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Administrative Law

CASES AND MATERIALS

Eighth Edition

2024–2025 CUMULATIVE SUPPLEMENT REVISED

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CAROLINA ACADEMIC PRESS
Durham, North Carolina

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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:

The vulnerability of the nondelegation doctrine is an ongoing question for the Court. This past term, and as described in the note immediately following this one, the Justices refrained from a nondelegation ruling regarding 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*, 144 S. Ct. 2117 (2024) (relying on the Seventh Amendment and public rights doctrine). Nevertheless, as long as the Court appears to remain open to revisiting the constitutional limits on administrative agencies, nondelegation will remain an important constitutional issue. *Jarkesy* represents the latest in a series of cases seeking to limit agency power through expansion of various constitutional doctrines. 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 pp. 47-63, replace existing Part IC.2 with the following:

2. Agencies as "Courts"

Suppose that Congress charges some regulatory agency with, say, ensuring clean water. This agency has authority to promulgate regulations barring water pollution and to investigate to ensure compliance. As agency officials conduct investigations, they must determine facts on the ground in individual cases (*e.g.*, did firm *X* dump sludge in the stream?) and apply those facts to pertinent law (*e.g.*, do agency regulations bar dumping sludge into streams?). It may make considerable policy sense to give the agency's determinations on these matters substantial, even dispositive, weight. The agency, after all, is supposed to be the "expert" on water pollution and how to control it. The legislature might therefore authorize the agency to issue cease-and-desist orders commanding regulated entities to halt violations. The legislature might even go so far as to authorize the agency to issue citations penalizing violators.

An obvious potential constitutional roadblock to this type of scheme lies in Article III, § 1 of the Constitution, which provides that the "judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." To ensure decisional independence, this provision adds that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." In other words, the Constitution requires that officials wielding the judicial power of the United States must enjoy both life tenure and salary protection. In exercising this power, courts find facts and apply law to arrive at final, binding orders that determine case outcomes. An agency's adjudicative order that carries too much "binding" force threatens to usurp this judicial power.

This usurpation problem is furthered by the fact that agencies do not hold jury trials as part of their adjudication systems. Coincidentally (or not, depending on your point of view), the Seventh Amendment of the Constitution guarantees the right to a jury trial in "suits at common law, where the value in controversy shall exceed twenty dollars." The Seventh Amendment therefore adds another potential roadblock to agencies acting as courts, especially where the relevant issues are similar to a common law cause of action typically decided by courts of law.

In light of all of these competing factors, it should come as no surprise that the Supreme Court's efforts

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to draw the line between acceptable agency adjudicative authority and unacceptable usurpation of judicial power have resulted in an extremely complex and difficult body of law. As you work through these materials, it may be helpful to consider: Why should this line matter in the first place? Are there reasons to trust judges more than administrators? If so, how should these reasons affect efforts to define Article III's "judicial power" and the scope of the Seventh Amendment??

Lesson 1C.2. After reluctantly concluding that the WTC's rulemaking authority is constitutional under long established doctrine, Abby examined the agency's adjudicative authority. She saw that § 7 authorizes the agency to conduct a trial-like process to determine if a regulated party has violated the WTCA or regulations promulgated pursuant to it. As part of these proceedings, the agency can issue orders designed to "cure" such violations. Section 10 authorizes judicial proceedings in which civil and criminal penalties and injunctive relief may be imposed against violators of the WTCA, WTC rules, or WTC orders. The agency need not go to court to impose a penalty, however, because § 11 authorizes the WTC to impose "administrative penalties" in its own internal proceedings. Compounding all this power, § 9, to Abby's surprise, substantially limits judicial review of agency decisionmaking.

Abby finds it particularly distressing that §§ 7 and 11 of the Act appear to grant the same "judicial power" to the Commission that Article III vests in life tenured federal judges. Can the WTC constitutionally apply these provisions to issue orders against regulated parties? Does the answer depend on what remedy the WTC chooses?

Suppose that the WTC is contemplating adopting a rule that will allow private parties to initiate § 7 proceedings against regulated winemakers for violation of § 5's anti-fraud provisions. Using its authority under § 7 to issue "curative" orders, the WTC will order parties found liable to pay compensatory damages to plaintiffs. Is this scheme consistent with Article III? The Seventh Amendment? What if the WTC instead issued an order requiring the disgorgement of funds based on unjust enrichment (an equitable claim)?

Background of *SEC v. Jarkesy*

After the 1929 stock market crash that incited the Great Depression, Congress passed several laws designed to increase market transparency and prevent securities fraud. For example, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940 govern the registration of securities, the trading of securities, and the activities of investment advisers, respectively. Although they are not identical, they overlap and, in pertinent part, target the same basic behavior: misrepresenting or concealing material facts regarding the securities markets. Congress created the SEC to enforce these statutes, empowering it to bring enforcement actions against alleged violators. Under the Dodd Frank Act, the SEC has the choice of filing such enforcement actions in federal court or initiating its own "in-house" administrative proceedings.

According to the SEC, Jarkesy and Patriot28 misled investors in at least three ways: (1) by misrepresenting the investment strategies that Jarkesy and Patriot28 employed, (2) by lying about the identity of the funds' auditor and prime broker, and (3) by inflating the funds' claimed value so that Jarkesy and Patriot28 could collect larger management fees. The SEC brought an administrative enforcement action against George Jarkesy and his advisory firm Patriot28, L.L.C. The enforcement action sought civil penalties for alleged securities fraud. The SEC chose to pursue an administrative enforcement proceeding against Jarkesy, in which an administrative law judge (ALJ) found that he and Patriot28 had violated the securities laws. The Commission affirmed in pertinent part and ordered Jarkesy, *inter alia*, to pay a civil penalty.

On review, the Fifth Circuit held, by a 2-1 vote, that: (a) Congress violated the Seventh Amendment by authorizing the Commission to seek civil penalties for fraud via administrative enforcement proceedings; (b) Congress's decision to grant the Commission power to choose between judicial and administrative enforcement actions for civil penalties violated the nondelegation doctrine; and (c) the APA's "for cause"

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removal protections of ALJs unconstitutionally infringed on the president's authority under Article II. The Supreme Court did not address the nondelegation or removal questions. It affirmed on Seventh Amendment grounds, in the process significantly narrowing its constitutional jurisprudence regarding administrative adjudication.

Securities and Exchange Commission v. Jarkesy

144 S. Ct. 2117 (2024)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In 2013, the Securities and Exchange Commission initiated an enforcement action against respondents George Jarkesy, Jr., and Patriot28, LLC, seeking civil penalties for alleged securities fraud. The SEC chose to adjudicate the matter in-house before one of its administrative law judges, rather than in federal court where respondents could have proceeded before a jury. We consider whether the Seventh Amendment permits the SEC to compel respondents to defend themselves before the agency rather than before a jury in federal court.

I

A

*** Three *** statutes are relevant here: The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. *** Although each regulates different aspects of the securities markets, their pertinent provisions—collectively referred to by regulators as "the antifraud provisions,"—target the same basic behavior: misrepresenting or concealing material facts.

***

To enforce these Acts, Congress created the SEC. The SEC may bring an enforcement action in one of two forums. First, the Commission can adjudicate the matter itself. Alternatively, it can file a suit in federal court. . . . [I]n federal court a jury finds the facts . . . .

Conversely, when the SEC adjudicates the matter in-house, there are no juries. Instead, the Commission presides and finds facts . . . [and] may . . . delegate its role as judge and factfinder to *** an administrative law judge (ALJ) that it employs.

When a Commission member or an ALJ presides, the full Commission can review that official's findings and conclusions, but it is not obligated to do so. Judicial review is also available once the proceedings have concluded. . . .

In 2010, Congress passed the . . . Dodd-Frank Act . . . . [Under that] Act . . . the SEC may now seek civil penalties in federal court, or it may impose them through its own in-house proceedings.

Civil penalties . . . consist of fines of up to $725,000 per violation. And the SEC may levy these penalties even when no investor has actually suffered financial loss.

B

. . . According to the SEC, Jarkesy and Patriot28 . . . violated the antifraud provisions . . . .

. . . [T]he SEC opted to adjudicate the matter itself rather than in federal court. . . . The final order levied a civil penalty of $300,000 against Jarkesy and Patriot28 . . . ordered Patriot28 to disgorge earnings, and prohibited Jarkesy from participating in the securities industry . . . .

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Jarkesy and Patriot28 petitioned for judicial review. A divided panel of the Fifth Circuit granted their petition and vacated the final order. . . . [T]he panel held that the agency's decision to adjudicate the matter in-house violated Jarkesy's and Patriot28's Seventh Amendment right to a jury trial. . . . It also identified two further constitutional problems. First, it determined that Congress had violated the nondelegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate this action in an Article III court or to adjudicate the matter itself. The panel also found that the insulation of the SEC ALJs from executive supervision with two layers of for-cause removal protections violated the separation of powers. The Fifth Circuit denied rehearing en banc, and we granted certiorari, 600 U. S. —— (2023).

II

This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud. Our analysis of this question follows the approach set forth in *Granfinanciera* and *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). The threshold issue is whether this action implicates the Seventh Amendment. It does. The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.

Since this case does implicate the Seventh Amendment, we next consider whether the "public rights" exception to Article III jurisdiction applies. This exception has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial. The exception does not apply here because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury. The Seventh Amendment therefore applies and a jury is required. Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.

A

We first explain why this action implicates the Seventh Amendment.

1

The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." Commentators recognized the right as "the glory of the English law," 3 W. Blackstone, Commentaries on the Laws of England 379 (8th ed. 1778) (Blackstone), and it was prized by the American colonists. . . . And when the English continued to try Americans without juries, the Founders cited the practice as a justification for severing our ties to England. See Declaration of Independence ¶20. . . .

In the Revolution's aftermath, perhaps the "most success[ful]" critique leveled against the proposed Constitution was its "want of a ... provision for the trial by jury in civil cases." The Federalist No. 83, p. 495 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). The Framers promptly adopted the Seventh Amendment to fix that flaw. In so doing, they "embedded" the right in the Constitution, securing it "against the passing demands of expediency or convenience." *Reid v. Covert*, 354 U.S. 1, 10, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (plurality opinion). Since then, "every encroachment upon it has been watched with great jealousy." *Parsons v. Bedford*, 3 Pet. 433, 28 U.S. 433, 7 L.Ed. 732 (1830).

2

By its text, the Seventh Amendment guarantees that in "[s]uits at common law, ... the right of trial by jury shall be preserved." . . .

The Seventh Amendment extends to a particular statutory claim if the claim is "legal in nature." As we made clear in *Tull*, whether that claim is statutory is immaterial to this analysis. In that case, the Government sued a real estate developer for civil penalties in federal court. The developer responded by invoking his right to a jury trial. . . . To determine whether a suit is legal in nature, we directed courts to consider the

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cause of action and the remedy it provides. Since some causes of action sound in both law and equity, we concluded that the remedy was the "more important" consideration.

In this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to "restore the status quo." As we have previously explained, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." . . . Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law." The same is true here.

To start, the Securities Exchange Act and the Investment Advisers Act condition the availability of civil penalties on six statutory factors: (1) whether the alleged misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements, (2) whether it caused harm, (3) whether it resulted in unjust enrichment, accounting for any restitution made, (4) whether the defendant had previously violated securities laws or regulations, or had previously committed certain crimes, (5) the need for deterrence, and (6) other "matters as justice may require." Of these, several concern culpability, deterrence, and recidivism. Because they tie the availability of civil penalties to the perceived need to punish the defendant rather than to restore the victim, such considerations are legal rather than equitable.

The same is true of the criteria that determine the size of the available remedy. . . . Each tier [of monetary penalty] conditions the available penalty on the culpability of the defendant and the need for deterrence, not the size of the harm that must be remedied. Indeed, showing that a victim suffered harm is not even required to advance a defendant from one tier to the next. Since nothing in this analysis turns on "restor[ing] the status quo," these factors show that these civil penalties are designed to be punitive.

The final proof that this remedy is punitive is that the SEC is not obligated to return any money to victims. See *id*., at 422–423, 107 S.Ct. 1831. Although the SEC can choose to compensate injured shareholders from the civil penalties it collects, it admits that it is not required to do so. Such a penalty by definition does not "restore the status quo" and can make no pretense of being equitable.

In sum, the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "a type of remedy at common law that could only be enforced in courts of law." That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims.

The close relationship between the causes of action in this case and common law fraud confirms that conclusion. Both target the same basic conduct: misrepresenting or concealing material facts. That is no accident. Congress deliberately used "fraud" and other common law terms of art . . . . In so doing, Congress incorporated prohibitions from common law fraud into federal securities law. . . .

Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law "ancestor." "[W]hen Congress transplants a common-law term, the old soil comes with it." Our precedents therefore often consider common law fraud principles when interpreting federal securities law. (string citation omitted).

That is not to say that federal securities fraud and common law fraud are identical. In some respects, federal securities fraud is narrower. For example, federal securities law does not "convert every common-law fraud that happens to involve securities into a violation." . . . In other respects, federal securities fraud is broader. For example, federal securities fraud employs the burden of proof typical in civil cases, while its common law analogue traditionally used a more stringent standard. Nevertheless, the close relationship between federal securities fraud and common law fraud confirms that this action is "legal in nature."

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B

1

Although the claims at issue here implicate the Seventh Amendment, the Government and the dissent argue that a jury trial is not required because the "public rights" exception applies. Under this exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. But this case does not fall within the exception, so Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal.

The Constitution prohibits Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284, 15 L.Ed. 372 (1856). Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies. . . .

On that basis, we have repeatedly explained that matters concerning private rights may not be removed from Article III courts. . . . If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory.

At the same time, our precedent has also recognized a class of cases concerning what we have called "public rights." Such matters "historically could have been determined exclusively by [the executive and legislative] branches," even when they were "presented in such form that the judicial power [wa]s capable of acting on them[.]" In contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in such a case.

The decision that first recognized the public rights exception was *Murray's Lessee*. In that case, a federal customs collector failed to deliver public funds to the Treasury, so the Government issued a "warrant of distress" to compel him to produce the withheld sum. Pursuant to the warrant, the Government eventually seized and sold a plot of the collector's land. . . .

The Court upheld the sale. It explained that pursuant to its power to collect revenue, the Government could rely on "summary proceedings" to compel its officers to "pay such balances of the public money" into the Treasury "as may be in their hands." Indeed, the Court observed, there was an unbroken tradition—long predating the founding—of using these kinds of proceedings to "enforce payment of balances due from receivers of the revenue." In light of this historical practice, the Government could issue a valid warrant without intruding on the domain of the Judiciary. . . .

This principle extends beyond cases involving the collection of revenue. In *Oceanic Steam Navigation Co. v. Stranahan*, we considered the imposition of a monetary penalty on a steamship company. Pursuant to its plenary power over immigration, Congress had excluded immigration by aliens afflicted with "loathsome or dangerous contagious diseases," and it authorized customs collectors to enforce the prohibition with fines. When a steamship company challenged the penalty under Article III, we upheld it. Congress's power over foreign commerce, we explained, was so total that . . . Congress could . . . prohibit immigration by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury. In *Ex parte Bakelite Corp*., we upheld a law authorizing the President to impose tariffs on goods imported by "unfair methods of competition." . . . Because the political branches had traditionally held exclusive power over this field and had exercised it, we explained that the assessment of tariffs did not implicate Article III. *Id*., at 458, 460–461, 49 S.Ct. 411.

This Court has since held that certain other historic categories of adjudications fall within the exception, including relations with Indian tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights.

Our opinions governing the public rights exception have not always spoken in precise terms. The Court "has not 'definitively explained' the distinction between public and private rights," and we do not claim to do so today.

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Nevertheless, since *Murray's Lessee*, this Court has typically evaluated the legal basis for the assertion of the doctrine with care. The public rights exception is, after all, an *exception*. It has no textual basis in the Constitution and must therefore derive instead from background legal principles. From the beginning we have emphasized one point: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can ... withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." We have never embraced the proposition that "practical" considerations alone can justify extending the scope of the public rights exception to such matters. "[E]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." And for good reason: "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."

2

This is not the first time we have considered whether the Seventh Amendment guarantees the right to a jury trial "in the face of Congress' decision to allow a non-Article III tribunal to adjudicate" a statutory "fraud claim." . . . .

Granfinanciera involved a statutory action for fraudulent conveyance. . . . Actions for fraudulent conveyance were well known at common law. . . . In 1984, however, Congress designated fraudulent conveyance actions "core [bankruptcy] proceedings" and authorized non-Article III bankruptcy judges to hear them without juries.

The issue in *Granfinanciera* was whether this designation was permissible under the public rights exception. We explained that it was not. . . . What mattered, we explained, was the substance of the suit. . . . To determine whether the claim implicated the Seventh Amendment, . . . [w]e examined whether the matter was "from [its] nature subject to 'a suit at common law.' " . . .

We also considered whether these actions were "closely intertwined" with the bankruptcy regime. Some bankruptcy claims, such as "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," are highly interdependent and require coordination. . . . Other claims, though, can be brought in standalone suits, because they are neither prioritized nor subordinated to related claims. Since fraudulent conveyance actions fall into that latter category, we concluded that these actions were not "closely intertwined" with the bankruptcy process. We also noted that Congress had already authorized jury trials for certain bankruptcy matters, demonstrating that jury trials were not generally "incompatible" with the overall regime.

