leeway. The enacting Congress told EPA to pick the "best system of emission reduction" (taking into account various factors). In selecting those words, Congress understood—it had to—that the "best system" would change over time. … EPA followed those statutory directions to the letter when it issued the Clean Power Plan. It selected a system (as the regulated parties agree) that achieved greater emissions reductions at lower cost than any technological alternative could have, while maintaining a reliable electricity market. Even if that system was novel, it was in EPA's view better—actually, "best." So it was the system that accorded with the enacting Congress's choice.

And contra the majority, it is that Congress's choice which counts, not any later one's. The majority says it "cannot ignore" that Congress in recent years has "considered and rejected" cap-and-trade schemes. But under normal principles of statutory construction, the majority *should* ignore that fact (just as I should ignore that Congress failed to enact bills barring EPA from implementing the Clean Power Plan). As we have explained time and again, failed legislation "offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress" adopted. …

III

Some years ago, I remarked that "[w]e're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence.

….

In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest.

Today, the Court is not. Section 111, most naturally read, authorizes EPA to develop the Clean Power Plan—in other words, to decide that generation shifting is the "best system of emission reduction" for power plants churning out carbon dioxide. Evaluating systems of emission reduction is what EPA does. And nothing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean Air Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.

The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The

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Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

NOTES

1. Two questions about the WTC's authority to issue the rule Ben proposes. The EPA's Clean Power Plan at issue in *West Virginia v. EPA* was a "legislative rule" because, if it had taken effect, it would have been binding on the energy industry in much the same way as a statute. Likewise, the rule that our fictional friend Ben is contemplating in Lesson 3A, which would require disclosures relating to ingredients and perhaps even ban some ingredients with adverse health effects, would bind the wine industry.

An agency's promulgation of a legislative rule might raise two questions. First, there is the threshold question of whether the agency possesses any legislative rulemaking authority. As the introductory materials before the excerpt of *West Virginia v. EPA* suggest, this question is usually so straightforward to resolve under current law that it seldom presents a live issue. To confirm this point, make a very short argument that the WTC possesses such authority citing § 8 of the WTCA and a case.

Second, assuming an agency has authority to issue at least some legislative rules, one might face the problem of determining whether a particular rule falls within the scope of that authority. Here, in exceptional cases, the major questions doctrine of *West Virginia* may come into play as well as principles espoused in cases such as *National Petroleum* and *Chrysler*. Turning again to Lesson 3A, might any of the rulemaking possibilities that Ben is considering implicate the major questions doctrine? How should one tell? How about rulemaking possibilities that do not implicate the major questions doctrine? Would they fall within the potential scope of the agency's legislative rulemaking authority?

2. Why a major questions doctrine? Is it a good idea? The major questions doctrine demands a "clear congressional authorization" for agency claims of regulatory authority that are somehow "major" or perhaps "extraordinary." The Court has imposed "clear statement rules" in other contexts, as we will see later in the book. For instance, courts require a clear statement from Congress to overcome a presumption that agency actions are subject to judicial review—which isn't too surprising as one might expect courts to think rather highly of that practice. If clear statement rules actually affect interpretive outcomes, then they must mark departures from the ordinary, default approach to statutory interpretation. How does the Chief Justice justify this departure for the major questions doctrine? What does Justice Gorsuch add? Why does Justice Kagan think these justifications fail?

Does the major questions doctrine's clear statement rule misunderstand the nature and goals of delegations of statutory authority? Congress chooses to shift power to agencies (at least in significant part) because they have greater expertise and experience in certain subject matter areas and are more efficient than Congress in responding to problems that develop in those areas. As a result, Congress very often *chooses* to delegate broad, sometimes vaguely defined, power to agencies precisely *because* it wants those agencies to deal with major issues that Congress is neither expert in nor is able to deal with promptly and efficiently. Limiting agency power to only those issues Congress explicitly mentioned in the statute arguably defeats the purpose of delegation by requiring Congress to do one of two things it is not well suited for: predict problems (sometimes far) in advance and react quickly when they arise. By contrast, Justice Kagan's rejection of the major questions doctrine may raise concerns about granting agencies too much latitude to tackle

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controversial policy issues with little public accountability.

What about workability and predictability? The major questions doctrine introduces a threshold question—whether the issue is "major" enough to trigger the clear statement requirement—that is largely undefined by the courts and is entirely at their discretion. How will application of this doctrine likely evolve among the hundreds of lower court judges?

3. Evolution of the doctrine in recent precedents. In *West Virginia v. EPA*, Chief Justice Roberts relied heavily on five or so precedents as foundations for the major questions doctrine. Justice Kagan, by contrast, characterized these cases as engaging in "normal statutory interpretation," which requires that statutes "be read in context, and with a modicum of common sense." Under her approach, courts should look to whether an agency asserts authority that is outside its "traditional … expertise or experience" or is inconsistent with "Congress's broader design." A claim of delegated power should be rejected where it is "a misfit for both the agency and the statutory scheme."

It probably should not be surprising that one can find support for both the Chief Justice's and Justice Kagan's spins on these precedents. The basic storyline, however, is that concerns about an agency's claim to a major power that upends longstanding expectations based on broad, opaque, or obscure language are not new. A couple of decades ago, the Supreme Court gave expression to this attitude by regarding the "extraordinary" nature of an agency's claim to authority as a factor weighing against its validity. The major questions doctrine evolved from this practice, crystalizing no later than 2021 into the current doctrine that agency claims to statutory authority implicating major questions require clear congressional authorization. A tour of some the most relevant precedents follows.

In *FDA v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120 (2000), the Court addressed FDA's assertion of power to regulate tobacco products as "drugs," which the Food, Drug, and Cosmetic Act (FDCA) defines as including "articles (other than food) intended to affect the structure or any function of the body." The Court accepted that *Chevron* deference should apply to the FDA's conclusion that tobacco products fell within the scope of this definition and thus the agency's regulatory power. This meant that to reject the agency's position, the Court needed to conclude that Congress had clearly precluded FDA from regulating tobacco products. In other words, the Court had to conclude that FDA's statutory interpretation of "drugs" and related terms was unreasonable.

You might think that this should have been a gimme for the agency—how could it be unreasonable to regard nicotine-delivery devices, which have addicted and killed many millions of people, as "drugs"? The Supreme Court saw things differently and held, 5-4, that Congress had indeed clearly precluded FDA from regulating tobacco products as "drugs." The Court gave three reasons for this counter-intuitive result: First and foremost, the FDCA requires that products regulated by the FDA be "safe," and, as tobacco products cannot be safe, if FDA has authority to regulate them, it must ban them, which is manifestly inconsistent with congressional intent. Second, Congress had over decades created an alternative regulatory scheme for tobacco, focusing on labeling and marketing. Adoption of this scheme had the effect of ratifying FDA's long-held position, only recently abandoned, that it lacked regulatory jurisdiction over tobacco. Third, *Chevron* deference is premised on the idea that Congress implicitly intends for agencies, not courts, to resolve ambiguities in agency enabling acts. In "extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."

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The FDA's new position that it had authority to regulate tobacco products, a major American industry that had long been subsidized by Congress, presented such a case. The Court concluded that Congress would not have granted such massive, unexpected authority to overturn a deeply entrenched legal and policy status quo "in so cryptic a fashion." *Brown & Williamson* thus treated the "extraordinary" nature of FDA's assertion of power as a factor weighing against its validity, but not as a basis for a full-blown clear statement rule as in *West Virginia*.

In *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302 (2014), the Court, notwithstanding "textual plausibility," rejected interpreting "any air pollutant," as used by certain provisions of the Clean Air Act, as extending to greenhouse gases because this construction would massively expand agency "permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements." This expansion would be inconsistent with the Clean Air Act's "structure and design" and "place plainly excessive demands on limited governmental resources." The Court held that EPA's interpretation, although entitled to *Chevron* deference, should be rejected as unreasonable because, among other reasons,

> it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."

In *UARG*, we thus see: (a) the Court applying *Chevron* deference to an agency statutory construction even though it raised a major question; and (b) declaration of a clear statement rule indicating that it is unreasonable for agencies to claim major new powers of vast economic and political significance without clear congressional approval.