We accordingly concluded that fraudulent conveyance actions were akin to "suits at common law" and were not inseparable from the bankruptcy process. The public rights exception therefore did not apply, and a jury was required.

3

Granfinanciera effectively decides this case. Even when an action "originate[s] in a newly fashioned regulatory scheme," what matters is the substance of the action, not where Congress has assigned it. *Id*., at 52, 109 S.Ct. 2782. And in this case, the substance points in only one direction.

According to the SEC, these are actions under the "antifraud provisions of the federal securities laws" for "fraudulent conduct." They provide civil penalties, a punitive remedy that we have recognized "could only be enforced in courts of law." And they target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles. In short, this action involves a "matter[ ] of private rather than public right." Therefore, "Congress may not 'withdraw' " it " 'from judicial cognizance.' " . . .

4

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The SEC's sole remaining basis for distinguishing *Granfinanciera* is that the Government is the party prosecuting this action. But we have never held that "the presence of the United States as a proper party to the proceeding is ... sufficient" by itself to trigger the exception. *Northern Pipeline Constr. Co.*, 458 U.S. at 69, n. 23, 102 S.Ct. 2858 (plurality opinion). Again, what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. The object of this SEC action is to regulate transactions between private individuals interacting in a pre-existing market. To do so, the Government has created claims whose causes of action are modeled on common law fraud and that provide a type of remedy available only in law courts. This is a common law suit in all but name. And such suits typically must be adjudicated in Article III courts.

5

The principal case on which the SEC and the dissent rely is *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977). . . .The litigation in *Atlas Roofing* arose under the Occupational Safety and Health Act of 1970 (OSH Act), a federal regulatory regime created to promote safe working conditions. The Act authorized the Secretary of Labor to promulgate safety regulations, and it empowered the Occupational Safety and Health Review Commission (OSHRC) to adjudicate alleged violations. If a party violated the regulations, the agency could impose civil penalties.

Unlike the claims in *Granfinanciera* and this action, the OSH Act did not borrow its cause of action from the common law. Rather, it simply commanded that "[e]ach employer ... shall comply with occupational safety and health standards promulgated under this chapter." These standards bring no common law soil with them. Rather than reiterate common law terms of art, they instead resembled a detailed building code. . . . The purpose of this regime was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law. Rather, Congress stated that it intended the agency to "develop[ ] innovative methods, techniques, and approaches for dealing with occupational safety and health problems." In both concept and execution, the Act was self-consciously novel.

Facing enforcement actions, two employers alleged that the adjudicatory authority of the OSHRC violated the Seventh Amendment. The Court rejected the challenge, concluding that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[ ]." As the Court explained, the case involved "a new cause of action, and remedies therefor, unknown to the common law." The Seventh Amendment, the Court concluded, was accordingly "no bar to ... enforcement outside the regular courts of law."

The cases that *Atlas Roofing* relied upon did not extend the public rights exception to "traditional legal claims." Instead, they applied the exception to actions that were " 'not ... suit[s] at common law or in the nature of such ... suit[s].' " . . .

Atlas Roofing concluded that Congress could assign the OSH Act adjudications to an agency because the claims were "unknown to the common law." The case therefore does not control here, where the statutory claim is " 'in the nature of ' " a common law suit. . . .

The reasoning of *Atlas Roofing* cannot support any broader rule. . . . Even as *Atlas Roofing* invoked the public rights exception, the definition it offered of the exception was circular. The exception applied, the Court said, "in cases in which 'public rights' are being litigated—*e. g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes." After *Atlas Roofing*, this Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims. In addition, we have explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication. . . .

The novel claims in *Atlas Roofing* had never been brought in an Article III court. By contrast, law courts have dealt with fraud actions since before the founding . . . . Given the judiciary's long history of handling fraud claims, it cannot be argued that the courts lack the capacity needed to adjudicate such actions.

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* * *

A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator. . . . We do not reach the remaining constitutional issues and affirm the ruling of the Fifth Circuit on the Seventh Amendment ground alone.

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

It is so ordered.

[Justice GORSUCH's concurrence, which Justice THOMAS joined, is omitted]

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

Throughout our Nation's history, Congress has authorized agency adjudicators to find violations of statutory obligations and award civil penalties to the Government as an injured sovereign. . . . This Court has blessed that practice repeatedly, declaring it "the 'settled judicial construction' " all along; indeed, " 'from the beginning.' " *Atlas Roofing* . . . . Unsurprisingly, Congress has taken this Court's word at face value. It has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations. Congress had no reason to anticipate the chaos today's majority would unleash after all these years.

Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the Government in its sovereign capacity, also known as a public right. According to the majority, the Constitution requires the Government to seek civil penalties for federal-securities fraud before a jury in federal court. The nature of the remedy is, in the majority's view, virtually dispositive. That is plainly wrong. This Court has held, without exception, that Congress has broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries.

[T]he majority's . . . ruling reveals a far more fundamental problem: This Court's repeated failure to appreciate that its decisions can threaten the separation of powers. Here, that threat comes from the Court's mistaken conclusion that Congress cannot assign a certain public-rights matter for initial adjudication to the Executive because it must come only to the Judiciary.

The majority today upends longstanding precedent and the established practice of its coequal partners in our tripartite system of Government. Because the Court fails to act as a neutral umpire when it rewrites established rules in the manner it does today, I respectfully dissent.

I

…

II

. . . This Court's longstanding precedent and established government practice uniformly support the constitutionality of administrative schemes like the SEC's: agency adjudications of statutory claims for civil penalties brought by the Government in its sovereign capacity. In assessing the constitutionality of such adjudications, the political branches' " '[l]ong settled and established practice,' " which this Court has upheld and reaffirmed time and again, is entitled to " 'great weight.' "

A

Although this case involves a Seventh Amendment challenge, the principal question at issue is one rooted in Article III and the separation of powers. That is because, as the majority rightly acknowledges, the

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Seventh Amendment's jury-trial right "applies" only in "an Article III court." . . . Consistent with that understanding, this Court has held repeatedly that "the Seventh Amendment is not applicable to administrative proceedings." [(citing *Tull*)] . . . . The conclusion that Congress properly assigned a matter to an agency for adjudication therefore necessarily "resolves [any] Seventh Amendment challenge." . . .

So, the critical issue in this type of case is whether Congress can assign a particular matter to a non-Article III factfinder.

B

For more than a century and a half, this Court has answered that Article III question by pointing to the distinction between "private rights" and "public rights." . . . [P]ublic rights always can be assigned outside of Article III. They " 'do not require judicial determination' " under the Constitution, even if they " 'are susceptible of it.' "

The majority says that aspects of the public-rights doctrine have been confusing. That might be true for cases involving wholly private disputes, but not for cases where the Government is a party.[3] It has long been settled and undisputed that, at a minimum, a matter of public rights arises "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." Indeed, "from the time the doctrine of public rights was born, in 1856," everyone understood that public rights " 'arise "between the government and others," ' " and refer to "rights *of the public*—that is, rights pertaining to claims brought by or against the United States. So, while this Court has recognized public rights in certain disputes between private parties, the doctrine's heartland consists of claims belonging to the Government.

When a claim belongs to the Government as sovereign, the Constitution permits Congress to enact new statutory obligations, prescribe consequences for the breach of those obligations, and then empower federal agencies to adjudicate such violations and impose the appropriate penalty. This Court has repeatedly emphasized these unifying principles through an unbroken series of cases over almost 200 years.

1

Start at the beginning, with *Murray's Lessee* in 1856. [T]he dispute arose between the Government and the customs collector in connection with the Government's exercise of its constitutional power to collect revenue. The Court . . . endorsed [a] constitutional balance: Congress could decide whether to assign a public-rights dispute to the Executive for initial adjudication subject to judicial review or to an Article III federal court for resolution.

In *Oceanic Steam Nav. Co. v. Stranahan*, the Court upheld a customs official's imposition of a penalty on a steamship company . . . . The Court noted the breadth of Congress's immigration power . . . Yet, . . . the *Stranahan* Court went out of its way to explain that the "settled judicial construction" that civil-penalty claims brought by the Government could be assigned to the Executive for initial adjudication extended "not only as to tariff, but as to internal revenue, taxation, and other subjects," including the regulation of foreign commerce.

Importantly, *Stranahan* rejected the "proposition" that, in "cases of penalty or punishment, ... enforcement must depend upon the exertion of judicial power, either by civil or criminal process." . . . This Court has repeatedly approved Congress's assignment of public rights to agencies in diverse areas of the law, reflecting Congress's varied constitutional powers. A nonexhaustive list includes "interstate and foreign

[3] Every case that has expressed consternation about the precise contours of the public-rights doctrine, including those cited by the majority, involve only private disputes—or, more precisely, "disputes to which the Federal Government is not a party in its sovereign capacity." [(collecting cases)].

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commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans," . . . .

[I]n every case where the Government has acted in its sovereign capacity to enforce a new statutory obligation through the administrative imposition of civil penalties or fines, this Court, without exception, has sustained the statutory scheme authorizing that enforcement outside of Article III.

A unanimous Court made this exact point nearly half a century ago in *Atlas Roofing*. . . . It relied on the long history of public-rights cases endorsing Congress's now-settled practice of assigning the Government's rights to civil penalties for violations of a statutory obligation to in-house adjudication in the first instance. In light of this "history and our cases," the Court concluded that, where Congress "create[s] a new cause of action, and remedies therefor, unknown to the common law," it is free to "plac[e] their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved." "That is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law."

C

. . . [T]his case should have been resolved under a faithful and straightforward application of *Atlas Roofing* and a long line of this Court's precedents. The constitutional question is indistinguishable. The majority instead wishes away *Atlas Roofing* by burying it at the end of its opinion and minimizing the unbroken line of cases on which *Atlas Roofing* relied. That approach to precedent significantly undermines this Court's commitment to *stare decisis* and the rule of law.

This case may involve a different statute from *Atlas Roofing*, but the schemes are remarkably similar. Here, just as in *Atlas Roofing*, Congress identified a problem; concluded that the existing remedies were inadequate; and enacted a new regulatory scheme as a solution. The problem was a lack of transparency and accountability in the securities market that contributed to the Great Depression of the 1930s. The inadequate remedies were the then-existing state statutory and common-law fraud causes of action. The solution was a comprehensive federal scheme of securities regulation . . . .

The prophylactic nature of the statutory regime also is virtually indistinguishable from the OSHA scheme at issue in *Atlas Roofing*. . . . Critically, federal-securities laws do not require proof of actual reliance on an investor's misrepresentations or that an "investor has actually suffered financial loss." OSHA too prohibits conduct that could, but does not necessarily, injure a private person. . . . The employer's failure to maintain safe and healthy working conditions violates OSHA even if there is no actionable harm to an employee, just as a misrepresentation to investors in connection with the buying or selling of securities violates federal-securities law even if there is no actual injury to the investors.

Moreover, both here and in *Atlas Roofing*, Congress empowered the Government to institute administrative enforcement proceedings to adjudicate potential violations of federal law and impose civil penalties on a private party for those violations, all while making the final agency decision subject to judicial review. . . .

Ultimately, both cases arise between the Government and others in connection with the performance of the Government's constitutional functions, and involve the Government acting in its sovereign capacity to bring a statutory claim on behalf of the United States in order to vindicate the public interest. . . . In a world where precedent means something, this should end the case. Yet here it does not. . . .

III

A

To start, it is almost impossible to discern how the majority defines a public right and whether its view of the doctrine is consistent with this Court's public-rights cases. The majority at times seems to limit the public-rights exception to areas of its own choosing. It points out, for example, that some public-rights cases involved the collection of revenue, customs law, and immigration law . . . Other times, the majority highlights a particular practice predating the founding, such as the "unbroken tradition" in *Murray's Lessee*

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of executive officials issuing warrants of distress to collect revenue. Needless to say, none of these explanations for the doctrine is satisfactory. What is the legal principle behind saying only these areas and no further? . . . How does the requirement of a historical practice dating back to the founding, or "flow[ing] from centuries-old rules," account for the broad universe of public-rights cases in the United States Reporter? The majority does not say.

The majority's only other theory fares no better. The majority seems to suggest that a common thread underlying these cases is that "the political branches had traditionally held exclusive power over th[ese] field[s] and had exercised it." To the extent the majority thinks this is a distinction, it fails for at least two reasons.

First, *Atlas Roofing* expressly rejected the argument that the public-rights doctrine is limited to particular exercises of congressional power. . . .

Second, even if *Atlas Roofing* had not explicitly rejected the proposed distinction here, the majority cannot reconcile its restrictive view of the public-rights doctrine with *Atlas Roofing* and other precedents. For example, it is unclear . . . why the exercise of interstate-commerce power to enact [the OSH Act or National Labor Relations Act] would be any different from the exercise of that same power to enact the federal-securities laws at issue here.

The majority's description of the doctrine also fails to account for public rights that do not belong to the Federal Government in its sovereign capacity. . . . Conspicuously absent from the majority's discussion are, for example, cases in which this Court held that Congress could assign a private federally created action that was "closely integrated into a public regulatory scheme" for adjudication in a non-Article III forum. . . . Both *Thomas* and *Schor* thus upheld the non-Article III adjudication of disputes between private parties, which naturally did not involve the Government in its sovereign capacity.

Even accepting the majority's public-rights-are-confusing defense, . . . [t]he majority ignores countless public-rights cases and entire strands of the doctrine, and fails to heed its own admonition that "close attention" must be paid "to the basis for each asserted application of the doctrine."

B

[T]he majority instead purports to follow *Tull* and *Granfinanciera*. The former involved a suit in federal court and the latter involved a dispute between private parties. So, just like that, the majority ventures off on the wrong path. Indeed, as explained below, both the majority and the concurrence miss the critical distinction drawn in this Court's precedents between the non-Article III adjudication of public-rights matters involving the liability of one individual to another and those involving claims belonging to the Government in its sovereign capacity.

1

The majority bafflingly proclaims that "the remedy is all but dispositive" in this case, ignoring that *Atlas Roofing* and countless precedents before it rejected that proposition. . . . The employers in *Atlas Roofing* argued that the Seventh Amendment prohibited Congress from assigning to an agency the same remedy at issue here: civil penalties. This Court rejected that argument outright, citing a long line of cases involving the Executive's adjudication of statutory claims for civil penalties brought by the Government in its sovereign capacity. . . . Again, even if over a century of precedent did not foreclose the majority's argument, it fails on its own terms. The majority relies almost entirely on *Tull*, which held that statutory claims for civil penalties were "a type of remedy at common law" that entitled a defendant to a jury trial. Critically, however, the *Tull* Court's analysis took place in an entirely different context: federal court. . . . *Tull* stands for the unremarkable proposition that, when the Government sues an entity for civil penalties in federal district court, the Seventh Amendment entitles the defendant "to a jury trial to determine his liability on the legal claims."

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That conclusion says nothing about the constitutionality of the SEC's in-house adjudicative scheme. *Atlas Roofing* and its predecessors could not have been clearer on this point: Congress can assign the enforcement of a statutory obligation for in-house adjudication to executive officials, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency." . . .

Tull even reaffirmed *Atlas Roofing* by emphasizing that the Seventh Amendment depends on the forum, not just the remedy, because it "is not applicable to administrative proceedings." For the majority to pretend otherwise is wishful thinking at best.

The majority next argues that the "close relationship" between the federal-securities laws and common-law fraud "confirms that this action is 'legal in nature,' " and entitles respondents to a jury trial. . . . Again, the majority bends inapposite case law to an illogical thesis. *Granfinanciera*, on which the majority relies to make its cause-of-action argument, set forth the public-rights analysis only for "disputes to which the Federal Government is not a party in its sovereign capacity." For cases that, as here, involve the Government in its sovereign capacity, the *Granfinanciera* Court plainly stated that "Congress may fashion causes of action that are closely *analogous* to common-law claims and [still] place them beyond the ambit of the Seventh Amendment by assigning their resolution to a [non-Article III] forum in which jury trials are unavailable." . . .

Granfinanciera explains that there are two ways to identify a "public right." First, . . . [t]he Court explained that "Congress may effectively supplant a common law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity."

The second kind of public right that *Granfinanciera* recognized involves "[w]holly private" disputes. . . . "The crucial question, *in cases not involving the Federal Government*, is whether 'Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.' "

These two approaches together stand for the proposition that "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, *and* if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." (emphasis added). Once in federal court, "[i]f the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial."

Because *Granfinanciera* did not involve a statutory right that belonged to the Government in its sovereign capacity, *Atlas Roofing* did not control the outcome. . . .

The majority . . . writes . . . [that] this Court has "never held that the 'presence of the United States as a proper party to the proceeding is ... sufficient' by itself to trigger the exception." Here, too, the majority attacks a strawman. The SEC does not claim that the mere presence of the United States as a proper party necessarily means that a public right is at issue.[9]

. . . Congress did not just repackage a common-law claim . . . Congress created a new right unknown to the common law that, unlike common-law fraud, belongs to the public and inheres in the Government in its sovereign capacity. . . .

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[9] Indeed, "the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party."