The Court's 2021 term brought a flurry of three major questions cases that culminated with *West Virginia*. The first of these cases was *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485, 2487 (2021) (per curiam), in which the Court opined that it "strains credulity" to believe that the Centers for Disease Control had statutory authority to issue a nationwide moratorium on evictions of tenants in counties with high levels of COVID-19 transmission. The CDC had relied on a statutory provision adopted in 1944, § 316(a) of the Public Health Service Act, which provides:

> "The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases … from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."

The government's theory was that the first sentence of this provision gave it power to impose a moratorium on evictions to curb spread that might occur as infected people moved from one place to another. The Court rejected this stance on the ground that the second sentence limited the government to taking measures that "directly relate to preventing the interstate spread of disease

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by identifying, isolating, and destroying the disease itself." More to the present point, the Court also cited *UARG* and *Brown & Williamson* for the proposition that it "expect[ed] Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" CDC's moratorium qualified as it covered at least 80% of the country, would have on the order of $50 billion worth of impact on landlords, intruded on a domain of landlord-tenant law traditionally left to the states, and offered no limiting principle on the scope of CDC's power to do whatever it thought "necessary." Notably, *Alabama Ass'n* represents a shift from the frameworks of *UARG* and *Brown & Williamson* insofar as it contains no mention of *Chevron* deference—the idea that the courts should defer to CDC's construction of its authority does not play a role. As in *West Virginia* later in the term, the Court decides for itself how best to interpret the statute and uses a clear statement rule as a basis for rejecting the government's position.

Rounding out our tour, we come to another pandemic case, *National Federation of Independent Business v. Department of Labor, OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam). In this case, the Court held that petitioners were likely to prevail on their claim that the Secretary of Labor, acting through OSHA, had exceeded their statutory authority by imposing a mandate covering "virtually all employers with at least 100 employees" that would require "that covered workers receive a COVID-19 vaccine" or else regularly test for the disease and wear a mask. OSHA had promulgated this mandate pursuant to statutory authority to adopt an emergency standard on showing that: (1) "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) the "emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). It is not difficult to read this broad language as authorizing a vaccine mandate to protect employees from the "new hazard" of COVID-19. The Court disagreed. As the mandate plainly implicated power of "vast economic and political significance," it required a clear authorization from Congress. The Court concluded that § 655(c)(1) did not provide this clear authorization primarily because COVID-19 is a hazard everywhere rather than an "occupational" hazard falling into OSHA's domain of authority and expertise. (The Court did not have an especially good answer to the dissent's objection that the same might be said of hazards OSHA regulates such as fire, faulty electrical installations, and inadequate emergency exits.) The Court also found it "telling" that OSHA had never before issued "a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace." This "lack of historical precedent" provided further evidence that the mandate "extends beyond the agency's legitimate reach." (It is tempting to point out that OSHA had never before encountered a pandemic killing hundreds of thousands of people, but there it is.)

> The Chief Justice looks at these cases and sees a "major questions doctrine" that requires clear authorization from Congress for exceptional claims of agency authority. Justice Kagan sees traditional statutory analysis. It seems to us that both justices, who are, after all, supremely gifted practitioners of legal analysis, offered reasonable, albeit contradictory, characterizations of these precedents. Which would you choose and why? Does either path lead to a more preferable role for agencies (or Congress)?

4. The Supreme Court's first MQD decision after *West Virginia*. Only one term after its decision in *West Virginia v. EPA*, the Court returned to the major questions doctrine (MQD) in another high-profile case, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). In 2022, President Biden instructed the Secretary of Education to create a student loan forgiveness program that would have cancelled approximately $430 billion in federal student debt. The program was created under the

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Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), which states that the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a . . . national emergency." The HEROES Act also directs that the Secretary, after exercising this power, must publish a notice in the Federal Register "'includ[ing] *the terms and conditions to be applied in lieu of* such statutory and regulatory provisions' as the Secretary has waived or modified." *Id.* at 2371 (quoting 20 U.S.C. § 1098bb(b)(2)) (emphasis added by Court).

The Court, in a 6-3 opinion by Chief Justice Roberts that divided along ideological lines, held that the loan forgiveness program was neither a modification nor a waiver of an existing student loan provision under the plain text of the HEROES Act. The majority held that the program could not qualify as a modification because "to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress." Nor could the program qualify as a waiver for two reasons. First, the Court observed that no specific provision of the statute imposed an obligation on borrowers to pay back their student loans. As such, the Secretary had not been able to identify any specific provision that he had "waived" to achieve the desired result of loan forgiveness. Second, the program could not be characterized as a "waiver" because it added "new and substantially different provisions" by identifying "particular sums to be forgiven and income-based eligibility requirements." *See id.* at 2369-71 (setting forth the Court's statutory analysis).

Although the Court did not need any help from the MQD to invalidate the loan forgiveness program, it seized its chance to reaffirm and strengthen this doctrine anyway. Citing *West Virginia*, the Court held that, because the economic and political significance of the loan forgiveness program (43 million borrowers and $430 billion dollars) was "staggering by any measure," such a decision must rest with Congress itself or an agency acting pursuant to a clear statutory delegation absent from the HEROES Act.

Most importantly for the future of the MQD, the Court rejected arguments that the MQD should not apply to the loan forgiveness program because it would provide benefits rather than impose regulatory requirements. Benefits programs do not, the government argued, have the same effect on individual rights and do not pose the same threat of executive overreach during a national emergency as regulatory programs, which coerce private entities to act in ways they might otherwise avoid. The majority rejected this argument on the grounds that it was not supported by precedent and that, because the power of the purse is one of Congress's most important powers, "[i]t would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations." *Id.* at 2375. The Court concluded that, pursuant to its holding in *West Virginia*, "'[t]he basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.'" *Id.*

In dissent, Justice Kagan argued that the majority incorrectly applied the statutory text by "pick[ing] the statute apart piece by piece in an attempt to escape the meaning of the whole. But the whole—the expansive delegation—is so apparent that the majority ha[d] no choice but to justify its holding on extra-statutory grounds." She characterized the MQD as a "made up" doctrine that improperly seizes political power. She also assailed the majority for expanding the reach of the MQD by applying it to a "core provision of a recently enacted statute" that squarely implicated agency experience and expertise. *See id.* at 2398-99. By rejecting the government's regulation-

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benefits distinction and Justice Kagan's limitation based on agency expertise, the Court in *Biden v Nebraska* confirmed both the breadth and durability of the MQD.

The majority and dissent both closed their opinions with discussions of judicial overreach. Justice Kagan accused the majority of "depart[ing] from the demands of judicial restraint. At the behest of a party that has suffered no injury, the majority decides a contested public policy issue properly belonging to the politically accountable branches and the people they represent." Chief Justice Roberts responded that "[i]t has become a disturbing feature of some recent opinions to criticize . . . decisions . . . as going beyond the proper role of the judiciary. . . . We do not mistake this plainly heartfelt disagreement for disparagement. . . . Any such misperception would be harmful to this institution and our country." Is this exchange evidence that the justices are sensitive to the fact that the MQD and other controversial recent decisions may be harming the Court's reputation? As more controversial administrative law decisions come before the Court, it will be interesting to see what role, if any, this issue of judicial overreach and the public perception thereof will play.

5. Another clear statement rule limiting interpretations of agency power? *Sackett v. EPA* is a vitally important environmental law case. It resolved a decades-long dispute over the scope of regulatable "waters of the United States" under the Clean Water Act (CWA). In terms of its relevance to more general administrative law principles, *Sackett* is noteworthy for its treatment of the EPA's interpretation of the CWA. Not surprisingly, the EPA asked the Court to defer to its existing definition of "waters of the United States." The Court declined. After rejecting the agency's textual and structural analyses of the CWA, the majority announced that "this Court 'require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.'" (quoting *United States Forest Serv.* v. *Cowpasture River Preservation Assn.*, 140 S. Ct. 1837, 1849-50 (2022)). Noting that water and land regulation "lies at the core of state authority," the Court cited the vastness of the area covered by wetlands at issue in *Sackett* and the problems raised by applying a vague standard to impose criminal penalties under the CWA as reasons not to defer to the agency's judgment in the absence of clear authorization by Congress, which it also found lacking. It is unclear if the Court's argument against deference stakes out new ground or is limited to the idiosyncrasies of the CWA. The majority did not cite any traditional deference decisions such as *Chevron* or *Skidmore* in its analysis, nor did it expressly refer to the major questions doctrine, but its use of a clear statement rule and reference to the magnitude of agency authority are clearly evocative of the MQD.