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C

. . . [T]he majority's late-stage attempt to distinguish *Atlas Roofing* fails. The majority's principal argument that the OSHA scheme in *Atlas Roofing* "did not borrow its cause of action from the common law" and was instead a "self-consciously novel" scheme that "resembled a detailed building code," is flawed on multiple fronts.

First, OSHA's cause of action should be largely irrelevant under the majority's view that the remedy of civil penalties is effectively dispositive under *Tull*. *Atlas Roofing*, and many other cases involving non-Article III adjudications, also involved civil penalties designed to punish and deter, and yet the majority does not expressly disavow them. Logically, then, either *Atlas Roofing* and countless other cases were wrongly decided, or the majority's view on civil penalties is wrong.

Second, because the majority . . . fails to grapple with the fact that this case, like *Atlas Roofing* and unlike *Granfinanciera*, involves the Government acting in its sovereign capacity to enforce a statutory violation. That makes the right at issue a "public right" that Congress can take outside the purview of Article III, even when the new cause of action is analogous to a common-law claim.

Third, the relationship between the . . . antifraud provisions[] and common-law fraud is materially indistinguishable from the relationship between OSHA and the common-law torts of wrongful death and negligence. . . .

IV

A faithful and straightforward application of this Court's longstanding precedent should have resolved this case. Faithful "[a]dherence to precedent is 'a foundation stone of the rule of law.' " . . .

Today's decision disregards these foundational principles. . . . The majority's decision, . . . effects a seismic shift in this Court's jurisprudence. Indeed, "[i]f you've never heard of a statute being struck down on that ground," and you recall having read countless cases approving of that arrangement, "you're not alone." *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 294, 140 S.Ct. 2183, 207 L.Ed.2d 494 (2020) (KAGAN, J., concurring in judgment with respect to severability and dissenting in part).

The majority pulls a rug out from under Congress without even acknowledging that its decision upends over two centuries of settled Government practice. . . .

Following this Court's precedents . . . Congress has enacted countless new statutes in the past 50 years that have empowered federal agencies to impose civil penalties for statutory violations. . . . "By 1986, there were over 200 such statutes" and "[t]he trend has, if anything, accelerated" since then.

Similarly, there are, at the very least, more than two dozen agencies that can impose civil penalties in administrative proceedings. Some agencies, like the Consumer Financial Protection Bureau, the Environmental Protection Agency, and the SEC, can pursue civil penalties in both administrative proceedings and federal court. . . . [M]any others, can pursue civil penalties only in agency enforcement proceedings. . . .

Today's decision is a massive sea change. Litigants seeking further dismantling of the "administrative state" have reason to rejoice in their win today, but those of us who cherish the rule of law have nothing to celebrate.

* * *

Today's ruling is part of a disconcerting trend: When it comes to the separation of powers, this Court tells the American public and its coordinate branches that it knows best. . . .There are good reasons for Congress to set up a scheme like the SEC's . . . such as greater efficiency and expertise, transparency and reasoned decisionmaking, as well as uniformity, predictability, and greater political accountability. Others may believe . . . that a federal jury is a better check on government overreach. . . . These are policy considerations for Congress in exercising its legislative judgment and constitutional authority to decide how to tackle

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today's problems. It is the electorate, and the Executive to some degree, not this Court, that can and should provide a check on the wisdom of those judgments.

Make no mistake: Today's decision is a power grab. . . . In telling Congress that it cannot entrust certain public-rights matters to the Executive because it must bring them first into the Judiciary's province, the majority oversteps its role and encroaches on Congress's constitutional authority. . . . Judicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches. . . .

Because the Court disregards its own precedent and its coequal partners in our tripartite system of Government, I respectfully dissent.

Notes

1. The Court's use of the Seventh Amendment. The majority began its analysis in *Jarkesy* with the question of whether the Seventh Amendment right to jury trial attached to the SEC's enforcement action. It concluded that because securities fraud has a "close relationship" with common law fraud, the SEC enforcement proceeding was a "suit at common law" within the meaning of the Amendment. Justice Sotomayor points out in dissent that this is backward from the way the Court has previously conducted Seventh Amendment inquiries in the agency adjudication context. Because the Seventh Amendment only applies to cases in federal court, she argues, the Court has consistently started by asking if the proceeding was allowed to be brought in an agency proceeding under Article III. Only if the case was required to go to federal court under Article III did courts ask if the Seventh Amendment required a jury trial.

What is the significance, if any, of this debate to the outcome of *Jarkesy* or the future of agency adjudication? Did it matter that the majority performed the Seventh Amendment analysis first and then framed the Article III public rights analysis in terms of claims that are traditionally "the subject of a suit at the common law?"

2. *Granfinanciera* and *Tull*. The majority relied heavily on *Granfinanciera* and *Tull* to support its conclusions that the SEC's enforcement action against Jarkesy was covered by the Seventh Amendment and did not fit within the "public rights exception," which would have allowed the action to proceed in the agency. The SEC and the dissent distinguish both cases. What were the grounds on which they were distinguished and did you find those distinctions persuasive?

3. Article III's "arcane distinctions and confusing precedents." Many agencies, like the SEC (and our fictional WTC, for that matter) can act in ways that look very much like a court, conducting trial-like procedures to find facts, apply law, and issue orders to specific parties. Although it may seem difficult to square this power with Article III, non-Article III tribunals have been determining matters that seem amenable to judicial resolution throughout the history of the Republic. *See, e.g., American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828) (affirming exercise by non-Article III "territorial court" of jurisdiction over admiralty claim). The scope of congressional power to grant adjudicatory authority to non-Article III tribunals has presented one of the thorniest problems in all of constitutional law. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring) (observing that this doctrine is rife with "frequently arcane distinctions and confusing precedents"). How would you characterize *Jarkesy*'s response to the difficulty of determining the permissible scope of non-Article III adjudicative authority? Was it an expansion of the "public rights exception"? A contraction? Neither?

4. "Adjuncts" can help the courts. No one doubts that a judge can, consistent with Article III, properly hire a clerk to carry out tasks such as the initial drafting of opinions. This type of assistance does not threaten usurpation of the "judicial power" so long as the judge retains sufficient control over the decisionmaking process and outcome. This idea finds expression in legal doctrine in the "adjunct theory" of administrative adjudication, which is closely associated with *Crowell v. Benson*, 285 U.S. 22 (1932). *Cf.* Richard Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 933 (1988)

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(arguing for an "appellate review" approach to the Article III problem, under which "sufficiently searching review of a legislative court's or administrative agency's decision by a constitutional court will always satisfy the requirements of article III").

Crowell addressed the constitutionality of a federal statutory scheme that required employers to provide compensation on a strict liability basis for work-related injuries that occurred on navigable waters of the United States. The statute gave the task of determining facts to the United States Employees' Compensation Commission. The Commission's findings were subject to deferential judicial review to determine if they were "supported by evidence." Responding to this allocation of factfinding power, the Court observed, "there is no requirement that, in order to maintain the essential attributes of the judicial power all determinations of fact in constitutional courts shall be made by judges." 285 U.S. at 51. Indeed, in common law cases, juries are constitutionally required for this purpose; in equity and admiralty, courts have commonly used masters, commissioners, and assessors to determine certain factual matters, such as amounts of damages. *Id*. Turning to the particulars of the scheme in *Crowell*, the Court concluded that the Commission could, consistent with Article III, determine "nonjurisdictional" facts subject only to deferential review because: (a) the agency's jurisdictional reach was limited in scope, "being confined to the relation of master and servant"; (b) its role in factfinding was similar to "the familiar practice of commissioners and assessors"; (c) the courts maintained "full authority … to deal with matters of law"; and (d) factfinding by the Commission was "essential in order to apply [statutory] standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law." *Id*. at 54.

The Court reserved special treatment for questions of "jurisdictional" or "constitutional" fact. In *Crowell*, jurisdictional facts included whether an injury occurred on navigable waters of the United States and whether a master-servant relation existed. These conditions had to be satisfied for the Commission to have statutory and constitutional authority to act. The Court held that Article III courts must retain *de novo* control over the determination of such "fundamental" facts. This distinction — between "ordinary" facts on the one hand and "jurisdictional" or "constitutional" or "fundamental" facts on the other — proved very hard to maintain, and administrative law has essentially abandoned it.

Fifty years later, in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court refused to apply the adjunct theory to save the newly reorganized bankruptcy courts from an Article III attack. The Bankruptcy Act of 1978 granted bankruptcy courts jurisdiction to issue final judgments "in all civil proceedings arising under title 11 or arising in or related to cases under title 11." Bankruptcy judges, however, do not enjoy the constitutional tenure and salary protections of Article III judges. Justice Brennan's plurality opinion distinguished *Crowell* on grounds including: (a) the bankruptcy judges' subject matter jurisdiction, as just noted, was far broader; (b) whereas the agency in *Crowell* "possessed only limited power to issue compensation orders pursuant to specialized procedures," the bankruptcy judges could "exercise all ordinary powers of district courts," including, inter alia, issuing "any order, process, or judgment appropriate for the enforcement of the provisions of Title 11"; and (c) the agency orders in *Crowell* required judicial enforcement to become effective, whereas bankruptcy judges issued final judgments that became binding absent appeal. *See also Stern v. Marshall*, 131 S. Ct. 2594, 2618–19 (2011) (applying these same factors to conclude that bankruptcy courts could not be considered "adjuncts" of the district courts for the purpose of resolving a common-law tort counterclaim brought by a debtor in bankruptcy against a creditor). (For further discussion of *Stern*, see note 9, *infra*.)

What role, if any, did the "adjunct" theory seem to play in *Jarkesy*?

5. The difficult "public rights" doctrine. The public rights doctrine, as it has most frequently been called, is generally traced back to *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (1856), which challenged the validity of proceedings by which the federal government, acting without judicial authorization, seized and sold the property of a federal customs collector after an audit of his accounts showed he owed the government $1,374,119. In the course of upholding this extra-judicial process, the

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Court observed:

> [W]e think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

59 U.S. at 284. The sale of the collector's property fell on the "public rights" side of this dichotomy because it could be challenged only if Congress waived the government's sovereign immunity. As Chief Justice Roberts explained many years later, commenting on the "whole point" of *Murray's Lessee*, "Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all." *Stern v. Marshall*, 131 S. Ct. 2594, 2612 (2011).

6. *Northern Pipeline*'s categorical approach to public rights. In his plurality opinion in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Justice Brennan used this notion of "public rights" to justify ruling that the newly reorganized bankruptcy courts could not constitutionally resolve contract claims between private parties. He explained that the public rights doctrine "extends only to matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments, … and only to matters that historically could have been determined exclusively by those departments." *Id*. at 67 (citations omitted). By contrast, "the liability of one individual to another under the law as defined, is a matter of private rights." *Id*. at 69 (quotation marks omitted). The contract claim in *Northern Pipeline* was, on this approach, clearly a "private right," and it therefore could not be adjudicated by non-Article III bankruptcy courts.

7. The Court's pragmatic balancing approach in *Schor*. For many years, the leading case on the scope of agency adjudicative power consistent with Article III was *CFTC v. Schor*, 478 U.S. 833 (1986). It took a practical, functionalist approach that sought to synthesize many—if not all—of the approaches to this problem in the Court's precedents.

The Commodities Exchange Act (CEA) prohibits fraudulent or manipulative conduct in the commodities market. It also created an independent agency, the Commodities Futures Trading Commission (CFTC), to enforce the Act. The CEA provides that any person injured by a commodity broker's violation of the Act may bring a reparations action before the CFTC. The CFTC also promulgated a regulation that allows it, in a reparations proceeding, to adjudicate counterclaims "aris[ing] out of the transaction or occurrence . . . set forth in the complaint."

Schor brought a reparations claim before a CFTC administrative law judge (ALJ) seeking reparations against Conti, his commodities broker, for violating the CEA. Conti counterclaimed for debts Schor allegedly owed him. Conti prevailed in the CFTC proceeding and Schor sought review, arguing (in a blatant display of sour grapes) that the CFTC ALJ did not have statutory authority to adjudicate Conti's counterclaim. On review, the D.C. Circuit held that the CEA did not grant the CFTC statutory authority to determine Conti's counterclaim.

The Supreme Court, in an opinion drafted by Justice O'Connor, held that the CFTC's resolution of Conti's counterclaim not only was permitted by the CEA, but also was valid under Article III and the public rights doctrine. Most importantly for present purposes, *Schor* tackled the sticky constitutional question of when agencies may adjudicate a common law claim between private parties (Conti's counterclaim against Schor was a traditional common law debt action). Remember that claims involving the agency as a party had generally been assumed to involve public rights and therefore be available in non-Article III courts.

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See, e.g., *Atlas Roofing* and *Northern Pipeline*, *supra*. The *Schor* Court began by describing the two constitutional problems raised by agency adjudication. First is the individual liberty issue. Agency adjudicators are not independent in the same sense as Article III judges because they do not enjoy life tenure or salary protection. Agency adjudicators' lack of independence makes them less likely to be impartial, the argument goes, and therefore the agency adjudication infringes on the parties' liberty interest in a neutral arbiter for their hearing. The Court quickly dispensed with the individual liberty argument in Schor's case. It held that Schor waived his right to an Article III court by consenting to having his claim resolved before the CFTC and "by expressly demanding that [Conti] proceed with [his] counterclaims in the reparations proceedings rather than before the District Court."

Second is the structural issue. By allowing agency adjudicators to perform functions assigned to Article III judges by the Constitution, agency adjudication upsets the separation of powers in our federal system. Because it is built into the Constitution, much like federal subject matter jurisdiction, the parties cannot overcome a structural problem simply by consenting to have their claims resolved by an agency adjudicator. Most of the Court's analysis in *Schor* addressed the structural argument. After much discussion of relevant precedent, the Court articulated a balancing test to determine if an agency's exercise of adjudicative power violates Article III:

> In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are [1] the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, [2] the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [3] the origins and importance of the right to be adjudicated, and [4] the concerns that drove Congress to depart from the requirements of Article III.

This four-part balancing test—when combined with considerations of individual liberty through consent—made up the *Schor* test within the public rights doctrine. The first two factors implicated adjunct theory, assessing whether an agency adjudicator is, one might say, helping the federal courts or displacing them. The first factor asked whether an agency adjudicator is engaging in core judicial functions, such as sentencing people to prison, presiding over jury trials, or holding parties in contempt. *See Crowell*, *supra* note 4. The second factor reflects the generalist nature of the federal judiciary; if agency adjudicators are given authority over too wide a range of subject matters or types of cases, they can begin to resemble generalist Article III judges in a way that could impermissibly intrude on the judiciary's role in our constitutional order.

The third factor, "the origins and importance of the right to be adjudicated," implicated the "public rights" issue. At the time *Schor* was decided, public rights cases included those in military or territorial courts, where the government is a party, and cases like *Schor* where a claim between private parties was closely related to the agency's regulatory scheme. *See Northern Pipeline, supra* note 6; *Granfinanciera*, *infra* note 8. Critically, *Schor* characterized the issue of whether a right is "public" or "private" as a factor to be considered in determining whether agency adjudication was consistent with Article III. A determination that a right was private weighed against the constitutionality of agency authority but did not necessarily determine it.

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The fourth factor, whether Congress had good reasons for its allocation of authority, was, as Justice Brennan pointed in dissent, something of a throwaway because one can almost always find a "good" reason for what Congress does.

Applying this balancing test, the Court in *Schor* held that agency adjudication of Conti's counterclaim was consistent with Article III. The ALJ was not exercising any of the core powers of the judiciary. CFTC jurisdiction was limited to violations of the CEA, CFTC regulations, and counterclaims "arising out of" those violations, and Conti's counterclaim was closely related to the CFTC regulatory scheme. Permitting the CFTC to adjudicate a "narrow class of common law claims as an incident" to its primary jurisdiction did not threaten separation of powers. Finally, Congress granted the CFTC authority over counterclaims like Conti's because CFTC adjudication is faster and cheaper than federal court and because CFTC adjudicators have greater expertise in the regulatory scheme and related claims than the federal judiciary.

Schor was a pragmatic, functionalist attempt by a seven-member majority of the Court to find an approach to the public rights doctrine that incorporated Court precedent and balanced congressional intent and agency expertise against the value of an independent judiciary. Perhaps ironically given how the doctrine has developed, the two dissenters in *Schor*, Justices Brennan and Marshall, were its most progressive justices. They objected to the majority's holding on individual liberty grounds, reflecting concern about how agency adjudicators' lack of independence could impact less sophisticated or under-resourced parties.

The Chief Justice doesn't mention *Schor* in *Jarkesy*. Did the latter overrule the former? How would *Schor* turn out under the *Jarkesy* framework?

8. Back to bankruptcy court and the Seventh Amendment with *Granfinanciera*. The *Jarkesy* Court relied heavily on *Granfinanciera* for its combination of Seventh Amendment and public rights analyses. *Granfinanciera* involved a fraudulent conveyance action in a bankruptcy proceeding. A fraudulent conveyance occurs when a debtor makes a transfer prior to the bankruptcy and the debtor "received less than a reasonably equivalent value in exchange for such transfer." Under the Bankruptcy Code, a bankruptcy trustee can void such a transfer through a fraudulent conveyance action, which because it was designated a "core [bankruptcy] proceeding[]" by Congress, could be brought before a non-Article III bankruptcy judge without a jury trial. In *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33 (1989), the bankruptcy trustee brought suit in district court challenging an alleged fraudulent conveyance from the debtor to Granfinanciera. The action was referred to the bankruptcy court, which denied Granfinanciera's request for a jury trial.

The issue on appeal to the Supreme Court was whether this designation was permissible under the Seventh Amendment and the public rights doctrine. The Court explained that the public rights question must be answered first: "[I]f Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Id.* at 53-54. It then clarified, citing *Atlas Roofing*, that cases where the government is a party are recognized as public rights cases: "Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." In addition to claims where the government is a party, a public right also exists "[i]f a statutory right is [] closely intertwined with a federal regulatory program."

The Court held that the statutory provision allowing the fraudulent conveyance action in a bankruptcy (non-Article III) court was invalid because it violated both the public rights doctrine and the Seventh Amendment. As to the public rights doctrine, because the action was between private parties, the Court focused on whether the private cause of action was "closely intertwined" with the regulatory scheme (bankruptcy law), and concluded it was not because "fraudulent conveyance actions by bankruptcy trustees . . . 'constitute no part of the proceedings in bankruptcy but concern controversies arising out of it' . . . [and thus] more nearly resemble state-law contract claims" than claims to a portion of the proceeds in

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bankruptcy. *Id.* at 56. Since the action could not be heard in bankruptcy court (i.e. had to be brought in an Article III court), the next question was whether it was covered by the Seventh Amendment's right to a jury trial as an action that "from [its] nature [is] subject to 'a suit at common law.'" The Court again held in the affirmative, resulting in the action not only being unavailable in a bankruptcy proceeding, but also being subject to a jury trial under the Seventh Amendment.

Although *Granfinanciera* is often characterized as a Seventh Amendment decision, the Court treated the public rights issue as not only a prerequisite, but also the effectively dispositive issue in the case. In the context of the public rights doctrine, it confirmed that claims between private parties could be heard by a non-Article III court provided those claims were sufficiently integrated with a federal regulatory program. Its holding that the fraudulent conveyance action in that case was not so integrated with a federal regulatory program as to qualify as a public right subject to non-Article III adjudication in a bankruptcy court was most easily understood as an application of established doctrine, rather than a shift in the standards for non-Article III adjudication.

9. *Stern* treats the public rights doctrine as categorical but blurry. Thirteen years before penning his majority opinion *in Jarkesy*, Chief Justice Roberts took a crack at the public rights doctrine in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). At issue was whether a bankruptcy court could constitutionally determine a compulsory counterclaim for tortious interference with an expected gift brought by Vickie Lynn Marshall (popularly known as "Anna Nicole Smith") against Pierce Marshall, the son of Vickie's deceased husband, octogenarian Texas billionaire J. Howard Marshall II. Vickie claimed that J. Howard, whom she had married about a year before his death, intended to establish a trust for her benefit, but that Pierce tortiously interfered with the gift. By the time the litigation reached the Supreme Court for a second time in 2011, both Vickie and Pierce were dead, but their estates carried on the battle. Writing for a five-justice majority, Chief Justice Roberts concluded that the bankruptcy court could not determine the state-law counterclaim consistent with Article III because: (a) the claim did not implicate public rights; and (b) the bankruptcy court was not acting as an "adjunct" to an Article III court.

Consistent with the Court's post-*Northern Pipeline* cases, the Chief Justice characterized the category of "public rights" very broadly, reaching "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." *Id*. at 2613. "Public rights" must be "integrally related to particular federal government action." *Id*. With the stage thus set, the Chief Justice attempted to reconcile *Schor*'s multi-factor framework with the categorical approach that *Schor* had expressly rejected. He explained that *Schor* had rested on the following observations:

> (1) the claim and the counterclaim concerned a "single dispute" — the same account balance; (2) the CFTC's assertion of authority involved only "a narrow class of common law claims" in a "'particularized area of law'"; (3) the area of law in question was governed by "a specific and limited federal regulatory scheme" as to which the agency had "obvious expertise"; (4) the parties had freely elected to resolve their differences before the CFTC; and (5) CFTC orders were "enforceable only by order of the district court."

Stern, 131 S. Ct. at 2613 (quoting *Schor*). The most important of these factors was that Schor and Conti were fighting about the same account balance, and it was therefore "necessary" to allow the agency to determine Conti's common-law counterclaim to preserve the functioning of the reparations system that Congress had designed. *Id*. Casting this point in terms of the Chief Justice's definition of "public rights," it was "essential" to allow the CFTC, an "expert agency," to resolve the counterclaim in order to effectuate "a limited regulatory objective within the agency's authority." *Cf. id*. at 2613. *Schor* was, despite all appearances, thus a "public rights" case after all.

Vickie's counterclaim for tortious interference, by contrast, could not be shoehorned into the category of public rights. The counterclaim was a creature of state-law that bore no necessary connection to the outcome of any claim created by federal law. *Id*. at 2614. The Court also found it significant that: (a) Pierce,

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unlike Schor, had not genuinely consented to non-Article III resolution of the claim; and (b) the bankruptcy courts, unlike the CFTC, were not confined to a "particularized area of the law" and had no special expertise for resolving common-law tort claims. *Id*. at 2615.

Justice Breyer, dissenting for four justices, criticized the majority for disregarding *Schor*'s multi-factor approach that treats the public-private dichotomy as one factor among several bearing on the Article III question. *Id*. at 2625–26. In response, the majority expressly limited the implications of *Stern* for agency authority, observing that the bankruptcy and agency contexts are "markedly distinct" and that "we do not in this opinion express any view on how the [public rights] doctrine might apply in that different context." *Id*. at 2615.

10. Where does *Jarkesy* leave us with the Seventh Amendment? With public rights? Stepping back for a bigger picture, *Jarkesy* looks likely to be a watershed opinion with major implications for the scope of agency adjudicative power. Regarding its potential implications, consider three things. First, *Jarkesy* appears to have flipped the Court's traditional order of asking first whether an agency's adjudication complies with Article III before addressing Seventh Amendment concerns. We now start with the Amendment and then ask, if needed, whether the public rights doctrine provides an exception to the right to jury trial. By starting with the Seventh Amendment, the Court may be putting added weight on whether the claims in the agency adjudication under review have a common law analogue. Think about how this could affect the public rights analysis given Chief Justice Roberts's emphasis on *Murray's Lessee* and its focus on whether the claims have a common analogue and his deemphasis (to put it mildly) on the "closely integrated" analysis in *Atlas Roofing* and *Schor*. Does putting the Seventh Amendment first make it easier for the Court to avoid more pragmatic Article III precedents and narrow the scope of public rights to only historical and common law analogues of its own choosing?

Second, we have the related problem of determining whether a claim assigned to agency adjudication bears enough resemblance to a common law analogue claim to trigger the Seventh Amendment. How close will be close enough? Consider in particular: Given the underlying logic of *Jarkesy*, is OSHA's authority to issue sanctions, upheld in *Atlas Roofing*, actually safe?

Third, we have the problem of determining the scope of the public rights "exception" to the Seventh Amendment and Article III. To delineate the scope of public rights in *Jarkesy*, the Court, rather than attempt much in the way of conceptual guidance, discussed various matters that "historically could have been determined exclusively by [the executive and legislative] branches." How complete is the list? Can the courts or Congress add to it? Why isn't the category, "cases in which the government is a party" on the list? Didn't *Granfinanciera* (citing *Atlas Roofing*) suggest that cases involving the government as a party categorically involve public rights? The *Jarkesy* majority rejected this argument as effectively dicta, and the dissent responded with its own counterargument (and supporting evidence). Which did you find more convincing? Regardless of their relative persuasiveness, it does not seem after *Jarkesy* that claims involving the government will be viewed as public rights in the same way they were under pre-*Jarkesy* precedent.

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

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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.

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

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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 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

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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."

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)).

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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 "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.

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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 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

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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 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

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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, 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

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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 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

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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 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."

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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.

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

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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 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

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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 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).

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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 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

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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

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[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 with the following:

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 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

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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 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

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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"?
- 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,

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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

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.

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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

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). …

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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 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. …

…

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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

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.

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

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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 528–532. 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

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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 "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

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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).

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

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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 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.

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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 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

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they have long lived under the watchful eye of EPA. That was true even before EPA began regulating carbon dioxide.

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 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

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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 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

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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 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.

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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." 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

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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 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

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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 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-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.

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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 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

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> 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. 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:

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> 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."

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

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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, 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 act 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 was probably the dominant approach prior to the end of the Supreme Court's most recent term, applied *Chevron* deference to the problem. As you will read later in Chapter 5, the Court overruled *Chevron*, leaving in its place a less deferential form of review called *Skidmore* respect (named for the case that first articulated the standard). This results in quite a bit of uncertainty as to the standard for determining whether the language of an agency's enabling act triggers the APA's formal adjudication requirement. It remains to be seen whether *Skidmore* respect will simply replace *Chevron* as the preferred approach for courts in determining whether an agency's enabling act requires formal adjudication under the APA, or whether some of the other approaches to interpreting § 554 (discussed in note 1 after *Dominion Energy*) will prevail.

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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. . . .
>
> 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.

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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, 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 nonstatutory 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

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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 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?

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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 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.

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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 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

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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).

At p. 530, substitute for note 10:

10. Causation and redressability. Most discussion of constitutional standing revolves around determining whether a plaintiff can lay claim to a proper "injury." There are, however, two more prongs to constitutional standing analysis: causation and redressability. They are often, but not always, two sides of the same coin. Where an agency action causes an injury, a court order setting aside that action will typically provide redressability.

Regarding causation, *Lujan* declares, "there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." 504 U.S. at 560 (cleaned up). As for redressability, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (cleaned up).

In *Food and Drug Administration v. Alliance for Hippocratic Medicine*, physicians and national associations challenged FDA actions that widened access to the abortion-inducing drug, mifepristone. 602 U.S. 367 (2024). Writing for a unanimous Court, Justice Kavanaugh held that the federal courts lacked Article III standing to hear the plaintiffs' claims. His opinion provided notable guidance on the causality requirement of standing.

As a general matter, causality is more difficult to establish for plaintiffs who, rather than being regulated parties themselves, instead complain of the government's "'unlawful regulation (or lack of regulation) of *someone else*.'" *Id.* at 382 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-562 (1992)). "[T]o thread the causation needle in those circumstances," a plaintiff must demonstrate that other parties will act in "predictable ways that in turn will likely injure the plaintiffs." *Id.* (cleaned up). Plaintiffs may not rely on "attenuated" or "speculative" links.

The task of determining whether causal connections are sufficient is not "mechanical" and implicates questions of degree. *Id.* at 384. Providing guidance for this inquiry, the Court

> has identified a variety of familiar circumstances where government regulation of a third-party individual or business may be likely to cause injury in fact to an unregulated plaintiff. For example, when the government regulates (or under-regulates) a business, the regulation (or lack thereof) may cause downstream or upstream economic injuries to others in the chain, such as certain manufacturers, retailers, suppliers, competitors, or customers. When the government regulates parks, national forests, or bodies of water, for example, the regulation may cause harm to individual users. When the government regulates one property, it may reduce the value of adjacent property. The list goes on. *Id.* (citations omitted).

The plaintiff doctors had contended that FDA's actions increasing access to mifepristone would cause them to suffer conscience injuries and economic injuries. The conscience injury claim was based on the idea that the FDA actions would lead more women to take mifepristone, suffer complications, and rush to emergency rooms where the plaintiff doctors might have to provide emergency abortions. The Court rejected this claim for standing on causation grounds, concluding that federal law ensured that the doctors, if ever confronted with these circumstances, would not need to perform abortions.

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Regarding economic injury, the doctors contended that FDA's actions would cause them to "divert[ ] resources and time from other patients to treat patients with mifepristone complications" and increase "risk of liability suits from treating those patients," which would "potentially increase[ ] insurance costs." *Id.* at 390. The Court characterized these claims as lacking record support and highly speculative.

More broadly, the Court was concerned not to create a novel rule of "doctor standing" that would allow doctors to challenge any "loosening of general public safety requirements simply because more individuals might then show up at emergency rooms or in doctors' offices with follow-on injuries." *Id.* at 391. After making this observation, the Court gave a list of parallel examples where causality would not be satisfied:

> EPA rolls back emissions standards for power plants—does a doctor have standing to sue because she may need to spend more time treating asthma patients? A local school district starts a middle school football league—does a pediatrician have standing to challenge its constitutionality because she might need to spend more time treating concussions? A federal agency increases a speed limit from 65 to 80 miles per hour—does an emergency room doctor have standing to sue because he may have to treat more car accident victims? The government repeals certain restrictions on guns—does a surgeon have standing to sue because he might have to operate on more gunshot victims?
>
> The answer is no: The chain of causation is simply too attenuated.

The Court is not always so strict on matters of causation/redressability. For an example of a blockbuster case that took a notably laxer approach, you might take a look at *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that Massachusetts had standing to challenge EPA's rejection of a petition for rulemaking to limit greenhouse gas emissions from new motor vehicles; rejecting argument that Massachusetts could not satisfy redressability given that an EPA rule plainly could not solve the problem of global climate change; holding, in essence, that redressability was satisfied on an every-little-bit-helps theory).

At p. 587, insert new note at end of section on finality:

8. Accrual, not finality, starts the clock for APA actions. This past term, the Supreme Court weighed in on a question about statutory limitations periods that could have significant consequences for agencies defending against judicial challenges. In *Corner Post Inc. v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024), the Court took up the question of when the general statute of limitation for actions against the government begins running in suits against an agency. 28 U.S.C. § 2401(a). Section 2401 is the default limitations provision for suits against the government under the APA. It bars suits against the government "within six years after the right of action first accrues." Corner Post challenged the Federal Reserve Board's Regulation II, which set a maximum "interchange fee" that merchants (like Corner Post) must pay debit card issuers in order to accept the cards as payment. Corner Post brought its suit more than six years after Regulation II became effective, but less than six years after Corner Post was first injured by the rule.

The Supreme Court held that a cause of action "accrues" within the meaning of § 2401(a) when the plaintiff is first injured. Justice Jackson dissented, arguing that the majority's holding will create a tremendous disruption in agency activity, as any aggrieved party can challenge agency action at any time after it becomes final, provided that it is within six years of the plaintiff's initial injury. The facts of the case demonstrate her point. Corner Post, a truck stop in North Dakota, was only added as a plaintiff to the case after two large trade organizations who initially challenged Regulation II had their claims dismissed as untimely under § 2401(a). The majority's interpretation is ripe for manipulation, Justice Jacson argued, as new plaintiffs can be created decades after an agency action goes final. *Corner Post* may not be as high profile as some of the Court's other recent administrative law decisions, but it may be just as consequential. While many agencies have more specific statutes of limitations that explicitly adopt the finality timeline, and others may seek to use rulemaking to do so in response to the Court's decision, reading the default

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statute to run only when an individual plaintiff is injured threatens to eviscerate "any limitations period for lawsuits that challenge agency regulations on their face."

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 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

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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 Notes 8a and 8b 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 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

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> 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.
>
> * * *
>
> 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."

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8b. Arbitrariness in the response to comments. In *Ohio v. EPA*, 144 S. Ct. 2024 (2024), the Court either engaged in what may be a relatively mundane arbitrary and capricious analysis or it fashioned a new approach to gauging the role of public comments in judicial review of agency rulemaking. Under the Clean Air Act (CAA), states submit plans for compliance with new air pollution standards to EPA. If EPA determines that the plans are inadequate, it may implement its own national plan. Part of EPA's consideration is whether a State's plan takes into account the downwind effect of its pollution measures on other States. In 2023, EPA rejected 23 states' implementation plans for its new ozone standards and promulgated its own plan—the "good neighbor plan." The good neighbor plan sought the most cost-effective means for achieving compliance with the new ozone standards by treating the action of all 23 states collectively.

The good neighbor plan was stayed pending judicial review in 12 of the 23 states it covers. Three other States argued that because the good neighbor plan is in effect in less than half of the states for which it was designed, and because it depends for its success on a coordinated effort among all 23 upwind States, it is arbitrary and capricious under the CAA, 42 U.S.C. § 7607(d)(9) (applying the same arbitrary and capricious standard as the APA).

The Supreme Court ruled 5-4 to stay the good neighbor plan on the basis that it is arbitrary and capricious. The majority pointed to comments submitted during the good neighbor plan's notice and comment period that it was designed for participation by all 23 covered states and the agency did not adequately explain why it would continue to be effective if fewer states participated. In part because 12 of the 23 covered states had already been awarded stays by other circuits, the Court held that the EPA's continued pursuit of its plan was arbitrary because it "failed to offer a rational connection between the facts found and the choice made." 144 S. Ct. at 2053 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). It rejected the EPA's argument that its severance provision, which stated that, even if the plan is found invalid with respect to some states, it can "continue to be implemented as to any remaining jurisdictions," addressed the problem of partial participation. *Id.* at 2051. While the EPA argued that the severability provision serves as a reasonable response to the commentors' concern, the Court held that the provision "did not address the applicants' concern [about less than 23 states being part of the plan] so much as sidestep it." *Id.* at 2055.