Justice Kagan read the Court's deference explanation the same way. In her concurrence, she described the majority's deference analysis as "putting a thumb on the scale for property owners" that is not justified by the CWA's text, and she revisited her objection to the MQD from last term by arguing that the "court may not rewrite Congress's plain instructions because they go further than preferred. . . . Today's pop-up clear-statement rule is explicable only as a reflexive response to Congress's enactment of an ambitious scheme of environmental regulation." *Id.* at 1361.

6. May agencies create retroactive legislative rules? Under the APA, a "rule" is "an agency statement of general or particular applicability and future effect." 5 U.S.C. § 551(4). Most rules are specifically intended to govern future behavior. Sometimes, however, an agency may issue a rule that can be said to change the effects of past behavior. The Department of Health and Human Services tried to do just that after a court struck down on procedural grounds a 1981 rule setting rates for hospital reimbursements under Medicare. The court's ruling resulted in higher

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reimbursement rates than would have been true under the 1981 rule. In 1984, HHS reissued the 1981 rule using the proper procedures and then sought to adjust all payments made after the 1981 rule had been struck down. In *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Court rejected what it considered to be a retroactive rule:

> It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. In determining the validity of the Secretary's retroactive cost limit rule, the threshold question is whether the Medicare Act authorizes retroactive rulemaking.
>
> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant. …
>
> The statutory provisions establishing the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking. Any light that might be shed on this matter by suggestions of legislative intent also indicates that no such authority was contemplated.

In his concurring opinion, Justice Scalia took a slightly different approach, arguing that the APA definition of "rule," quoted above, does not permit any retroactive rules. Rules, he said, are agency statements of "future effect," having legal consequences only for the future. They contrast with adjudications, which decide the legal consequences of past acts. On this reading, no rule issued under the APA could be retroactive. He has yet to convince a majority of his position.

Despite *Bowen*'s reference to the absence of "express authorization of retroactive rulemaking," courts will recognize the authority to issue retroactive rules based upon indications in the statutory scheme or other indicators of congressional intent, despite the absence of express language authorizing retroactivity. For example, the D.C. Circuit in *Coalition for Common Sense in Government Procurement v. U.S.*, 707 F.3d 311 (D.C. Cir. 2013), upheld a rule retroactively imposing price caps on pharmaceuticals sold to military healthcare beneficiaries and requiring refunds for payments made above the price caps after the date of the statute authorizing the rule. In 2007, Congress had enacted the provision requiring price caps as of January 28, 2008, and had required the Secretary of Defense to "prescribe regulations to carry out this section." Although the Secretary did not issue the final rule until March 17, 2009, the court upheld the retroactive rule on the ground that the statute itself had imposed the price caps as of January 28, 2008. Generally, where a court considers retroactivity necessary to achieve the goals of the statutory scheme, it is likely to find that Congress intended retroactivity.

7. When is a rule retroactive? *Bowen v. Georgetown University Hospital* provided a relatively clear test for determining whether an agency may issue a retroactive rule. The next question is when a rule should be considered retroactive. In his Bowen concurrence, Justice Scalia distinguished between "primary retroactivity," which is forbidden, and "secondary retroactivity," which is not. The former alters the "*past* legal consequences of past actions." Thus, the rule in *Bowen* had primary retroactive effect because it changed payments for the physicians' past actions.

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By contrast, an IRS rule "prescrib[ing] … that for the purposes of assessing future income tax liability, income from certain trusts that has previously been considered non-taxable will be taxable" in the *future* would have secondary retroactive effects. Such effects may substantially reduce the current value of a past investment — just as in Justice Scalia's trust example. This type of secondary retroactivity is nonetheless generally permissible so long as it is not the result of arbitrary action.

It is important to recognize that a rule is not retroactive if it imposes requirements or conditions previously adopted through adjudication or if it merely clarifies an existing statute or regulation. For example, in *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914 (D.C. Cir. 2013), the D.C. Circuit upheld a 2004 rule governing behaviors prior to that date where the agency had adopted the same principle in an adjudicatory decision issued in 2000. Since the adjudicatory decision had effectively created the governing principle, the rule was not retroactive. Indeed, it is quite useful for an agency periodically to incorporate prior adjudicatory decisions into legislative rules, which are much more accessible to the general public.

Clay v. Johnson, 264 F.3d 744, 749 (7th Cir. 2001), illustrates the principle that a clarification of the existing law does not constitute a retroactive rule, even where the challenger thought it represented a change in the agency's position:

> However, a "rule simply clarifying an unsettled or confusing area of the law … does not change the law, but restates what the law according to the agency is and has always been." A clarifying rule, therefore, can be applied to the case at hand just as a judicial determination construing a statute can be applied to the case at hand.

Of course, the agency's new rule must truly be a clarification of an ambiguous provision, not a change of policy or position.

In light of these materials, suppose that the WTC adopted a version of the rule contemplated in Lesson 3A that bars the sale of wine by any regulated entity in a container intended for ultimate retail purchase (e.g., a wine bottle) unless that container carries a clear label identifying all ingredients. At the time of the rule's adoption, growers, distributors, and retailers all possess bottles with old, inadequate labels. Could the WTC's new rule apply to these bottles with their old labels, which were legal at the time they were applied, without running afoul of retroactivity concerns?

At p. 267, substitute for Note 6 and add Note 6.a. in Part 3F:

6. The coming and going of Executive Order 13771—two-for-one and regulatory budgeting. For nearly three decades, Exec. Order 12,866 provided the basic structure for White House review of agency rulemaking. President Trump introduced major innovations when, on January 30, 2017, he issued Exec. Order 13771, "Reducing Regulation and Controlling Regulatory Costs." Simplifying, this order imposed two core requirements. First, the order imposed a type of "regulatory budget" on agencies to cap the "incremental costs" for compliance that an agency's regulations can impose on regulated parties. For fiscal year 2017, agency regulatory budgets were set at zero, precluding agencies from increasing aggregate compliance costs at all. Second, the Trump executive order required agencies to offset "any new incremental costs associated with new regulations . . . by the elimination of existing costs associated with at least two prior regulations."

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Exec. Order 13,771 presumably contributed to the slow rate of adoption of regulations during the Trump administration. It is difficult to say how strong of an effect the order actually had, however, given the Trump administration's general hostility to regulation. To no one's surprise, President Biden rescinded this order, as well as several other Trump executive orders relating to regulatory affairs, on his first day in office. Exec. Order 13992, "Revocation of Certain Executive Orders Concerning Federal Regulation."

6a. Biden administration reforms get rolling. The Biden administration has initiated reforms that, although they adhere to the basic structure of Exec. Order 12,866, seek to modernize the regulatory review process, make it more accessible to historically underrepresented groups, and enhance its transparency.

On April 6, 2023, President Biden issued Exec. Order 14,094, Modernizing Regulatory Review, which both amended Exec. Order 12,866 and added additional requirements of its own. Section 1(b) of the new order amends the definition of "significant regulatory action[s]" subject to full-blown cost-benefit analysis. Updating for inflation, it sets the monetary standard for triggering significance at a $200 million effect on the economy, doubling the $100 million figure of Exec. Order 12,866, § 3(f)(1). Another more subtle but important change is that, whereas Exec. Order 12,866 broadly defined "significant regulatory action" as including regulatory actions likely to result in rules raising "novel legal or policy issues," the new executive order's parallel language provides that regulatory actions should be regarded as significant on a similar basis only "as specifically authorized in a timely manner by the Administrator of OIRA in each case." Exec. Order 14,094, § 1(b) (amending Exec. Order 12,866, § 3(f)(4)). This limitation ensures high-level accountability for invocation of this category of "significance" to trigger maximal OIRA involvement in rulemaking.

A primary goal of Exec. Order 14,094 is to expand access to the rulemaking and regulatory review processes for underrepresented communities. This shift comes in response to longstanding criticism that both processes tend to favor participation and influence by sophisticated, monied, special interests that are repeat players. Section 2(c) provides:

> To inform the development of regulatory agendas and plans, agencies shall endeavor, as practicable and appropriate, to proactively engage interested or affected parties, including members of underserved communities; consumers; workers and labor organizations; program beneficiaries; businesses and regulated entities; those with expertise in relevant disciplines; and other parties that may be interested or affected. These efforts shall incorporate, to the extent consistent with applicable law, best practices for information accessibility and engagement with interested or affected parties, including, as practicable and appropriate, community-based outreach; outreach to organizations that work with interested or affected parties; use of agency field offices; use of alternative platforms and media for engaging the public; and expansion of public capacity for engaging in the rulemaking process.

Exec. Order 14,094 also confirms that the process of regulatory analysis should not focus solely on efficiency effects of regulation (*i.e.*, the size of the pie) but should instead, "as practicable and appropriate, … recognize distributive impacts and equity, to the extent permitted by law." § 3(a).

For regulatory analysis, like many other things, the devil, of course, lies in the details, which, since 2003, have been governed by a document issued by the Office of Management and Budget,

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Circular A-4 (Regulatory Analysis). Exec. Order 14,094 orders the Director of OMB to issue revisions to Circular A-4 by April 6, 2024. In furtherance of this directive, OIRA issued proposed revisions of Circular A-4 on April 6, 2023, and these have been subject to a notice-and-comment process. The proposed revisions are 91 pages long and highly technical. One major change that leaps out involves the discount rate for assigning present values to future costs and benefits. The current version of Circular A-4 advises agencies to use discount rates of 3% or 7%. The proposed revision advises a much lower baseline rate of 1.7% for the first 30 years of effects, and it contemplates that lower rates may be appropriate for longer periods. The rate of 1.7% is the pre-tax rate of return over the last 30 years on long-term U.S. government debt (*i.e.*, riskless personal savings). Proposed Revision to Circular A-4, April 6, 2023, at 75-76.

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Chapter 4 The Process for Individual Decisions: Adjudication

At p. 273, replace Background of *Dominion Energy Brayton Point*:

BACKGROUND OF *DOMINION ENERGY BRAYTON POINT* AND A *CHEVRON* SIDEBAR

In Chapter 3, we learned the that the APA, at § 553(c), provides that an agency must use formal, trial-like procedures to promulgate a rule where the agency's enabling requires that rules be made "on the record after opportunity for an agency hearing." We also saw that the Supreme Court, in large part because formal rulemaking is almost universally regarded as a bad idea, requires quite clear language to pull this trigger—e.g., the mere fact that an agency's enabling act requires rules to be made "after hearing" does not suffice. *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973).

Here in Chapter 4, we begin by examining the parallel problem of determining when agencies must use formal, trial-like procedures for adjudication under the APA. Section 554(a) provides that formal procedures must be used where an agency's enabling act—brace for it—provides that adjudication is to be determined "on the record after opportunity for an agency hearing." One might think that, given that § 553(c) and § 554(a) use exactly the same trigger language in neighboring provisions of the same law, that courts would interpret them the same way. They do not do so, largely because, to be realistic about it, using trial-like techniques makes much more sense for adjudications than rules.

As you will see in the materials below, courts have in fact adopted several different approaches to the trigger problem for formal adjudication, and the Supreme Court, funnily enough, has not yet chosen among them. The excerpt that follows is from *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006). This case examined whether the EPA was required to use formal adjudication when deciding whether to grant a National Pollution Discharge Elimination System (NPDES) permit under § 402 of the Clean Water Act (and a thermal variance under § 316(a)) that would allow Dominion Energy, which used river water to cool its nuclear reactor, to discharge heated water into a bay. The CWA requires the EPA to offer an "opportunity for public hearing" before taking these steps, raising the question: Is this statutory phrase enough to pull the APA trigger for formal adjudication?

The First Circuit, following what is probably the dominant approach at this point, applied *Chevron* deference to the problem. You first briefly encountered *Chevron* back at the beginning of Chapter 3 when we examined the "major questions doctrine." *Dominion Energy* is the first case, however, we have encountered that relies on the doctrine, so a bit of (simplified) explanation is in order. In 1984, the Supreme Court held that, when reviewing an agency's interpretation of a statute that it administers, a court should ask and answer two questions. Step one: The court, using "traditional tools of statutory interpretation," should determine whether Congress has clearly spoken to the precise issue raised by the agency's statutory interpretation. If Congress has clearly spoken, then the court's job, of course, is to follow Congress's wishes. Step two: If Congress has not clearly spoken to the precise issue, then the court should affirm the agency's statutory

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construction so long as it is "reasonable" or "permissible." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In short, *Chevron* deference cedes to agencies power to resolve ambiguities in their enabling acts. The Court justified this move with the observations that agencies are more politically accountable than courts and should enjoy greater relevant expertise.

We will examine *Chevron* much more closely in Chapter 5 on judicial review. For now, however, here are a few observations and warning flags. *Chevron* was eagerly embraced by the Reagan administration and then newly installed Justice Scalia as a means to enhance executive control of the administrative state, and it quickly became deeply embedded in case law. It has been cited more than any other modern case. It is also regarded by many observers as shifting the law in an extremely important way—e.g., it has been called the "Counter-*Marbury*" of the administrative state due to its ostensible shift of interpretive power to agencies from courts. It has been catnip for law professors, launching innumerable law review articles debating its parameters and legitimacy. Over time, *Chevron* deference has grown increasingly complex, in part because the Supreme Court has devised various threshold conditions that an agency statutory interpretation must satisfy to qualify.

This entire edifice now seems to be cracking at its base. Over the last decade or so, a vocal critique has developed among conservatives that *Chevron* represents an illegitimate and unconstitutional transfer of power from courts to the executive branch. On the Court, Justices Thomas and Gorsuch are especially strong proponents of this view. The accession of Justices Gorsuch, Kavanaugh, and Barrett led to considerable speculation that the Court might, as some of its members would plainly like to do, eliminate or at least sharply cut back on *Chevron* deference. The Supreme Court's 2021 Term presented at least two cases that offered suitable occasions for doing so in *Becerra v. Empire Health Foundation*, 142 S. Ct. 2354 (2022), and *American Hospital Assoc. v. Becerra*, 142 S. Ct. 1896 (2022). Administrative law geeks (and we use that term affectionately, of course) waited with bated breath to see what the Court would do.

And the Court … punted. Both *Empire Health* and *American Hospital* avoided any express discussion of the *Chevron* doctrine by styling the statutes at question as clear, and, if a statute is clear, there is no need to apply or discuss deference. (It may bear remarking that, in *Empire Health*, five justices held that the statutory provision at issue clearly meant one thing, and four dissenting justices said it clearly meant another.) Plainly, in a term marked by the overturning of *Roe v. Wade* among other notable shifts in constitutional and administrative law, the justices must have figured they had enough on their plates without ripping out a foundational case of modern administrative law.

So, *Chevron* deference has been a hugely important aspect of administrative law for decades, but it is no longer certain whether it will be around in a few years—although we would hazard that it is more likely that the Court will cut back on *Chevron* deference rather than jettison it entirely.

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Chapter 5 Judicial Review of Agency Action

At p. 474, insert as Note 8a in Part 5A:

8a. Can the agency head supplement the record on review? The Supreme Court had another occasion to consider the administrative record in a high-profile case involving the Obama Administration's Deferred Action for Childhood Arrivals (DACA) program. DACA was initiated in 2012 via a memorandum issued by the Secretary of Homeland Security, the official responsible for enforcing immigration laws. In general, DACA did two things. It offered undocumented individuals who came to the United States as children and met certain conditions during their stay temporary relief from deportation. It also, by triggering conditions in other, preexisting regulations, rendered some DACA recipients eligible for federal social security and health care benefits.

In 2017, the Acting Secretary of Homeland Security in the Trump Administration, Elaine C. Duke, issued a memorandum rescinding DACA on the grounds that the program was illegal ("Duke Memo"). The memo relied on an opinion from the Attorney General stating that DACA was illegal as adopted because making federal benefits available to a class of people—individuals who qualify to participate in DACA—was not within the president's statutory authority.

The Duke Memo was challenged in three different cases on arbitrary and capricious grounds. (For a more detailed discussion of the arbitrary and capricious challenges to the program, see note 8a in Part 5G.2.) The lower courts all ruled in favor of the challengers, but one court stayed its judgment for 90 days to allow the current DHS Secretary, Kirstjen Nielsen, to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority" (the "Nielsen Memo"). The Nielsen Memo agreed with the Duke Memo that DACA "was contrary to law." It also offered three new policy reasons for rescinding DACA that were not in the Duke Memo. The lower court concluded that the Nielsen Memo's additional explanation was not enough to cure the Duke Memo's arbitrariness.