Justice Barrett's dissent offered a different account of the rulemaking record. It noted that although the state-specific data collected by EPA in preparing its plan focused on the pollution budget of each state, the "final rule suggests that EPA calculated cost-effectiveness thresholds based on . . . *national, industry-wide data*," and did not, "[c]ontrary to the Court's speculations . . . depend on the number of covered States." *Id.* at 2065 (emphasis in original). This focus on nationwide data, Justice Barrett argued, made the number of participating States irrelevant to the good neighbor plan's effectiveness and thus made the agency's decision to press ahead without full participation rational (i.e., not arbitrary and capricious).

Taken on its face, the majority opinion may simply represent a rigorous application of hard look review under the CAA's arbitrary and capricious standard. Justice Barrett's dissent, however, offers an alternative perspective that raises the specter of future disputes within the Court over the scope of an agency's obligation to respond to individual comments in rulemaking, an issue which could have far broader consequences going forward.

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At pp. 648-698, replace existing Part 5G.3, Review of Law with the following:

3. Review of Law

Courts generally take the view that they should be in charge of interpreting law. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (claiming for the courts the peculiar "province and duty … to say what the law is."). Their default position is that they interpret laws independently, without deferring to the views of nonjudicial actors. Such judicial independence is commonly thought to play an integral role in maintaining the "rule of law" as it helps ensure that those charged with enforcing the law do not twist it to mean whatever they would like.

In administrative law, the Supreme Court has sometimes been willing to carve out exceptions to the principle that courts exercise independent judgment to determine legal meaning. Two core rationales for this stance are agency expertise and congressional delegation. In this vein, it is plausible to think that the EPA will often know better than the courts how best to make sense of a complicated statute such as the Clean Air Act (CAA); it is also plausible to think that Congress, by specifically charging EPA with the task of enforcing this statute, may have in some sense delegated power to the agency to determine what it means. Such reasoning leads to the conclusion that, although a court would not defer, for example, to the EPA's interpretation of the Due Process Clause, perhaps the court should defer to the EPA's interpretation of the CAA (or regulations that the agency has promulgated pursuant to it).

In 1984, the Supreme Court crystalized the idea that courts should defer under some circumstances to an agency's reasonable construction of a statute that it administers in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). It seems clear that the Court, which decided the case with a bare six-justice quorum, did not at the time think of *Chevron* as fundamentally reworking the doctrine governing judicial review of issues of law. *Chevron* soon took on a life of its own, however, as the Department of Justice and Justice Scalia, among others, seized on it as a device to push executive branch statutory interpretations through the Court. Over the next forty years, federal courts cited *Chevron* over 18,000 times, and its framework became a foundational element of modern administrative law. The *Chevron* doctrine grew more complex as courts added threshold inquiries to determine which types of agency statutory constructions qualified for its favorable treatment. Administrative law professors wrote endless articles examining and critiquing the *Chevron* doctrine (hey, it's a living). Then, at some point in the early twenty-first century, destroying *Chevron* deference became an important project of elements of the conservative legal movement. This marked a flip from the original ideological valence of *Chevron*, which had been initially favored more by conservatives and opposed by progressives.

In 2024, efforts to overturn *Chevron* deference came to fruition in *Loper Bright Enterprises v Raimondo*, 144 S. Ct. 2244 (2024), which, in addition to extolling the virtues of courts exercising independent judgment to determine legal meaning, held that *Chevron* deference violated the APA's instruction that:

> [t]o the extent necessary to decision and when presented, [a reviewing court] shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

5 U.S.C. § 706.

The remainder of this subchapter first examines pre-*Chevron* doctrines governing judicial review of agency statutory interpretations before moving on to the *Chevron* doctrine itself. (You need to understand *Chevron* in case in case you encounter one of those 18,000 judicial opinions that cited it before it was overruled.) We will then turn to the Supreme Court's decision in *Loper Bright* eliminating *Chevron* deference to assess the current state of the law and whether it marks an improvement.

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a. Two Paradigms from Before the *Chevron* (R)evolution

Before *Chevron,* the case law governing judicial review to agency interpretations of law was famously something of a muddle. In some opinions, courts stated that deference to agency statutory interpretations was in order given agency expertise, especially where the agency's position had been consistent over time. Often, however, courts would independently determine the meaning of agency enabling acts without breathing a hint of deference, at least on the page.

This subpart will examine two especially important Supreme Court opinions from the pre-*Chevron* era, *Skidmore v. Swift & Co.* and *NLRB v. Hearst Publications Co.*, that identified circumstances where a court should extend some level of deference (or respect, which might be different) to an agency statutory construction. A couple of readings from now, you will want to consider the implications of *Loper Bright* for the doctrines of *Skidmore* and *Hearst.*

Lesson 5G.3.a. The WTC brought a § 7 enforcement action against Gallery, charging that it had violated § 5(b) of the WTCA in connection with its sale of hard apple cider under the "Apple Sue's" brand name. The labels for "Apple Sue's Cider" declare that it is "Nothing But the Best Apples!" The complaint against Gallery alleged that this label created a materially misleading impression that the cider is made entirely from freshly pressed apples when in fact it is made in part from apple concentrate and contains preservatives.

Section 2(f) of the WTCA defines "wine" as "includ[ing] any alcoholic drink made primarily from fermented grapes or an equivalent fruit." The conference committee report issued before passage of the WTCA states that "the statutory definition of 'wine' was intended to capture the common usage that alcoholic drinks made from raspberries, strawberries, and similar fruits are commonly considered 'fruit wines' by both producers and consumers."

Soon after the WTC was created twenty years ago, the agency published in the *Federal Register* a document titled, *Guidance on the Jurisdiction of the WTC*. This document included an interpretive rule that discussed the meaning of "equivalent fruit" as used by § 2(f). The WTC noted that the first definition of "equivalent" in *Merriam-Webster* is "equal in force, amount, or value." *Merriam-Webster*'s most pertinent definition of "equal" is "like in quality, nature, or status." As such, for fruit to be "equivalent" to "grapes" within the meaning of the Act, that fruit must be "equal" to or "like" grapes in some respect that logically relates to the meaning of "wine." The legislative history of the Act demonstrated that the purpose behind expanding the definition of "wine" beyond grape-based products was to align the jurisdiction of the agency with consumer perceptions. It followed that a particular piece of fruit should be considered "equivalent" to grapes if that particular fruit was used to make a beverage generally perceived by consumers as a type of "wine." On this approach, some fruit of a given type might be "equivalent" to grapes but some not, depending on usage. As an example, the *Guidance* noted that apples should be regarded as "equivalent" to grapes provided they are used to make a beverage that consumers generally regard as an apple wine. Apples are not "equivalent" to grapes if they are used for some other purpose, such as to make a beverage that consumers do not generally regard as wine, such as apple cider.

Last year, the WTC published the *Amended Guidance on the Jurisdiction of the WTC* in the *Federal Register*. The *Amended Guide* confirmed that fruit should be considered "equivalent" to grapes provided it is used to make a beverage that consumers regard as "wine." Equivalency should, however, be determined based on a type of fruit rather than on usage of particular fruits. It follows that all apples are "equivalent" to grapes because some apples are used to make a beverage that consumers generally regard as "wine." In support of this change, the *Amended Guidance* observed that the definition of "wine" includes "*any* alcoholic drink made primarily from" a fruit that is "equivalent" to "fermented grapes." WTCA § 2(f). Use of the term "any" indicated that "wine," as used in the statute, extends beyond beverages typically understood to be "wines." The *Amended Guide* added that this broadened definition would enable the WTC to avoid difficult line-drawing problems and gamesmanship by manufacturers.

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In the enforcement proceedings before the ALJ, Gallery contested the WTC's regulatory authority, contending that, in keeping with the agency's initial guidance and the WTCA's legislative history, "apple cider" is not "apple wine." The WTC insisted that its definitional approach in the *Amended Guidance* was correct.

In the alternative, the WTC contended that Gallery's product, Apple Sue's Cider, qualified as a "wine" under the earlier definitional approach. In support of this position, the WTC offered testimony of a qualified expert that the primary difference between "apple wine" and "apple cider" in the market is alcohol content. Apple wines typically are 12-14% alcohol by volume (ABV); apple cider typically has much lower, beer-like levels of 4.5-7.5% ABV. To attain higher alcohol content, winemakers add sugar during the winemaking process. Apple Sue's Cider has a 10% ABV, and sugar is added during fermenting. In this expert's opinion, these facts were more consistent with consumer expectations for wines rather than ciders.

Gallery countered with its own qualified expert, who explained that apple cider makers often add sugar to sweeten the beverage or speed fermentation. Gallery's expert also testified that, although it was true that traditional ciders typically have ABV levels in the 4.5-7.5% range, some drier ciders have levels as high as 12%. In response, the WTC observed that the difficulty of drawing lines on the margins between apple wine and apple cider supported the definitional approach of the *Amended Guidance*.

The ALJ rejected the definitional approach of the *Amended Guidance* as an unpersuasive, unjustified flip-flop. The ALJ also concluded that, accepting the testimony of both experts as true, Apple Sue Cider, though presenting an edge case, did not qualify as a "wine" made from fruit "equivalent" to fermented grapes under the definition of the initial *Guidance.* The ALJ therefore ordered dismissal.

On review, the WTC reversed. Regarding the jurisdictional issue, it held: (a) the definitional approach of the *Amended Guidance* was correct for the reasons given in that document, and Apple Sue's Cider qualified as "wine" under that definition; and (b) Apple Sue's Cider qualified as "wine" under the superseded definitional approach of the initial *Guidance* given its wine-like ABV level and the addition of sugar during manufacture.

Gallery sought review from the court of appeals. What do you see as the best arguments for either side on whether the WTC can regulate Apple Sue's Cider? How would you rule on them?

Background of *Skidmore v. Swift & Co.*

Employees of Swift & Co. agreed to spend several nights a week on company premises to respond to fire alarms. When not answering infrequent alarms, they stayed in a well-equipped "fire hall" with sleeping quarters, a pool table, a domino table, and a radio. The employees claimed that they were entitled to overtime under the Fair Labor Standards Act (FLSA) for this on-call time. The FLSA does not create a system for determining such disputes administratively. Instead, courts decide them. The FLSA does, however, create the post of Administrator with the power to initiate injunctive actions in court to require compliance with the Act. In the excerpt that follows, the Court discussed the level deference that courts should give to the Administrator's views on construction and implementation of the Act. What is this level of deference (sometimes called "*Skidmore* respect")? What rationales support it? What role did the absence of administrative adjudication play in the Court's discussion? (You will want to remember this last query when you read note 2 discussing the *Hearst* doctrine.)

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Skidmore v. Swift & Co.

323 U.S. 134 (1944)

MR. JUSTICE JACKSON delivered the opinion of the Court.

Seven employees of the Swift and Company packing plant at Fort Worth, Texas, brought an action under the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq., to recover overtime, liquidated damages, and attorneys' fees, totaling approximately $77,000. The District Court rendered judgment denying this claim wholly, and the Circuit Court of Appeals for the Fifth Circuit affirmed.

It is not denied that the daytime employment of these persons was working time within the Act. Two were engaged in general fire hall duties and maintenance of fire-fighting equipment of the Swift plant. The others operated elevators or acted as relief men in fire duties. They worked from 7:00 a.m. to 3:30 p.m., with a half-hour lunch period, five days a week. They were paid weekly salaries.

Under their oral agreement of employment, however, petitioners undertook to stay in the fire hall on the Company premises, or within hailing distance, three and a half to four nights a week. This involved no task except to answer alarms, either because of fire or because the sprinkler was set off for some other reason. No fires occurred during the period in issue, the alarms were rare, and the time required for their answer rarely exceeded an hour. For each alarm answered the employees were paid in addition to their fixed compensation an agreed amount, fifty cents at first, and later sixty-four cents. The Company provided a brick fire hall equipped with steam heat and air-conditioned rooms. It provided sleeping quarters, a pool table, a domino table, and a radio. The men used their time in sleep or amusement as they saw fit, except that they were required to stay in or close by the fire hall and be ready to respond to alarms. It is stipulated that 'they agreed to remain in the fire hall and stay in it or within hailing distance, subject to call, in event of fire or other casualty, but were not required to perform any specific tasks during these periods of time, except in answering alarms.' The trial court found the evidentiary facts as stipulated; it made no findings of fact as such as to whether under the arrangement of the parties and the circumstances of this case … the fire hall duty or any part thereof constituted working time. It said, however, as a 'conclusion of law' that 'the time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts,' and in its opinion observed, 'of course we know pursuing such pleasurable occupations or performing such personal chores does not constitute work.' The Circuit Court of Appeals affirmed.

… [W]e hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they way show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.

We do not minimize the difficulty of such an inquiry where the arrangements of the parties have not contemplated the problem posed by the statute. But it does not differ in nature or in the standards to guide judgment from that which frequently confronts courts where they must find retrospectively the effect of contracts as to matters which the parties failed to anticipate or explicitly to provide for.

Congress did not utilize the services of an administrative agency to find facts and to determine in the

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first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts. But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. *Wage and Hour Division, Interpretative Bulletin* No. 13.

The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call. Examples are an operator of a small telephone exchange where the switchboard is in her home and she ordinarily gets several hours of uninterrupted sleep each night; or a pumper of a stripper well or watchman of a lumber camp during the off season, who may be on duty twenty-four hours a day but ordinarily 'has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits.' Exclusion of all such hours the Administrator thinks may be justified. In general, the answer depends 'upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work.' 'Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer. …'

The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the work-week and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative

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regulations of the Treasury and of other bodies that were not of adversary origin.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

… [I]n this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an understanding of the law which we hold to be erroneous. Accordingly, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

Reversed.

Notes

1. *Skidmore* "deference" (or is it something else?). What is the rationale for what has commonly been called *Skidmore* "deference?" What does its practice require of a reviewing court? What aspects of an agency's decision affect or should affect its "weight"?

2. Consistency v. Flip-flops. The Supreme Court has frequently observed over the last two centuries that longstanding, uniform agency constructions are entitled to substantial judicial deference. *See, e.g.*, *United States v. Vowell*, 9 U.S. 368 (1810). What did *Skidmore* have to say about consistency? You will want to compare *Skidmore* on this point to what the Court had to say in *Chevron* and *Loper Bright*. Spoiler: Turns out the Supreme Court is not consistent about consistency.

3. *Hearst* and "mixed questions" of law and fact. In 1944 the Supreme Court issued not one but two opinions with lasting implications for judicial review of agency action. One of them was *Skidmore*. The other was *NLRB v. Hearst Publications, Inc*., 322 U.S. 111 (1944), which stands for the ideas that the courts are in charge of determining pure questions of statutory interpretation but that they should defer to agency decisions regarding how to apply broad statutory terms to specific facts.

To tackle *Hearst*, start with the proposition that statements about "evidentiary facts" use language that avoids legal terms of art to characterize events that occur in the world. For instance, the proposition, "the defendant dropped a banana peel," is a matter of evidentiary fact. Determinations of "ultimate fact" (or "material fact") cloak evidentiary facts in language with legal significance. For instance, one might infer from the (evidentiary) fact that the defendant dropped a banana peel the (ultimate) fact that the defendant was "negligent." To use some of Judge Frank's language from the remand of *Universal Camera*, determinations of ultimate fact are the result of "derivative" or "secondary" inferences that decisionmakers draw from evidentiary facts. (See note 2 following *Universal Camera* and *Penasquitos* above.) Recall also from *Universal Camera* that judicial review of such factual determinations is supposed to be quite deferential.

Of course, any application of a legal term of art to a given set of facts about the world may raise problems concerning the legal term's meaning — one cannot decide who has been "negligent" without some notion of what this term means. Courts therefore sometimes speak of such determinations as presenting "mixed questions" of law and fact. The upshot of all this nomenclature is that several phrases — "ultimate fact," "material fact," "derivative inference," "secondary inference," and "mixed question" — all refer to the problem of characterizing facts in language with legal significance.

One can contrast "mixed questions" of law and fact with "pure" questions of law. By definition, it is impossible to determine a mixed question without knowing the facts of a particular case (*e.g.*, did the defendant drop a banana peel?). By contrast, one can decide a pure question of law without knowing any particular facts about what particular person did what to whom. For instance, one does not need to know

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whether a given person ran a red light to determine whether running a red light is negligent per se.

In the *Hearst* case, the Court reviewed the NLRB's determination that newspaper-distributors called "newsboys" were "employees" within the meaning of the National Labor Relations Act. The NLRB's decision meant that the newsboys had a right to bargain collectively with their employers. This task required the Court to confront both a pure question of statutory interpretation and a mixed question of law and fact. The pure question was whether the term "employee" as used by the NLRA incorporates by reference common law standards for establishing an employment relationship, or whether its meaning is to be determined entirely by reference to the terms and purpose of the statute. Applying its own independent judgment, the Court held that statutory sources, not common law, determine the meaning of "employee." In essence, the Court said that the meaning of "employee" in any particular situation was to be determined in light of the statutory goal to "bring industrial peace," not by common-law concepts that may have no relationship to that goal.