At the Supreme Court, the government argued that the Nielsen Memo's rationale is sufficient to overcome an arbitrary and capricious challenge, citing the policy reasons in the Nielsen Memo that were absent from the Duke Memo. Chief Justice Roberts, writing for the Court, held that the Nielsen Memo, insofar as it offered explanations that were not included in the Duke Memo, was not part of the relevant administrative record in this case:

> Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission [the Duke Memo] rather than take new administrative action, she was limited to the agency's original reasons, and her explanation "must be viewed critically" to ensure that the rescission is not upheld on the basis of impermissible "*post hoc* rationalization." But despite purporting to explain the Duke Memorandum, Secretary Nielsen's reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. By contrast, Secretary Nielsen's new memorandum offered three "separate and independently sufficient reasons" for the rescission, only the first of which is the conclusion that DACA is illegal. . . .

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> The policy reasons that Secretary Nielsen cites as a [] basis for the rescission are also nowhere to be found in the Duke Memorandum. That document makes no mention of a preference for legislative fixes, the superiority of case-by-case decisionmaking, the importance of sending a message of robust enforcement, or any other policy consideration. Nor are these points included in the legal analysis from the . . . Attorney General. They can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us.

Because the Nielsen Memo claimed to be an elaboration on the Duke Memo, rather than a new agency action, the Nielsen Memo's arguments that were not also part of the Duke Memo were post hoc rationalizations, and thus could not be considered in the Court's arbitrary and capricious analysis.

Justice Kavanaugh, writing in dissent, argued that the Chief Justice misapplied the Court's administrative record precedents. First, Justice Kavanaugh argued that the exclusive record requirement only applied to review of agency adjudications, not rulemakings as in the case at hand. (The Court accepted that the Duke and Nielsen Memos were interpretive rules, not adjudications). The Chief Justice effectively dismissed this argument out of hand, noting that Justice Kavanaugh "cites no authority" for his proposition and that "[t]he Government does not even raise this unheralded argument." Second, Justice Kavanaugh argued that prior cases only excluded post hoc rationalizations made by lawyers defending agency action on review, not explanations (like the Nielsen Memo) provided by the agency head herself. The Chief Justice rejected this argument by explaining that:

> While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves.

In sum, the majority decision in the DACA cases affirmed the exclusive record requirement in judicial review of agency action by explaining that courts must reject arguments raised for the first time by the agency on review, regardless of who made the argument on behalf of the agency and whether the agency action under review is a rulemaking or an adjudication.

At p. 502, substitute for Note 3 in Part 5C:

3. Exclusivity of special statutory review proceedings and *Thunder Basin* factors. As we have seen, agency enabling acts often contain provisions creating special statutory review schemes for judicial review of various agency actions. The existence of such a special statutory review scheme can raise a limited type of preclusion issue—*i.e.*, if Congress has spelled out a specific template for judicial review in an agency's enabling act, does this template implicitly preclude use of alternative paths to judicial review?

In its 2022 term, the Court took up this question in *Axon Enterprises, Inc. v. FTC*, 143 S. Ct. 890 (2023) (consolidated with *Securities and Exchange Commission v. Cochran*). In both cases,

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the plaintiffs were respondents in agency enforcement actions subject to initial adjudication by an administrative law judge (ALJ). Both plaintiffs raised structural constitutional challenges to statutory provisions shielding ALJs from removal. Both the Federal Trade Commission Act and the Securities Exchange Act channel review of agency adjudications to the courts of appeals. To follow this path to review, the plaintiffs would have raised their constitutional issue before the ALJ, appealed an adverse decision to the agency itself, and then petitioned for review of an adverse decision by the agency to the court of appeals. Rather than trudge through this process, the plaintiffs, invoking federal question jurisdiction under 28 U.S.C. § 1331, pursued a form of nonstatutory review, suing in district court to enjoin the administrative proceedings as unconstitutional. (For a brief discussion of nonstautory review, see note 2 at p. 468.) The Court held that this shorter path was permissible because the special statutory review schemes did not implicitly preclude federal question jurisdiction in district court over the type of claims at issue.

The Court explained that, ordinarily, where Congress creates a special statutory review scheme that channels review of agency action to the courts of appeals, this scheme divests the district courts of their jurisdiction for "covered cases." This principle leaves the problem of determining whether a particular claim falls within the coverage of a special statutory review scheme. To make this determination, the Court relies on three factors articulated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994): First, could precluding district court jurisdiction "foreclose all meaningful judicial review" of the claim? Second, is the claim "wholly collateral" to the statute's review provisions? And third, is the claim "outside the agency's expertise"? *Id*. at 212-13.

In *Axon*, the Court answered all three questions in the affirmative. Applying the first *Thunder Basin* factor, the Court held that precluding district court review could foreclose all meaningful judicial review because the plaintiffs alleged a "'here and now' injury of subjection to an unconstitutionally structured decisionmaking process" that "is impossible to remedy once the proceeding is over." *Axon*, 143 S. Ct. at 903-04. Under the second factor, the Court held that the constitutional challenges were "collateral" to the FTC and SEC statutory review provisions because the questions about constitutional structure "have nothing to do with the enforcement-related matters the Commissions 'regularly adjudicate[].'" *Id.* at 904-05. Finally, the Court held that the claims raised by Axon and Cochran in district court were outside of the agencies' expertise because they raise "'standard questions of administrative' and constitutional law, detached from 'considerations of agency policy.'" *Id.* at 905. Taking all these things together, the Court concluded that the plaintiffs' constitutional claims were not "of the type Congress intended to be reviewed" within the judicial review provisions of the FTC and Exchange Acts, which left the district courts free to exercise jurisdiction over these claims under their general federal question jurisdiction. *Cf. Elgin v. Dept. of Treasury,* 567 U.S. 1 (2012) (applying *Thunder Basin* factors; holding that Civil Service Reform Act, which creates an "elaborate" framework of "painstaking detail" for review by Merit Systems Protection Board and Federal Circuit of adverse employment actions, precluded jurisdiction in federal district court over constitutional claims).

At p. 523, insert Note 2a in Part 5D.1:

2a. Should we call it an "injury-in-law," instead? It is clear enough that not all "injuries" that we might reasonably say exist as a matter of "fact" are sufficient for constitutional standing. Justice Kavanaugh made this point expressly in *United States v. Texas*, 143 S. Ct. 1964 (2023), in which

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states challenged guidelines promulgated by the Secretary of Homeland Security setting priorities for the arrest and removal of noncitizens in immigration proceedings. The states based their claim to standing on financial costs they claimed they would incur due to the federal government's failure to make mandatory arrests (*e.g.*, increased prison costs). Justice Kavanaugh, writing for five, conceded that monetary costs "of course" constitute injuries, and he did not reject the district court's finding that the states would incur costs due to the challenged policy. To net constitutional standing, however, an injury must be "legally and judicially cognizable." *Id.* at 1970. "[H]istory and tradition" are good places to look for guidance on which types of injuries satisfy this requirement. *Id.* This guidance proved fatal to the states' claim to standing. Justice Kavanaugh observed that the states had not "cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions." *Id.* Moreover, the "leading precedent" in this context, *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973), made clear that, in "American jurisprudence at least, a party lacks a judicially cognizable interest in the prosecution ... of another." *Texas*, 143 S. Ct. at 1970.

So, only those injuries-in-fact that pass a test of judicial cognizability suffice for constitutional standing. Might the phrase injury-in-law be a better descriptor?

At p. 525, substitute for Note 5 in Part 5D.1:

5. Important but not very concrete guidance about what it means to be concrete. Case law provides some fixed points for determining the "concreteness" of injuries. The justices have long agreed that a busybody-interest in enforcing the law because it is, after all, the law is too "abstract" to count. *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). As we saw two notes ago, case law also insists that mere ideological injury does not suffice. *Sierra Club v. Morton*, 405 U.S. 727 (1972). On the other hand, an injury need not be physical or economic to qualify as concrete. For instance, damage to aesthetic or recreational interests can be concrete enough for standing. *Summers v. Earth Island Institute*, 555 U.S. 488 (2009).

Bearing these fixed points in mind, suppose that a credit reporting agency were to send you a letter informing you that it had concluded you may be a terrorist or a drug trafficker. Would that cause you any concrete harm? How about if you receive such a letter but the information it contains has not been disclosed to any third parties—yet? These issues came up in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), in which the Supreme Court revisited the problem of standing to enforce a statutory cause of action provided by the Fair Credit Reporting Act (FCRA).