This determination of "pure" law left open the mixed question of whether the newsboys were "employees" as that term is used in the NLRA. To make this determination, one needs to know how the Hearst-newsboy relationship relates to the goal of achieving industrial peace. The Court explained that, at least where Congress has assigned the initial determination of the facts of a case to an agency, courts should defer to reasonable administrative determinations of such mixed questions:

> It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board. *Gray v. Powell*, 314 U.S. 402, 411.
>
> In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. *Undoubtedly questions of statutory interpretation*, especially when arising in the first instance in judicial proceedings, *are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute*. But where the question is one of *specific application of a broad statutory term* in a proceeding in which the agency administering the statute must determine it initially, *the reviewing court's function is limited*. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, or that he was injured 'in the course of his employment', and the Federal Communications Commission's determination that one company is under the 'control' of another, *the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law.*
>
> In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and

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> their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act,' the Board concluded that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion. [Emphasis added.]

In the preceding passage, what justifications does the Court offer for reviewing mixed questions regarding "specific application of a broad statutory term" deferentially? What approach does the Court prescribe for pure questions of statutory interpretation? Can you see the shadow of *Skidmore* anywhere?

4. Functional analysis. In a discussion of the scope of the deferential clear-error standard governing appellate review of district court fact-finding, Judge Posner offered the following explanation for deferential review of mixed-questions:

> The proper standard of review depends on the character of the ruling sought to be reviewed. If it is a ruling on a pure question of law, review is plenary because it is intolerable to have the law differ from district judge to district judge. If it is a pure question of fact — a "who did what where when and to whom" kind of question, "pure" in the sense that no legal knowledge or instruction is necessary to answer it — then the correct standard is clear error.
>
> If it is a "mixed" question of law and fact or, the same thing under a different label, an "ultimate" question of fact — that is, if it is the application of a legal standard (such as negligence) to the pure facts (what the defendant did) to yield a legal conclusion (the defendant was or was not negligent) — then again, except in those few, mainly constitutional cases in which the Supreme Court has decreed plenary review of such determinations, the clear-error standard governs. The application of a legal rule or standard to the particular facts of particular cases will yield different outcomes from case to case depending on the facts of the individual case. So uniformity of outcome is unattainable; and as divergent applications of law to fact do not unsettle the law — doctrine is unaffected — a heavy appellate hand in these cases is unnecessary to assure the law's clarity and coherence.
>
> Then too the court that finds the facts will know them better than the reviewing court will, and so its application of the law to the facts is likely to be more accurate.

Thomas v. General Motors Acceptance Corp., 288 F.3d 305, 307–308 (7th Cir. 2002) (internal citations omitted).

5. The continuing relevance of mixed questions in federal law. The mixed question concept is an important one to master in part because it can apply in a wide variety of contexts beyond administrative law — *cf.* Judge Posner's application of it to "negligence" above. In federal administrative law, the *Hearst* approach was long eclipsed by the *Chevron* doctrine, the topic of the next reading. Later, you will want to check: What effect did *Loper Bright* have on the *Hearst* approach?

b. The *Chevron* (R)evolution

In *Loper Bright Industries v. Raimondo*, 144 S. Ct. 2244 (2024), the Supreme Court overruled the *Chevron* doctrine. Why study it now? One answer is that, during the *Chevron* doctrine's forty-year lifespan, it was cited by over 18,000 opinions in the federal courts. You may have to read, understand, and use some of these opinions at some point. Another answer is that the debate over *Chevron* implicates important and,

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dare-we-say, interesting issues of separation of powers and the appropriate role of a generalist, unelected judiciary in policing the work of expert agencies answerable to the political branches. What rationales did the Court offer in *Chevron* to justify deference to agency statutory interpretations? Do you find them persuasive?

Lesson 5G.3.b. In Lesson 5G.3.b., we confronted the problem of whether the WTC had jurisdiction over Apple Sue's Cider. How would application of *Chevron* deference change the method for determining this question? Would it change the outcome? Would these changes be good or bad?

Background of *Chevron, U.S.A., Inc. v. NRDC*

The Clean Air Act Amendments of 1977 established an expensive permitting process applicable to "new or modified stationary sources" of air pollution in "nonattainment" states that had not yet managed to comply with standards created by EPA pursuant to the Clean Air Act. The new provisions naturally raised the problem of defining "stationary source." More specifically, suppose that a plant contains four smokestacks. Is each smokestack an individual "stationary source"? Or do they together constitute just one? This latter characterization implicates the "bubble concept," which encases an entire plant in a metaphorical bubble. Equipment in the plant may be added or altered, without triggering permitting requirements, so long as the total amount of emissions escaping the bubble does not increase.

To grasp the regulatory significance of these bubbles, now suppose that the four smokestacks in our example each emit 100 tons per year of air pollutants. The owner wishes to add new, super-efficient manufacturing equipment expected to double production. It will also, however, require a fifth smokestack that is also expected to emit 100 tons per year of air pollutants. If the bubble concept applies, the owner need not go through a difficult permitting process so long as it can shave 25 tons per year from the emissions of each of the four old smokestacks. This approach would keep total emissions escaping the bubble at 400 tons per year, but with greater production. If "stationary source" refers to individual smokestacks, however, then the new equipment will require permitting, including meeting some expensive pollution-reduction requirements. If the expense is too great, the owner will forgo building the fifth smokestack.

The Clean Air Act Amendments of 1977 do not contain any express provisions clearly governing whether "stationary source," as used by that statute, permits application of the "bubble concept." The EPA struggled for several years to determine its stance on this issue. In August 1980, the agency promulgated a rule that adopted a bifurcated approach that required application of the bubble concept for programs designed to *maintain* air quality but barred its application for programs designed to *improve* air quality in "nonattainment" states. The agency relied heavily on two recent D.C. Circuit court opinions to reach this result. In October 1981, after the Reagan administration had swept into power on a deregulatory agenda, the agency reversed course. Its new rule allowed "nonattainment" states implementing the permitting program to apply the bubble concept and adopt a plantwide definition of "stationary source." The Natural Resources Defense Council challenged this rule, and the D.C. Circuit, following its own earlier decisions, set the rule aside. The Supreme Court reversed, upholding the EPA's new definition as a "permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth."

Along the path to this conclusion, the Court accidentally revolutionized the law of judicial deference with the *Chevron* two-step, which you have already encountered repeatedly in this course. As you read the excerpt below, look for any available guidance concerning the nature of these steps and how to apply them. Examine carefully how the Court deployed the available statutory language, legislative history, and policy concerns. How does the Court's treatment of policy in *Chevron* compare to its treatment of policy in *State Farm*? On a broader note, what rationales justify *Chevron* deference? Are they persuasive?

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Chevron, U.S.A., Inc. v. Natural Resources Defense Council

467 U.S. 837 (1984)

JUSTICE STEVENS delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source."[2] Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October 14, 1981. Respondents filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. § 7607(b)(1). The Court of Appeals set aside the regulations.

The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source, to which the permit program … should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. Since the purpose of the permit program — its "*raison d'être*," in the court's view — was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, and we now reverse.

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals. Nevertheless, since this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

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[2] "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act."(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

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II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[11]

"The power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations

> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, *e.g., National Broadcasting Co. v. United States*, 319 U.S. 190; *Labor Board v. Hearst Publications, Inc.*, 322 U.S. 111; *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793; *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194; *Labor Board v. Seven-Up Bottling Co*., 344 U.S. 344.
>
> "… If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961).
>
> *Accord Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699–700 (1984).

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general

[9] The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Massive string cite omitted.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

[11] The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. [String cite omitted.]

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context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

III

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. The Clean Air Amendments of 1970 "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," but continued to assign "primary responsibility for assuring air quality" to the several States. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's) and § 110 directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, § 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided:

> "For purposes of this section: …
>
> "(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant."

In the 1970 Amendments that definition was not only applicable to the NSPS program required by § 111, but also was made applicable to a requirement of § 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards.

In due course, the EPA promulgated NAAQS's, approved SIP's, and adopted detailed regulations governing NSPS's for various categories of equipment. In one of its programs, the EPA used a plantwide definition of the term "stationary source." In 1974, it issued NSPS's for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant.[17] …

IV

The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments.[22]

Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. … [T]he SIP's were required to contain a number of provisions designed to

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[17] The Court of Appeals ultimately held that this plantwide approach was prohibited by the 1970 Act, see *ASARCO Inc*., 578 F.2d, at 325–327. This decision was rendered after enactment of the 1977 Amendments, and hence the standard was in effect when Congress enacted the 1977 Amendments.

[22] Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in § 172(b)(6) of the Act, 42 U.S.C. § 7502(b)(6).

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achieve the goals as expeditiously as possible.

Most significantly for our purposes, the statute provided that each plan shall

> "(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173. …"

Before issuing a permit, § 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to § 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER).

The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in § 111(a)(3), applicable by the terms of the Act to the NSPS program. Section 302(j), however, defines the term "major stationary source" as follows:

> "(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." …

VI

As previously noted, prior to the 1977 Amendments, the EPA had adhered to a plantwide definition of the term "source" under a NSPS program. After adoption of the 1977 Amendments, proposals for a plantwide definition were considered in at least three formal proceedings.

In January 1979, … [for] those areas that did not have a revised SIP in effect by July 1979, the EPA rejected the plantwide definition; on the other hand, it expressly concluded that the plantwide approach would be permissible in certain circumstances if authorized by an approved SIP. …

In April, and again in September 1979, the EPA published additional comments in which it indicated that revised SIP's could adopt the plantwide definition of source in nonattainment areas in certain circumstances. On the latter occasion, the EPA made a formal rulemaking proposal that would have permitted the use of the "bubble concept" for new installations within a plant as well as for modifications of existing units. …

Significantly, the EPA expressly noted that the word "source" might be given a plantwide definition for some purposes and a narrower definition for other purposes. It wrote:

> "Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. 'Building, structure, facility or installation' means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out."[28]

The EPA's summary of its proposed Ruling discloses a flexible rather than rigid definition of the term

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[28] In its explanation of why the use of the "bubble concept" was especially appropriate in preventing significant deterioration (PSD) in clean air areas, the EPA stated: "In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity."

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"source" to implement various policies and programs. …

In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these cases. The EPA took particular note of the two then-recent Court of Appeals decisions, which had created the bright-line rule that the "bubble concept" should be employed in a program designed to maintain air quality but not in one designed to enhance air quality. Relying heavily on those cases, EPA adopted a dual definition of "source" for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plantwide definition because it "would bring in more sources or modifications for review," but its primary legal analysis was predicated on the two Court of Appeals decisions.

In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." 46 Fed.Reg. 16281. In the context of that review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." Moreover, the new definition "would simplify EPA's rules by using the same definition of 'source' for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency." Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQS's as expeditiously as possible. These conclusions were expressed in a proposed rulemaking in August 1981 that was formally promulgated in October.

VII

In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality. Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition — if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. They thus contend that the EPA rules adopted in 1980, insofar as they apply to the maintenance of the quality of clean air, as well as the 1981 rules which apply to nonattainment areas, violate the statute.

Statutory Language

The definition of the term "stationary source" in § 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this definition applicable to the permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from § 302(j), which defines the term "major stationary source." We disagree with petitioners on this point.

The definition in § 302(j) tells us what the word "major" means — a source must emit at least 100 tons of pollution to qualify — but it sheds virtually no light on the meaning of the term "stationary source." It

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does equate a source with a facility — a "major emitting facility" and a "major stationary source" are synonymous under § 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose. Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of § 302(j) simply does not compel any given interpretation of the term "source."

Respondents recognize that, and hence point to § 111(a)(3). Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute. As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant. A "word may have a character of its own not to be submerged by its association." On the other hand, the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms — a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that § 111(a)(3) defines "source" as that term is used in § 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents "were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire. …" … We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns — the allowance of reasonable economic growth — and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. Indeed, its reasoning is supported by the public record developed in the

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rulemaking process,[36] as well as by certain private studies.[37]

Our review of the EPA's varying interpretations of the word "source" — both before and after the 1977 Amendments — convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly — not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. The distinction the court drew may well be a sensible one, but our labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product. We conclude that it was the Court of Appeals, rather than Congress or any of the decisionmakers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency.

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

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[36] See, for example, the statement of the New York State Department of Environmental Conservation, pointing out that denying a source owner flexibility in selecting options made it "simpler and cheaper to operate old, more polluting sources than to trade up. …" App. 128–129.

[37] "Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control. … [The 'bubble' or 'netting' concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply." L. Lave & G. Omenn, Cleaning Air: Reforming the Clean Air Act 28 (1981) (footnote omitted).

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Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. The judgment of the Court of Appeals is reversed.

It is so ordered.

Notes on Chevron *Deference*

1. Deference round robin. How might *Skidmore* have applied to the facts presented in *Chevron*? How might *Hearst* principles have applied? By the way, Justice Stevens cited both of these cases in *Chevron*, which he declared was based on "well-settled principles." 467 U.S. at 845.

2. The *Chevron* "two-step" and its rationales. Justice Stevens' description of the judicial method for reviewing an agency's construction of a statute it administers calls for a two-step inquiry. At step one "is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. 842–43. As for step two: "If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation" but should instead defer to an agency's "permissible" or "reasonable" construction. *Id.*

What rationales did the Court give for this deference framework? Do you find these rationales persuasive? Do they justify a blanket presumption that courts should defer to an agency's reasonable construction of its own enabling act? *Cf. Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (castigating *Chevron* for "wresting" from the courts "the ultimate authority to "say what the law is").

3. Step one and the "traditional tools." How, at step one, should a reviewing judge determine whether Congress has declared its "unambiguously expressed intent"? Justice Stevens gave the following guidance in note 9 of *Chevron*:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing *traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. [Emphasis added.]

When determining "clear congressional intent," courts may use any interpretive method they have "traditionally" used. Given that debates over proper interpretive methods are interminable, Justice Stevens'

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instructions left a great deal of room for judicial maneuver. Judicial opinions applying step one have relied upon, *inter alia*: the "plain meaning" of statutory text, statutory structure, legislative purpose and policy, legislative history, dictionaries from various centuries, and the so-called "canons of construction." Which tools did the Court apply in *Chevron* itself? And how?

4. Step two and its relation to arbitrariness review. If a reviewing judge determines that an agency's statutory construction survives step one, how should she determine if it is sufficiently "permissible" or "reasonable" to survive step two? On a moment's reflection, step two presents a puzzle. To get by step one in the first place, an agency's construction must be reasonable in the sense that it does not violate the unambiguously expressed intent of Congress. How then, can a construction that survives step one *ever* be "unreasonable" at step two? On a practical note, one quasi-answer to the preceding question was that if an agency won at step one, it was very likely to win at step two.

Over the years, a number of scholars and judges have contended that *Chevron* step two should be regarded as a form of arbitrariness review applied to the policymaking function embedded in resolving statutory ambiguities. *See, e.g.*, Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (arguing that step two and arbitrariness review should be regarded as "identical"). In *Judulang v. Holder*, 132 S. Ct. 476 (2012), Justice Kagan, an administrative-law expert, signaled agreement:

> The Government urges us instead to analyze this case under the second step of the test we announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), to govern judicial review of an agency's statutory interpretations. Were we to do so, our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is "'arbitrary or capricious in substance.'" ... But we think the more apt analytic framework in this case is standard "arbitrary [or] capricious" review under the APA. The BIA's comparable-grounds policy … is not an interpretation of any statutory language — nor could it be, given that § 212(c) does not mention deportation cases.

Judulang, 132 S. Ct. at 483 n.7 (cleaned up). Thus, according to *Judulang, Chevron*'s step two asked the same basic question as arbitrariness review. You will want to revisit this point as you think about what *Loper Bright* has to say about delegations of discretionary authority to agencies.

5. Step zero: the problem of *Chevron's* reach. *Chevron* itself did not expressly indicate that the applicability of its strong form of deference depended on an agency's use of any given form of procedure. It was, nonetheless, amenable to this interpretation given that the EPA had promulgated its construction of "stationary source" through notice-and-comment rulemaking. Circuit courts split on this issue of procedural sensitivity, with some reserving *Chevron* deference to "legally binding" interpretations such as those contained in notice-and-comment rulemaking or formal adjudication. Around the turn of the millennium, the Supreme Court issued two opinions addressing this problem, *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Barnhart v. Walton,* 535 U.S. 212 (2002).

Mead began its complex effort to delineate when *Chevron* applied by stating:

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [1] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [2] that the agency interpretation claiming deference was promulgated in the exercise of that authority.

533 U.S. at 226–27. Thus, *Chevron* deference required both a *delegation* of force-of-law power from Congress and *invocation* of that power by the agency.

The *Mead* Court observed generally that delegation of power to imbue an interpretation with the force of law "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-

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and-comment rulemaking, or by some other indication of a comparable congressional intent." 533 U.S. at 227. The basic idea here was that extensive procedures encourage deliberation and transparency, thus generating the types of interpretations that Congress would want to have the force of law.

The Court was careful to stress in *Mead* that Congress can signal its delegation of *Chevron* power by means "other" than granting authority to engage in notice-and-comment rulemaking or formal adjudication. 533 U.S. at 227. In *Barnhart v. Walton*, 535 U.S. 212 (2002), Justice Breyer seized on this loophole to downplay *Mead*'s focus on procedure in favor of a multi-factor approach. Explaining that a longstanding interpretation of the term "disability" was eligible for *Chevron* deference, he observed:

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Id. at 221–22.