In 2002, TransUnion LLC began offering a service, OFAC Name Screen Alert, which compared consumers' names against a list of terrorists and other criminals maintained by the Office of Foreign Assets Control (OFAC). TransUnion provided an alert if a consumer's first and last names matched those of a person on the OFAC list. Sergio Ramirez and his wife attempted to purchase a car at a Nissan dealership, but a salesperson told him that he could not do so because he was on a "terrorist list." After this unpleasant surprise, Ramirez requested that TransUnion send him a copy of his credit file. An initial mailing did not include information relating to his suspected status as a terrorist, but it did include a required summary of his rights prepared by the Consumer Financial Protection Bureau (CFPB). A second mailing arrived the next day that informed Ramirez

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that his name matched one on the OFAC list. A CFPB summary of his rights did not come with this second mailing.

Ramirez invoked an express cause of action granted by FCRA to bring three claims against TransUnion. One claim alleged that TransUnion had violated its obligation to "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b). A second alleged that TransUnion had violated its obligation to provide a consumer "[a]ll information in the consumer's file" at the time of the consumer's request. *Id.* at § 1681g(a)(1). A third alleged that TransUnion had violated its obligation to provide a consumer a summary of rights developed by the CFPB "with each written disclosure by the agency to the consumer." *Id.* at § 1681g(c)(2). The district court certified a class of 8,185 members who had received an OFAC notification letter. The parties stipulated that TransUnion had sent misleading OFAC alerts to third parties about 1,853 of the class members (including Ramirez). A jury awarded statutory damages of $984.22 and punitive damages of $6,353.08 to each class member.

The Supreme Court granted certiorari to assess whether the class members had Article III standing for their three claims. Writing for a five-justice majority, Justice Kavanaugh explained that courts assessing concreteness should look to "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." 141 S. Ct. at 2204 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). Tangible harms, such as physical and monetary ones, easily qualify. Intangible harms, such as "reputational harms, disclosure of private information, and intrusion upon seclusion" can qualify as concrete if they satisfy the close relationship/tradition inquiry. *Id.*

Applying these principles, Justice Kavanaugh accepted that the 1,853 class members who had been identified to third parties as OFAC matches had suffered concrete harm sufficient for Article III standing because this harm bore a "close relationship" with "the reputational harm associated with the tort of defamation." *Id.* at 2208. The other 6,332 class members, however, did not suffer a concrete injury given that, for them, the analogy to reputational torts broke down as these torts require publication for liability.

The class members whose information had not been disclosed to third parties contended they had nonetheless suffered concrete harm given the risk that TransUnion might have disclosed this information at any time. Justice Kavanaugh conceded that a risk of harm can suffice for standing to seek "forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *Id.* But he added that "mere risk of future harm, standing alone," cannot support standing to seek retrospective relief in the form of damages "unless the exposure to the risk of future harm itself causes a separate concrete harm." *Id.* at 2210-11. (For general discussion of risk-of-harm as injury-in-fact, see notes 7 and 8, *infra*).

Justice Kavanaugh quickly disposed of standing for the plaintiffs' other claims, maintaining that they had not "demonstrate[d] that they suffered any harm at all from the formatting violations," much less one with a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 2213.

Justice Thomas, who has made himself the leading critic of the Court's standing jurisprudence in recent years, wrote the lead dissent, and he was joined, with a notable caveat, by the three remaining liberals on the Court. He insisted that the Court's premise that Article III standing always requires an "injury-in-fact" is, notwithstanding numbing repetition over the last several decades, flat-out wrong. Instead, the "[k]ey to the scope of the judicial power … is whether an

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individual asserts his or her own rights . . . or a duty owed broadly to the community." *Id.* at 2217 (citations to Justice Thomas's earlier concurrences omitted). A plaintiff must show an injury-in-fact in the latter case but not the former. As the plaintiffs' claims obviously implicated their individual rights under the FCRA, the plaintiffs could sue to enforce them.

Justice Kagan, joined by Justices Breyer and Sotomayor, agreed with Justice Thomas's evisceration of the majority's application of standing principles but disagreed with his contention that a concrete injury is not necessary for standing to enforce an individual right. *Id.* at 2226 (Kagan, J., dissenting). This difference should generally be immaterial however, because concreteness only requires "real harm," and Congress is in a much better position than the courts to determine where such "real harm" exists. *Id.* As such, proper judicial deference to Congress's judgments means that "[o]verriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue." *Id.*

So, we have eight justices who agree that a plaintiff must, in theory, demonstrate a concrete injury-in-fact to invoke an express cause of action created by Congress to sue for violation of an individual right. Three of these justices, however, take the view that, if Congress says there is an injury good enough for standing, then there is almost always an injury good enough for standing. And Justice Thomas, who seems inclined to take a sledgehammer to much of modern standing doctrine, thinks that a plaintiff need not demonstrate an injury-in-fact (concrete or not) to enforce an individual right.

At p. 530, insert paragraph at end of note 9 in Part 5D.1:

The Supreme Court's decision in *United States v. Texas*, 143 S. Ct. 1964 (2023), provides evidence that "special solicitude" for states may be dying on the vine. In *Texas*, states had claimed standing based on their assertion that federal guidelines establishing priorities for arrest and removal of criminal noncitizens would cost the states money in the form of increased incarceration and social services costs. The problem with accepting this sort of claim is that every significant federal policy has some downstream, indirect effects on state budgets. Therefore, approving the states' claim to standing in *Texas* would have been tantamount to conceding that states have constitutional standing to challenge all federal policies.

Justice Kavanaugh pushed back against this result, observing, "in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending. And when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated." *Id.* at 1972 n.3. Justice Kavanaugh's majority opinion did not attempt to square this principle with "special solicitude" for states. Picking up on this gap in a concurrence joined by Justices Thomas and Barrett, Justice Gorsuch contended that the idea that states enjoy special solicitude for standing had no basis in the Court's pre-*Massachusetts* jurisprudence and had "not played a meaningful role in [its] decisions in the years since." He added that "[e]ven so, it's hard not to wonder why the Court says nothing about 'special solicitude' in this case. And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones." 143 S. Ct. at 1977 (Gorsuch, J., concurring).

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At p. 599, insert new note between notes 2 and 3 in Part 5F.2:

2a. Statutory exhaustion is "jurisdictional" only if Congress has clearly said so. In *Santos-Zacarias v. Garland*, 143 S. Ct. 1103, 1112 (2023), the petitioner sought judicial review of her claim that the Board of Immigration Appeals had engaged in improper factfinding in the course of upholding an Immigration Judge's order denying her protection from removal. The Fifth Circuit dismissed the petition based on a statutory exhaustion provision, which the government had not raised, instructing that "[a] court may review a final order of removal only if … the [noncitizen] has exhausted all administrative remedies available to the [noncitizen] as of right." 8 U.S.C. § 1252(d)(1). The court had raised this statutory requirement *sua sponte* on the ground that it was jurisdictional.

The Supreme Court reversed, holding that § 1252(d)(1) imposes a claim-processing rule rather than a jurisdictional rule. This distinction can be critical as claim-processing rules, even if mandatory, are still subject to waiver, forfeiture, and equitable exceptions. Jurisdictional rules, which set limits on judicial authority, are not subject to these exceptions, can be raised at any time in litigation, and should be enforced *sua sponte*. *Id.* at 1112. The Court explained that, because the consequences of the designation can be so severe, it will characterize a statutory requirement as "jurisdictional" only where Congress has provided a clear statement of this intent. *Id.*

Two aspects of § 1252(d)(1) led the Court to conclude that this provision belonged on the claim-processing side of this line. First, generically, exhaustion requirements are "quintessential claim-processing rule[s]," which suggests that § 1252(d)(1) is one, too. Sound policy supports this expectation as treating exhaustion as jurisdictional could create waste by forcing parties to participate in preliminary proceedings that no one wants or allowing a late objection to "derail" months of proceedings. *Id.* at 1113. Second, in related immigration provisions, Congress has used "unambiguous jurisdictional terms" that could not be plainer, such as "no court shall have jurisdiction." *Id.* Congress's decision not to use such language, combined with the unsuitability of categorizing exhaustion requirements as jurisdictional, compelled the conclusion that § 1252(d)(1) was not jurisdictional.

At p. 600, substitute for the last paragraph of Note 3 in Part 5F.2:

In *Carr v. Saul*, 141 S. Ct. 1352 (2021), the SSA tried to distinguish *Sims* in a case in which claimants first raised their challenge to the constitutionality of an SSA ALJ's appointment in judicial proceedings. The SSA argued that issue exhaustion should apply to this challenge because the proceedings before the ALJ in *Carr* were more adversarial than those before the Appeals Council in *Sims*. After noting that ALJ proceedings include many inquisitorial features, the Court conceded that they "may be comparatively more adversarial than Appeals Council proceedings" because, for example, they provide claimants a greater opportunity to advance specific issues. *Id*. at 1360. The Court did not, however, resolve whether ALJ proceedings are "adversarial enough" as a general matter to warrant issue exhaustion because "[i]n the specific context of petitioners' Appointments Clause challenges, two additional considerations tip the scales" against this requirement. *Id*. First, agency adjudications are "generally ill-suited to address structural constitutional challenges" because they are outside the agency's expertise. *Id*. Second, issue

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exhaustion would be futile in the present case because ALJs were powerless to remedy their own flawed appointments.

The Court's acknowledgement of the difference between ALJ and Appeals Council proceedings, even if insufficient to sway the outcome in *Carr*, could signal a new approach to line-drawing by the Court regarding the adversarial nature of proceedings for issue exhaustion more broadly. But as Justice O'Connor reminded us in her concurrence in *Sims*, the baseline principle of issue exhaustion remains unchanged: "[i]n most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court. On this underlying principle of administrative law, the Court is unanimous." *Sims*, 530 U.S. at 112.

At p. 647, insert as Note 8a in Part 5G.2:

8a. A recent, high-profile affirmation of *State Farm*'s approach to hard look review. The Court confirmed its rational in *State Farm* in a high-profile immigration case, *DHS v. Regents of the University of California*, 140 S. Ct. 1891 (2020). *Regents* addressed the validity of the Trump Administration's rescission of the Obama Administration's Deferred Action for Childhood Arrivals (DACA) program, including a challenge to the rescission of the program as arbitrary and capricious under § 706(a)(2) of the APA.

There were two parts to the DACA program: forbearance, or temporary protection from deportation for certain undocumented individuals, and a benefits component, by which individuals who otherwise would not be eligible for certain federal social security and health care benefits were made eligible by virtue of their participation in the DACA program. DACA was implemented by a memorandum from the Secretary of Homeland Security in the Obama Administration. Rescission of the program was announced in 2017 by a memorandum from Elaine C. Duke, the acting DHS Secretary in the Trump Administration (the Duke Memo). The Duke Memo's explanation for rescinding DACA was based on an opinion from the Attorney General that the original implementation of the program, specifically the fact that the program made a class of individuals eligible for federal benefits without congressional authorization, was contrary to law.

The lower courts all found the Duke Memo arbitrary and capricious. The Supreme Court, in an opinion by Chief Justice Roberts, agreed. The majority relied on its prior decision in *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.* to conclude that justifying rescission solely on the grounds that offering DACA recipients additional government benefits was unlawful rendered the rescission arbitrary and capricious for failing to consider the consequences to another relevant feature of the program—forbearance:

> In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." But Duke's memo offers no

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> reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.
>
> That reasoning repeated the error we identified in one of our leading modern administrative law cases, *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.* . . . .
>
> * * *
>
> Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only "disallow[ing]" benefits. It did "not cast doubt" on the legality of forbearance or upon DHS's original reasons for extending forbearance to childhood arrivals. Thus, given DHS's earlier judgment that forbearance is "especially justified" for "productive young people" who were brought here as children and "know only this country as home," the DACA Memorandum could not be rescinded in full "without any consideration whatsoever" of a forbearance-only policy [citing *State Farm*].

In addition to finding the Duke Memo arbitrary for failing to consider forbearance in connection with its decision to rescind the program, the Court went on to hold that the Duke Memo was also arbitrary for its failure to consider the impact of rescission on the reliance interests of DACA recipients.

> Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. When an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. ___, ___ (2016). "It would be arbitrary and capricious to ignore such matters." *Id.*, at 515. Yet that is what the Duke Memorandum did.
>
> For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no "legally cognizable reliance interests" because the DACA Memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments. But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.
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> * * *

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> To be clear, DHS was not required to do any of this or to "consider all policy alternatives in reaching [its] decision." *State Farm*, 463 U. S., at 51. Agencies are not compelled to explore "every alternative device and thought conceivable by the mind of man." But, because DHS was "not writing on a blank slate," it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

The Court held that Duke Memo's failure to address reliance interests rendered it arbitrary and capricious. Within two weeks of the Court's decision, Attorney General Barr wrote a letter to the acting DHS Secretary, Wolf, withdrawing Attorney General Session's 2017 letter questioning DACA's legality in order to "wipe the slate clean to make clear beyond doubt that you are free to exercise your own independent judgment in considering the full range of legal and policy issues implicated by a potential rescission or modification of DACA, as contemplated by the Supreme Court." Roughly one month later, on July 28, 2020, acting Secretary Wolf issued a memorandum announcing, *inter alia*, that the Department would, "effective immediately," reject all new initial DACA applications and "[l]imit the period of any deferred action granted pursuant to the DACA policy after the issuance of this memorandum (and thereby limit the period of any associated work authorization) to one year."

At p. 648, insert Note 10 in Part 5G.2:

10. Wait, have courts been wildly wrong about their remedial authority to vacate rules for decades? The note you just read about remand without vacation assumes that, in the ordinary course of things, courts should vacate illegal rules, eliminating their legal effect on everyone—not just the parties to the case. For decades, courts have taken the view that the APA's command in § 706 to "set aside" illegal agency action authorizes this form of "universal vacatur." Courts have also issued nationwide injunctions enjoining agency actions, which adds the possibility of enforcement through contempt sanctions.

Nationwide injunctions have grown increasingly controversial in recent years, with the left complaining that right-wing organizations shop for hyper-conservative judges in Texas and Louisiana, and the right complaining that left-wing organizations shop for hyper-liberal judges in California. A core critique of this practice is that it permits a single district judge to make controversial policy decisions binding the whole country. A growing academic literature debates whether and to what degree a court can grant injunctive relief directed beyond the parties to a case. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (contending that courts should issue only "plaintiff-protective" injunctions and that nationwide injunctions are inconsistent with equitable tradition and the "judicial power" under Article III). *Cf.* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020) ("rebut[ting] the proposition that the universal injunction is a recent invention and that it violates Article III or the traditional limits of equity as practiced in the federal courts").

Universal vacatur, too, has become controversial—as illustrated by Justice Gorsuch's concurrence, joined by Justices Thomas and Barrett, in *United States v. Texas*, 143 S. Ct. 1964 (2023). Justice Gorsuch opined that the federal government had made a strong case against "the

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essential premise … that the APA empowers courts to vacate agency action." *Id*. at 1980. Properly read, § 706's instruction to courts to "set aside" illegal action does not command vacation. Rather, "set aside" merely instructs a court to "disregard" an illegal agency action in resolving the individual case before it. *See id.* at 1981-82. This narrower reading coheres with the principle that remedies are supposed to provide party-specific relief and to affect nonparties only incidentally.

As the following exchange at oral argument between the Chief Justice and Solicitor General Prelogar shows, not every justice found the government's argument persuasive:

Roberts: [Y]our position on vacatur, that sounded to me to be fairly radical and inconsistent with, for example, those of us who were on the D.C. Circuit, you know, five times before breakfast, that's what you do in an APA case. And all of a sudden, you're telling us, no, you can't vacate it, you do something different. Are you overturning that whole established practice under the APA?

Prelogar: Yes, I acknowledge, Chief Justice, that the lower courts, including the D.C. Circuit, have, in our view, been getting this one wrong. They have reflexively assumed that vacatur is authorized under Section 706 of the APA. …

Roberts: Wow. … I mean, this is a long—that's what the D.C. Circuit and other courts of appeals have been doing all the time as a staple of their decision output.

For discussions of this controversy, *see* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020) (concluding that the APA authorizes "universal vacatur" of federal rules as well as injunctive enforcement); *cf.* John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. REG. BULL. 37 (2020) (contending that "set aside" as used by § 706 merely instructs courts "not to follow the agency action in deciding the case").