Taking *Mead* and *Barnhart* together, the practical upshot was that statutory interpretations vetted through notice-and-comment rulemaking or relatively formal adjudication fell into a safe harbor for claiming *Chevron* deference. Interpretations produced through other means could sometimes net *Chevron* deference based on an indeterminate multi-factor test.

6. Major Questions Doctrine as anti-*Chevron*. Two years before the Supreme Court overturned *Chevron* deference in *Loper Bright Industries v. Raimondo*, 144 S. Ct. 2244 (2024), the Court crystalized a rule of anti-deference in *West Virginia v. EPA*, 597 U.S. 697 (2022), which you may recall reading back in Chapter 3A. In brief, *West Virginia* involved a challenge to an Obama-era rule known as the Clean Power Plan (CPP) that invoked the agency's authority under § 111(d) of the Clean Air Act to set a "standard of performance" for carbon dioxide based on limitations achievable via the "best system of emission reduction [BSER]." 42 U.S.C. § 7411(a)(1). In modeling the BSER, EPA included limitations in emissions achievable via shifting generation from dirtier to cleaner plants. The CPP thus regulated "outside the fence line" of individual plants. Along the way to vacating the CPP, the Supreme Court declared:

> [I]n 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. 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.

West Virginia, 597 U.S. at 723 (cleaned up).

The CPP presented a "major questions case" because:

> 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." It located that newfound power in the vague language of an "ancillary provision[ ]" of the Act, one that was designed to function 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. 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).

Id. at 724-725 (cleaned up). For much more on the major questions doctrine, a/k/a the "MQD," you might take another look at Chapter 3.A.

7. *Chevron v.* stare decisis—the *Brand X* problem. Note that a judicial opinion that affirmed an agency interpretation as reasonable under *Chevron* left open the possibility that another, later agency interpretation

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might be reasonable, too. Judicial application of *Chevron* deference thus preserved a measure of agency interpretive freedom. Suppose, however, that a court determined that a particular agency interpretation does not qualify for *Chevron* deference. Applying *Skidmore*, the court decided that the agency's interpretation was not persuasive and adopted the construction it deemed best. The question then arose: Could an agency later adopt a different, *Chevron*-eligible construction that trumped the "best" judicial construction, or should judicial stare decisis block this possibility?

Justice Thomas, then still a fan of *Chevron*, answered this question for the Court majority in *National Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 125 S. Ct. 2688 (2005):

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley*, [517 U.S.] at 740–741. Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

The flexibility that this approach gave to agencies to shift among interpretative approaches was consistent with *Chevron*'s admonishment that an initial agency statutory interpretation is not "carved in stone." In *Loper Bright*, the Court regarded *Brand X* as an outrage, declaring, "[i]n fretting over the prospect of allowing a judicial interpretation of a statute to override an agency's in a dispute before a court, *Chevron* turns the statutory scheme for judicial review of agency action upside down." 144 S. Ct. at 2265 (cleaned up).

A Note on Auer *Deference*

8. What about deference to an agency's interpretations of its *regulations?* We have waited until the last note of this subchapter to throw yet another doctrine at you. *Auer* deference, once known as *Seminole Rock* deference, has required courts to defer to an agency's reasonable interpretation of its own *regulation* "unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997) (confirming this approach).

Auer deference has roots in the plausible proposition that the entity best placed to interpret a regulation is the agency that wrote it and applies it. Critics, however, have argued that *Auer* deference grants too much power to agencies to manipulate the meaning of regulations in enforcement actions. In the words of Justice Scalia, deferring to an agency's interpretation of its own regulation "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring and dissenting in part).

In response to such critiques, the Court took steps to limit agency manipulation of regulatory interpretations. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Court ruled that *Auer* deference applies only to those regulations that are genuine products of agency "expertise and experience." An agency therefore cannot reap the benefits of *Auer* deference by issuing a regulation that merely "parrots" statutory language. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court imposed

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additional limits on the reach of *Auer* deference, blocking its application to interpretive flip-flops — especially where they take regulated parties by surprise.

In *Kisor v. Wilkie*, the Court came within a whisker of overruling *Auer* deference. 588 U.S. 558 (2019). The Department of Veterans Affairs (VA) had denied benefits claims by James Kisor, a Vietnam War veteran suffering from post-traumatic stress disorder, for almost twenty-five years. The VA finally awarded benefits to him in 2006, when his claim was reopened. Based on an interpretation of its own regulation, however, the agency denied retroactive benefits to cover the period before this date. Kisor's challenge to this decision argued that *Auer* should be overruled. Although all nine justices voted to remand the case to give Kisor another chance to argue that he should be granted pre-2006 benefits, only four agreed that it was time to overrule *Auer*.

Justice Kagan wrote the lead opinion, which three other justices joined in full, and the Chief Justice joined in large part to add a fifth vote. Writing for this five-justice majority, Justice Kagan offered the following explanation for the reach and operation of *Auer* deference:

> First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. … If uncertainty does not exist, there is no plausible reason for deference. …
>
> And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. … To make that effort, a court must "carefully consider[ ]" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. …
>
> If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." … In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. …
>
> Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. …
>
> To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more *ad hoc* statement not reflecting the agency's views. …
>
> Next, the agency's interpretation must in some way implicate its substantive expertise. … So the basis for deference ebbs when "[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary" duties or "fall[s] within the scope of another agency's authority." …
>
> Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. … That means, we have stated, that a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack." And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties.

Id. at 574-579 (cleaned up).

Justice Gorsuch's concurring opinion (writing for as many as four justices in some parts) contended the Court should jettison *Auer* deference. He argued that the APA, the Constitution, and policy considerations all counsel against judicial deference to agency interpretations of regulations. In addition to invoking the general *Marbury* principle that the judicial branch must have the final say on interpreting legal provisions, he contended that judicial deference to executive branch interpretations deprives individuals of the

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protection of independent courts and improperly expands executive power by providing agencies too much influence over the legal effect of their regulations. Instead of applying *Auer*'s strong form of deference, courts should instead exercise independent judgment of issues of regulatory interpretation and, following *Skidmore*, affirm only those interpretations that they find "persuasive."

After the next reading, consider: Does *Auer* deference survive *Loper Bright*?

c. The Death of *Chevron*

Lesson 5G.3.c. Now that *Loper Bright* has overturned *Chevron* deference, how should the issue of the WTC's jurisdiction over Apple Sue's Cider turn out? Should *Skidmore* play a role? *Hearst* principles? Might *Loper Bright* "delegations" play any role?

Stepping back for the big picture, which opinion, *Chevron* or *Loper Bright*, provides the better approach to judicial review of agency statutory interpretations? Why?

Background of *Loper Bright Enterprises v. Raimondo*

The Magnuson-Stevens Fishery Conservation and Management Act (Act) claims "exclusive fishery management authority over all fish" within an "exclusive economic zone" extending 200 miles beyond U.S. territorial seas. Under the Act, regional fishery management councils develop fishery management plans, which the National Marine Fisheries Service (NMFS) approve and promulgate as rules. A plan may require that "one or more observers be carried on board" domestic vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." 16 U.S.C. § 1853(b)(8). The Act specifies that several groups must cover costs for carrying their observers, *e.g.*, foreign fishing vessels. The Act does not expressly specify whether Atlantic herring fishermen can be required to bear the costs of carrying observers. NMFS nonetheless adopted a rule requiring them to do so.

Loper Bright Enterprises, Inc., a business operating in the Atlantic herring fishery, challenged the rule. 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. The D.C. Circuit affirmed at *Chevron* step-two, holding that the agency interpretation was at least "reasonable." In parallel litigation, Relentless, Inc., also challenged the rule as unauthorized by the Act. The district court, invoking *Chevron* deference, granted summary judgment to the government, and the First Circuit affirmed.

The Supreme Court granted certiorari in both cases, seizing the opportunity to determine whether to overrule or clarify *Chevron*.

Loper Bright Enterprises v. Raimondo

144 S. Ct. 2244 (2024)

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., and GORSUCH, J., filed concurring opinions. KAGAN, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which JACKSON, J., joined as it applies to No. 22–1219 [*Relentless v. Department of Commerce*]. JACKSON, J., took no part in the consideration or decision of the case in No. 22–451 [*Relentless*].

Since our decision in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we have sometimes required courts to defer to "permissible" agency interpretations of the statutes

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those agencies administer—even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

I

Our *Chevron* doctrine requires courts to use a two-step framework to interpret statutes administered by federal agencies. After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." *Id*., at 842. If, and only if, congressional intent is "clear," that is the end of the inquiry. *Ibid.* But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at *Chevron*'s second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute." *Id.*, at 843. The reviewing courts in each of the cases before us applied *Chevron*'s framework to resolve in favor of the Government challenges to the same agency rule.

A

Before 1976, unregulated foreign vessels dominated fishing in the international waters off the U. S. coast, which began just 12 nautical miles offshore. Recognizing the resultant overfishing and the need for sound management of fishery resources, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The MSA and subsequent amendments extended the jurisdiction of the United States to 200 nautical miles beyond the U. S. territorial sea and claimed "exclusive fishery management authority over all fish" within that area, known as the "exclusive economic zone." The National Marine Fisheries Service (NMFS) administers the MSA under a delegation from the Secretary of Commerce.

The MSA established eight regional fishery management councils composed of representatives from the coastal States, fishery stakeholders, and NMFS. See 16 U.S.C. §§ 1852(a), (b). The councils develop fishery management plans, which NMFS approves and promulgates as final regulations. …

Relevant here, a [fishery management] plan may also require that "one or more observers be carried on board" domestic vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." § 1853(b)(8). …

The MSA does not contain similar terms addressing whether Atlantic herring fishermen may be required to bear costs associated with any observers a plan may mandate. … In 2013, however, the council proposed amending its fishery management plans to empower it to require fishermen to pay for observers if federal funding became unavailable. Several years later, NMFS promulgated a rule approving the amendment. See 85 Fed. Reg. 7414 (2020). …

B

Petitioners … are family businesses that operate in the Atlantic herring fishery. In February 2020, they challenged the Rule under the MSA, 16 U.S.C. § 1855(f), which incorporates the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. In relevant part, they argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan. The District Court granted summary judgment to the Government. …

A divided panel of the D. C. Circuit affirmed. *See* 45 F.4th 359 (2022). The majority addressed various provisions of the MSA and concluded that it was not "wholly unambiguous" whether NMFS may require Atlantic herring fishermen to pay for observers. Because there remained "some question" as to Congress's intent, the court proceeded to *Chevron*'s second step and deferred to the agency's interpretation as a "reasonable" construction of the MSA. In dissent, Judge Walker concluded that Congress's silence on industry funded observers for the Atlantic herring fishery—coupled with the express provision for such observers in other fisheries and on foreign vessels—unambiguously indicated that NMFS lacked the authority to "require [Atlantic herring] fishermen to pay the wages of at-sea monitors." …

II

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A

1

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. Cognizant of the limits of human language and foresight, they anticipated that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation," would be "more or less obscure and equivocal, until their meaning" was settled "by a series of particular discussions and adjudications." *The Federalist No. 37*, p. 236 (J. Cooke ed. 1961) (J. Madison).

2

The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." *Id., No. 78*, at 525 (A. Hamilton). Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." *Id.*, at 523. To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. *Id.*, at 522.

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). …

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, in *Edwards' Lessee v. Darby*, 12 Wheat. 206 (1827), the Court explained that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. … That is because "the longstanding 'practice of the government' "—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.' " *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (first quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); then quoting *Marbury*, 1 Cranch at 177). The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently ... the draftsmen of the laws they [were] afterwards called upon to interpret." *United States v. Moore*, 95 U.S. 760, 763 (1878).

"Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given by the head of a department." *Decatur*, 14 Pet. at 515. Otherwise, judicial judgment would not be independent at all. As Justice Story put it, "in cases where [a court's] own judgment ... differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." *Dickson,* 15 Pet. at 162.

B

The New Deal ushered in a "rapid expansion of the administrative process." But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment.

During this period, the Court often treated agency determinations of fact as binding on the courts, provided that there was "evidence to support the findings." *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 51 (1936). "When the legislature itself acts within the broad field of legislative discretion," the Court

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reasoned, "its determinations are conclusive." *Ibid.* Congress could therefore "appoint[ ] an agent to act within that sphere of legislative authority" and "endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily." *Ibid.*

But the Court did not extend similar deference to agency resolutions of questions of law. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." *United States v. American Trucking Assns., Inc.,* 310 U.S. 534, 544 (1940); *see also Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 681–682, n. 1 (1944). The Court understood, in the words of Justice Brandeis, that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards*, 298 U.S. at 84 (concurring opinion). It also continued to note, as it long had, that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to "great weight."

Perhaps most notably along those lines, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon ... specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. *Id.*, at 139–140. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*, at 140.

On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. For example, … in *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111 (1944), the Court deferred to the determination of the National Labor Relations Board that newsboys were "employee[s]" within the meaning of the National Labor Relations Act. The Act had, in the Court's judgment, "assigned primarily" to the Board the task of marking a "definitive limitation around the term 'employee.'" *Id.*, at 130. The Court accordingly viewed its own role as "limited" to assessing whether the Board's determination had a "'warrant in the record' and a reasonable basis in law." *Id.,* at 131.

Such deferential review, though, was cabined to factbound determinations like those at issue in … *Hearst*. … And in *Hearst*, the Court proclaimed that "[u]ndoubtedly questions of statutory interpretation ... are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." 322 U.S. at 130–131. At least with respect to questions it regarded as involving "statutory interpretation," the Court thus did not disturb the traditional rule. It merely thought that a different approach should apply where application of a statutory term was sufficiently intertwined with the agency's factfinding.

In any event, the Court was far from consistent in reviewing deferentially even such factbound statutory determinations. Often the Court simply interpreted and applied the statute before it. …

C

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." …

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C.

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§ 706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law." § 706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action, § 706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 does mandate that judicial review of agency policymaking and factfinding be deferential. See § 706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); § 706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

In a statute designed to "serve as the fundamental charter of the administrative state," Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was "exclusively a judicial function." But nothing in the APA hints at such a dramatic departure. On the contrary, by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference.

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. According to both the House and Senate Reports on the legislation, Section 706 "provide[d] that questions of law are for courts rather than agencies to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946) (emphasis added); accord, S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). Some of the legislation's most prominent supporters articulated the same view. Even the Department of Justice—an agency with every incentive to endorse a view of the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947). …

The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U.S. at 140. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.

In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[ ]" to an agency the authority to give meaning to a particular statutory term. *Batterton v. Francis*, 432 U.S. 416, 425 (1977) Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman v. Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan v. EPA*, 576 U.S. 743, 752, (2015), such as "appropriate" or "reasonable."

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," and ensuring the agency has engaged in "'reasoned decisionmaking'" within those boundaries, *Michigan*, 576 U.S. at 750, *see also Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29 (1983). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

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III

The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.

A

… *Chevron*, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. The question in the case was whether an EPA regulation "allow[ing] States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' " was consistent with the term "stationary source" as used in the Clean Air Act. To answer that question of statutory interpretation, the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action.

The first step was to discern "whether Congress ha[d] directly spoken to the precise question at issue." …

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding," That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme, EPA's "detailed and reasoned" consideration, the policy-laden nature of the judgment supposedly required, and the agency's indirect accountability to the people through the President.

Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that EPA's interpretation was "entitled to deference." It did not matter why Congress, as the Court saw it, had not squarely addressed the question, see ibid., or that "the agency ha[d] from time to time changed its interpretation." The latest EPA interpretation was a permissible reading of the Clean Air Act, so under the Court's new rule, that reading controlled.

B

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The "law of deference" that this Court has built on the foundation laid in *Chevron* has instead been "[h]eedless of the original design" of the APA.

1

Chevron defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide all relevant questions of law" and "interpret ... statutory provisions." § 706 (emphasis added). It requires a court to ignore, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. *Chevron*, 467 U.S. at 843, n. 11. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, *see, e.g., Edwards' Lessee*, 12 Wheat. at 210; *Skidmore*, 323 U.S. at 140, *Chevron* insists on much more. It demands that courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." *Brand X*, 545 U.S. at 982. That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of "allow[ing]" a judicial interpretation of a statute "to override an agency's" in a dispute before a court, *Chevron* turns the statutory scheme for judicial review of agency action upside down.

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Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron*'s presumption does not, because "[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two." C. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 445 (1989). As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. As the Framers recognized, ambiguities will inevitably follow from "the complexity of objects, ... the imperfection of the human faculties," and the simple fact that "no language is so copious as to supply words and phrases for every complex idea." *The Federalist No. 37*, at 236.

Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. Courts in that situation do not throw up their hands because "Congress's instructions have" supposedly "run out," leaving a statutory "gap." Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." *Wisconsin Central Ltd. v. United States*, 585 U.S. 274, 284 (2018) (emphasis deleted). So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.

In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. …

2

The Government responds that Congress must generally intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. … But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an agency's. We thus observed that "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Chevron*'s broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. Indeed, the Government and, seemingly, the dissent continue to defend the proposition that *Chevron* applies even in cases having little to do with an agency's technical subject matter expertise.