At p. 669, insert new Note 3.a. in Part 5G.3.b.:

3a. By the time you read this, *Chevron* may already be dead. It looks like Justices Thomas and Gorsuch will get their chance sooner rather than later to overturn *Chevron* deference as a monstrous violation of separation of powers. The Magnuson-Stevens Act provides that a fishery management plan may require that one or more observers be carried on a United States fishing vessel to gather data for management of the fishery. 16 U.S.C. § 1853(b)(8). The National Marine Fisheries Service (NMFS) has statutory authority to promulgate regulations that it deems "necessary or appropriate for the purposes of … implementing a fishery management plan." 16 U.S.C. § 1853(c)(1). It promulgated a rule requiring vessels to carry non-governmental observers and to pay for their services. Commercial fishing firms challenged the rule, asserting both: (a) the statute was "silent" on the issue of whether NMFS could require payment; and (b) several provisions authorizing fee-based programs in limited circumstances generated a negative inference that the agency lacked this authority. The district court granted summary judgment to the government, holding at *Chevron* step-one that the Act unambiguously granted authority to the agency to adopt the rule. *Loper Bright Enterprises, Inc. v. Raimondo*, 544 F. Supp.3d 82 (D.D.C. 2021). The D.C. Circuit affirmed at *Chevron* step-two, holding that the agency interpretation was at least "reasonable." 45 F.4th 359 (D.C. Cir. 2022).

In May 2023, the Supreme Court granted *certiorari* in the case. The question presented is:

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"Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

This grant of *certiorari* indicates that at least four justices are interested in responding to the question presented. Only eight will participate in the decision as Justice Jackson has recused, raising the possibility of an evenly divided Court. Dozens of *amicus* briefs have been submitted by industry organizations, think tanks, nonprofits, and academics.

As it would be irresponsible not to speculate, two broad possibilities present themselves. First, Justices Thomas and Gorsuch might persuade three other justices from the group of Roberts, Barrett, Alito, and Kavanaugh to be heroes and eliminate a foundational doctrine of modern administrative law. Second, two or more of these four might swing toward joining an opinion that follows Justice Kagan's template in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which is discussed at note 11, below. In *Kisor*, Justice Kagan rejected an effort to overturn *Auer* deference—a cousin to *Chevron* that applies rationality review to an agency's interpretation of its own *regulations* (rather than its enabling act). Writing in pertinent part for five justices (including the Chief Justice), her opinion emphasized, however, that *Auer* deference should apply only in cases where genuine ambiguity remains after rigorous application of all "traditional tools" of statutory construction—a phrase pulled from footnote 9 of *Chevron*. In other words, she insisted on a strict approach to step-one style analysis. Taking this approach in *Loper Bright* may attract institutionalist justices disinclined to create the litigation chaos likely to follow outright overruling of *Chevron* deference.

At p. 673, insert as Note 8a in Part 5G.3.b:

8a. Another threshold limit on *Chevron*'s reach—apparently, you gotta ask for it. Yet another issue relating to *Chevron* that has been percolating through judicial decisions and legal scholarship is whether its deferential standard of review is waivable. *See Amaya v. Rosen*, 986 F.3d 424, 430 n.4 (4th Cir. 2021) (canvassing conflicting precedents). On one view, the applicability of *Chevron* is a non-jurisdictional issue and therefore can be waived. On another, *Chevron* is a non-waivable standard of review embedded in the legal system.

In *Hollyfrontier Cheyenne Refining, LLC v. Renewable Fuels Association*, 141 S. Ct. 2172 (2021), the Court seems to have disposed of this issue in two sentences. This case turned on the meaning of "extension" in the context of a renewable fuel program (RFP) administered by the Environmental Protection Agency. The RFP imposes a statutory obligation on most domestic refineries to mix certain amounts of renewable fuels into their transportation fuels. Small refineries are able to obtain exemptions and to apply for "extensions" to them. 42 U.S.C. § 7545(o)(9)(b)(i). The EPA granted "extensions" to small refineries after their exemptions had lapsed. Renewable fuel producers challenged these extensions on the ground that lapsed exemptions cannot be extended. Justice Gorsuch, writing for a six-justice majority, rejected the argument that "extensions" cannot have temporal gaps; Justice Barrett authored a three-justice dissent.

Here is everything that Justice Gorsuch, an archfoe of *Chevron*, had to say on the issue of waiver in *Hollyfrontier*: "With the recent change in administrations, 'the government is not invoking *Chevron*.' *Brief for Federal Respondent* 46–47. We therefore decline to consider whether any deference might be due its regulation." *Id.* at 2180.

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The dissent did not object to the majority's assumption of *Chevron*'s waivability. Justice Barrett's only express reference to *Chevron* deference was to note that "[t]he Court avoids express reliance" on it. *Id.* at 2184 n.1 (Barrett, J., dissenting). A paragraph later, perhaps needling Justice Gorsuch a bit, she obliquely suggested that his majority opinion had, functionally speaking, applied *Chevron* deference by giving the win to the refiners based on a "possible" reading of "extension." *Id.* at 2184 (italics in original).

At p. 695, insert as supplement to note 7:

The "extraordinary cases" exception to *Chevron* discussed in *Burwell* has since crystalized into the "major questions doctrine" embraced and explained by the Court most notably in *West Virginia v. EPA*, 142 S. Ct. 2578 (2022). You will want to review the supplemental CB materials above for Chapter 3A for discussion of the recent evolution of this doctrine.

Under the logic of *Chevron*, should it apply to major questions? The theory of the major questions doctrine is that Congress speaks clearly when it wishes to assign exceptional powers to an agency. It follows that ambiguous language should not be regarded as an implicit delegation to agencies of authority to claim exceptional power. But hang on a second—application of *Chevron* only matters in cases where a statute is ambiguous in a material way. Who would Congress presumably want to resolve that ambiguity—the courts? Or agencies?

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Chapter 7 Open Government

At p. 766, insert as Note 2a in Part 7B:

2a. Exemption 5 and final views with legal effect. The Court revisited its deliberative process exemption jurisprudence in *Fish and Wildlife Service v. Sierra Club*, 141 S. Ct. 777 (2021). At issue in *Sierra Club* was whether certain draft biological opinions created under the Endangered Species Act (ESA) were protected from disclosure under FOIA's "deliberative process" exemption (Exemption 5). The Court held that Exemption 5 did protect these particular documents because they were predecisional and deliberative.

If an agency wishes to take an action that may "adversely affect" a species protected under the ESA, it must consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services), which will then prepare a "biological opinion" that determines whether the action will jeopardize the continued existence of the species. If the Services issue a "jeopardy" opinion, they will include "reasonable and prudent alternatives" to the action to avoid harm. The action agency must comply with these reasonable and prudent alternatives, abandon its action, or seek an exemption from the ESA.

Staffers at the Services prepared draft biological opinions that concluded an EPA proposed rule would jeopardize threatened or endangered species. Rather than approve these drafts or send them to EPA, decisionmakers at the Services instead concluded that "more work needed to be done." EPA revised its proposed rule, and the Services issued a final biological opinion concluding that this revised rule would not jeopardize any species. Sierra Club submitted a FOIA request to the Services for documents associated with their consultations with the EPA. The Services refused to turn over the draft biological opinions on the ground that these documents were nonfinal and therefore protected from disclosure.

The Court agreed that Exemption 5 applied. It noted that a proposal that "dies on the vine" remains predecisional and deliberative (and thus protected) because "[w]hat matters … is not whether a document is last in line, but whether it communicates a policy on which the agency has settled." *Id.* at 786. Courts should consider whether "the agency treats the document as its final view on the matter" and if the document will have a "real operative effect," rather than leaving the agency "free to change" its mind. *Id.*

For documents to have "real operative effect," they must have "legal" rather than merely "practical" consequences. *Id.* at 787. Final biological opinions have legal consequences because they "alter[] 'the legal regime to which the action agency is subject, authorizing it' to take action affecting an endangered species 'if (but only if) it complies with the prescribed conditions.'" *Id.* The draft biological opinions did not carry such legal consequences. They might have had the practical consequence of prompting the EPA to change its rule, but it cannot be the case "that any email or memorandum that has the effect of changing an agency's course constitutes a final administrative decision." *Id.* at 788.

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Nor did the draft biological opinions represent the Service's "final view." As evidence for this point, the Court noted that the documents were merely drafts, were not approved by agency decisionmakers, and were not sent to the EPA. It concluded that the deliberative process "worked as it should have: The Services and the EPA consulted about how the rule would affect aquatic wildlife until the EPA settled on an approach that would not jeopardize any protected species." *Id.*