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. … In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U.S. at 140. …

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For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute. …

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back on." *Kisor*, 588 U.S. at 575. Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches. *See The Federalist, No. 78*, at 522–525. They were to construe the law with "[c]lear heads ... and honest hearts," not with an eye to policy preferences that had not made it into the statute. 1 *Works of James Wilson* 363 (J. Andrews ed. 1896). …

3

In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction. So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.' " United States v. Mead Corp., 533 U.S. 218, 230 (2001).

Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality. We have said that *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–227. In practice, that threshold requirement—sometimes called *Chevron* "step zero"—largely limits *Chevron* to "the fruits of notice-and-comment rulemaking or formal adjudication." But even when those processes are used, deference is still not warranted "where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation."

Even where those procedural hurdles are cleared, substantive ones remain. Most notably, *Chevron* does not apply if the question at issue is one of "deep 'economic and political significance.'" King v. Burwell, 576 U.S. 473, 486 (2015). We have instead expected Congress to delegate such authority "expressly" if at all, ibid., for "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s],'" *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). …

The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing court," to "decide all relevant questions of law" and "interpret ... statutory provisions." § 706 (emphasis added).

IV

The only question left is whether stare decisis, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. Stare decisis is not an "inexorable command," and the stare decisis considerations most relevant here—"the quality of [the precedent's] reasoning, the

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workability of the rule it established, ... and reliance on the decision," all weigh in favor of letting *Chevron* go. …

Chevron has proved to be fundamentally misguided. Despite reshaping judicial review of agency action, neither it nor any case of ours applying it grappled with the APA—the statute that lays out how such review works. …

Experience has also shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, which requires deference at the doctrine's second step. But the concept of ambiguity has always evaded meaningful definition. As Justice Scalia put the dilemma just five years after *Chevron* was decided: "How clear is clear?" 1989 Duke L. J., at 521.

We are no closer to an answer to that question than we were four decades ago. "'[A]mbiguity' is a term that may have different meanings for different judges." …

The dissent proves the point. It tells us that a court should reach *Chevron*'s second step when it finds, "at the end of its interpretive work," that "Congress has left an ambiguity or gap." That is no guide at all. Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit. So for the dissent's test to have any meaning, it must think that in an agency case (unlike in any other), a court should give up on its "interpretive work" before it has identified that best meaning. But how does a court know when to do so? On that point, the dissent leaves a gap of its own. …

Four decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of "say[ing] what the law is." *Marbury*, 1 Cranch at 177. And its continuing import is far from clear. … At this point, all that remains of *Chevron* is a decaying husk with bold pretensions. …

Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistency" being "at most ... a reason for holding an interpretation to be ... arbitrary and capricious." *Brand X*, 545 U.S. at 981. But statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty. …

… *Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," is for us to leave *Chevron* behind.

By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." That is not enough to justify overruling a statutory precedent.

* * *

The dissent ends by quoting *Chevron*: "'Judges are not experts in the field.'" That depends, of course, on what the "field" is. If it is legal interpretation, that has been, "emphatically," "the province and duty of the judicial department" for at least 221 years. *Marbury*, 1 Cranch at 177. The rest of the dissent's selected epigraph is that judges "'are not part of either political branch.'" Indeed. Judges have always been expected

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to apply their "judgment" independent of the political branches when interpreting the laws those branches enact. *The Federalist No. 78*, at 523. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Because the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring. …

I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers, as I have previously explained at length. … *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits.

Chevron compels judges to abdicate their Article III "judicial Power." § 1. "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez*, 575 U.S. at 119 (opinion of THOMAS, J.); *accord*, post, at 2284 – 2285 (opinion of GORSUCH, J.). … Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III's mandate.

Chevron deference also permits the Executive Branch to exercise powers not given to it. … By allowing agencies to definitively interpret laws so long as they are ambiguous, *Chevron* "transfer[s]" the Judiciary's "interpretive judgment to the agency." *Perez*, 575 U.S. at 124 (opinion of THOMAS, J.).

Chevron deference "cannot be salvaged" by recasting it as deference to an agency's "formulation of policy." *Baldwin*, 589 U. S., at —— (opinion of THOMAS, J.) (internal quotation marks omitted). If that were true, *Chevron* would mean that "agencies are unconstitutionally exercising 'legislative Powers' vested in Congress." Baldwin, 589 U. S., at —— (opinion of THOMAS, J.) (quoting Art. I, § 1). … No matter the gloss put on it, *Chevron* expands agencies' power beyond the bounds of Article II by permitting them to exercise powers reserved to another branch of Government. …

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

For 40 years, *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress has done so, that is the end of the matter; the agency's views make no difference. But if the court finds, at the end of its interpretive work, that Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.

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And the rule is right. This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority. We defer, the Court has explained, "because of a presumption that Congress" would have "desired the agency (rather than the courts)" to exercise "whatever degree of discretion" the statute allows. *Smiley v. Citibank (South Dakota)*, N. A., 517 U.S. 735, 740–741 (1996).

Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies. The Court has substituted its own judgment on workplace health for that of the Occupational Safety and Health Administration; its own judgment on climate change for that of the Environmental Protection Agency; and its own judgment on student loans for that of the Department of Education. *See, e.g., National Federation of Independent Business v. OSHA*, 595 U.S. 109 (2022); *West Virginia v. EPA*, 597 U.S. 697 (2022); *Biden v. Nebraska*, 600 U. S. 477 (2023). But evidently that was, for this Court, all too piecemeal. In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar. It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act makes no such demand. Today's decision is not one Congress directed. It is entirely the majority's choice.

And the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second. (If opinions had titles, a good candidate for today's would be Hubris Squared.) Stare decisis is, among other things, a way to remind judges that wisdom often lies in what prior judges have done. … [The majority] barely tries to advance the usual factors this Court invokes for overruling precedent. Its justification comes down, in the end, to this: Courts must have more say over regulation—over the provision of health care, the protection of the environment, the safety of consumer products, the efficacy of transportation systems, and so on. A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power.

I

Begin with the problem that gave rise to *Chevron* (and also to its older precursors): The regulatory statutes Congress passes often contain ambiguities and gaps.

Consider a few examples from the caselaw. They will help show what a typical *Chevron* question looks like—or really, what a typical *Chevron* question is. Because when choosing whether to send some class of questions mainly to a court, or mainly to an agency, abstract analysis can only go so far; indeed, it may obscure what matters most. So I begin with the concrete:

- Under the Public Health Service Act, the Food and Drug Administration (FDA) regulates "biological product[s]," including "protein[s]." 42 U.S.C. § 262(i)(1). When does an alpha amino acid polymer qualify as such a "protein"? Must it have a specific, defined sequence of amino acids?

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• Under the Endangered Species Act, the Fish and Wildlife Service must designate endangered "vertebrate fish or wildlife" species, including "distinct population segment[s]" of those species. 16 U.S.C. § 1532(16); see § 1533. What makes one population segment "distinct" from another? …

• Under the Medicare program, reimbursements to hospitals are adjusted to reflect "differences in hospital wage levels" across "geographic area[s]." 42 U.S.C. § 1395ww(d)(3)(E)(i). How should the Department of Health and Human Services measure a "geographic area"? By city? By county? By metropolitan area?

• Congress directed the Department of the Interior and the Federal Aviation Administration to reduce noise from aircraft flying over Grand Canyon National Park—specifically, to "provide for substantial restoration of the natural quiet." § 3(b)(1), 101 Stat. 676; see § 3(b)(2). How much noise is consistent with "the natural quiet"? And how much of the park, for how many hours a day, must be that quiet for the "substantial restoration" requirement to be met?

• Or take *Chevron* itself. In amendments to the Clean Air Act, Congress told States to require permits for modifying or constructing "stationary sources" of air pollution. 42 U.S.C. § 7502(c)(5). Does the term "stationary source[ ]" refer to each pollution-emitting piece of equipment within a plant? Or does it refer to the entire plant, and thus allow escape from the permitting requirement when increased emissions from one piece of equipment are offset by reductions from another?

In each case, a statutory phrase has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, "fixed" the "single, best meaning" at "the time of enactment" (to use the majority's phrase). A question thus arises: Who decides which of the possible readings should govern?

This Court has long thought that the choice should usually fall to agencies, with courts broadly deferring to their judgments. For the last 40 years, that doctrine has gone by the name of *Chevron* deference, after the 1984 decision that formalized and canonized it. …

That rule, the Court has long explained, rests on a presumption about legislative intent—about what Congress wants when a statute it has charged an agency with implementing contains an ambiguity or a gap. An enacting Congress, as noted above, knows those uncertainties will arise, even if it does not know what they will turn out to be. And every once in a while, Congress provides an explicit instruction for dealing with that contingency—assigning primary responsibility to the courts, or else to an agency. But much more often, Congress does not say. Thus arises the need for a presumption—really, a default rule—for what should happen in that event. Does a statutory silence or ambiguity then go to a court for resolution? Or to an agency? This Court has long thought Congress would choose an agency, with courts serving only as a backstop to make sure the agency makes a reasonable choice among the possible readings. … Of course, Congress can always refute that presumptive choice—can say that, really, it would prefer courts to wield that discretionary power. But until then, the presumption cuts in the agency's favor. The next question is why.

For one, because agencies often know things about a statute's subject matter that courts could not hope to. The point is especially stark when the statute is of a "scientific or technical nature." … Consider, for example, the first bulleted case above. When does an alpha amino acid polymer qualify as a "protein"? I don't know many judges who would feel confident resolving that issue. (First question: What even is an alpha amino acid polymer?) …

A second idea is that Congress would value the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective. … Just as a common-law court makes better decisions as it sees multiple variations on a theme, an agency's construction of a statutory term benefits from its unique exposure to all the related ways the term comes into play. …

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Still more, *Chevron*'s presumption reflects that resolving statutory ambiguities, as Congress well knows, is "often more a question of policy than of law." The task is less one of construing a text than of balancing competing goals and values. Consider the statutory directive to achieve "substantial restoration of the [Grand Canyon's] natural quiet." Someone is going to have to decide exactly what that statute means for air traffic over the canyon. How many flights, in what places and at what times, are consistent with restoring enough natural quiet on the ground? That is a policy trade-off of a kind familiar to agencies—but peculiarly unsuited to judges. … Agencies are "subject to the supervision of the President, who in turn answers to the public." *Kisor*, 588 U.S. at 571–572 (plurality opinion). So when faced with a statutory ambiguity, "an agency to which Congress has delegated policymaking responsibilities" may rely on an accountable actor's "views of wise policy to inform its judgments." *Chevron*, 467 U.S. at 865. …

The majority makes two points in reply, neither convincing. First, it insists that "agencies have no special competence" in filling gaps or resolving ambiguities in regulatory statutes; rather, "[c]ourts do." Score one for self-confidence; maybe not so high for self-reflection or -knowledge. Of course courts often construe legal texts, hopefully well. And *Chevron*'s first step takes full advantage of that talent: There, a court tries to divine what Congress meant, even in the most complicated or abstruse statutory schemes. The deference comes in only if the court cannot do so—if the court must admit that standard legal tools will not avail to fill a statutory silence or give content to an ambiguous term. That is when the issues look like the ones I started off with: When does an alpha amino acid polymer qualify as a "protein"? How distinct is "distinct" for squirrel populations? What size "geographic area" will ensure appropriate hospital reimbursement? As between two equally feasible understandings of "stationary source," should one choose the one more protective of the environment or the one more favorable to economic growth? The idea that courts have "special competence" in deciding such questions whereas agencies have "no[ne]" is, if I may say, malarkey. …

Second, the majority complains that an ambiguity or gap does not "necessarily reflect a congressional intent that an agency" should have primary interpretive authority. On that score, I'll agree with the premise: It doesn't "necessarily" do so. *Chevron* is built on a presumption. The decision does not maintain that Congress in every case wants the agency, rather than a court, to fill in gaps. The decision maintains that when Congress does not expressly pick one or the other, we need a default rule; and the best default rule—agency or court?—is the one we think Congress would generally want. As to why Congress would generally want the agency: The answer lies in everything said above about Congress's delegation of regulatory power to the agency and the agency's special competencies. …

In that respect, the proof really is in the pudding: Congress basically never says otherwise, suggesting that *Chevron* chose the presumption aligning with legislative intent (or, in the majority's words, "approximat[ing] reality." Over the last four decades, Congress has authorized or reauthorized hundreds of statutes. The drafters of those statutes knew all about *Chevron*. So if they had wanted a different assignment of interpretive responsibility, they would have inserted a provision to that effect. With just a pair of exceptions I know of, they did not. …

II

The majority's principal arguments are in a different vein. Around 80 years after the APA was enacted and 40 years after *Chevron*, the majority has decided that the former precludes the latter. The APA's Section 706, the majority says, "makes clear" that agency interpretations of statutes "are not entitled to deference." And that provision, the majority continues, codified the contemporaneous law, which likewise did not allow for deference. But neither the APA nor the pre-APA state of the law does the work that the majority claims. Both are perfectly compatible with *Chevron* deference.

Section 706, enacted with the rest of the APA in 1946, provides for judicial review of agency action. It states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant

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questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.

That text, contra the majority, "does not resolve the *Chevron* question." C. Sunstein, Chevron *As Law*, 107 Geo. L. J. 1613, 1642 (2019). Or said a bit differently, Section 706 is "generally indeterminate" on the matter of deference. A. Vermeule, *Judging Under Uncertainty* 207 (2006). The majority highlights the phrase "decide all relevant questions of law" (italicizing the "all"), and notes that the provision "prescribes no deferential standard" for answering those questions. But just as the provision does not prescribe a deferential standard of review, so too it does not prescribe a de novo standard of review (in which the court starts from scratch, without giving deference). In point of fact, Section 706 does not specify any standard of review for construing statutes. …

Section 706's references to standards of review in other contexts only further undercut the majority's argument. The majority notes that Section 706 requires deferential review for agency fact-finding and policy-making (under, respectively, a substantial-evidence standard and an arbitrary-and-capricious standard). Congress, the majority claims, "surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart" rom de novo review. Surely? In another part of Section 706, Congress explicitly referred to de novo review. § 706(2)(F). With all those references to standards of review—both deferential and not—running around Section 706, what is "telling" is the absence of any standard for reviewing an agency's statutory constructions. That silence left the matter, as noted above, "generally indeterminate": Section 706 neither mandates nor forbids *Chevro*n-style deference.

And contra the majority, most "respected commentators" understood Section 706 in that way—as allowing, even if not requiring, deference. Ante, at 2262. The finest administrative law scholars of the time … certainly did. Professor Louis Jaffe described something very like the *Chevron* two-step as the preferred method of reviewing agency interpretations under the APA. … Similarly, Professor Kenneth Culp Davis, author of the then-preeminent treatise on administrative law, noted with approval that "reasonableness" review of agency interpretations—in which courts "refused to substitute judgment"—had "survived the APA." *Administrative Law* 880, 883, 885 (1951) (Davis). Other contemporaneous scholars and experts agreed. *See* R. Levin, *The APA and the Assault on Deference*, 106 *Minn. L. Rev.* 125, 181–183 (2021) (Levin) (listing many of them).

Nor, evidently, did the Supreme Court. In the years after the APA was enacted, the Court "never indicated that section 706 rejected the idea that courts might defer to agency interpretations of law." Sunstein 1654. Indeed, not a single Justice so much as floated that view of the APA. To the contrary, the Court issued a number of decisions in those years deferring to an agency's statutory interpretation. See, e.g., *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 153–154 (1946); *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398, 403 (1947); *Cardillo v. Liberty Mut. Ins. Co.,* 330 U.S. 469, 478–479 (1947). And that continued right up until *Chevron*. *See, e.g., Mitchell v. Budd*, 350 U.S. 473, 480 (1956); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 337 (1978). To be clear: Deference in those years was not always given to interpretations that would receive it under *Chevron*. The practice then was more inconsistent and less fully elaborated than it later became. The point here is only that the Court came nowhere close to accepting the majority's view of the APA. Take the language from Section 706 that the majority most relies on: "decide all relevant questions of law." In the decade after the APA's enactment, those words were used only four times in Supreme Court opinions (all in footnotes)—and never to suggest that courts could not defer to agency interpretations. *See* Sunstein 1656.

The majority's view of Section 706 likewise gets no support from how judicial review operated in the years leading up to the APA. That prior history matters: As the majority recognizes, Section 706 was generally understood to "restate[ ] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947). The problem for the majority is that in the years preceding the APA, courts became ever more deferential to agencies. New Deal administrative programs had by that point come into their own. And this Court and others, in a fairly short time, had

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abandoned their initial resistance and gotten on board. Justice Breyer, wearing his administrative-law-scholar hat, characterized the pre-APA period this way: "[J]udicial review of administrative action was curtailed, and particular agency decisions were frequently sustained with judicial obeisance to the mysteries of administrative expertise." S. Breyer et al., *Administrative Law and Regulatory Policy* 21 (7th ed. 2011). And that description extends to review of an agency's statutory constructions. An influential study of administrative practice, published five years before the APA's enactment, described the state of play: Judicial "review may, in some instances at least, be limited to the inquiry whether the administrative construction is a permissible one." *Final Report of Attorney General's Committee on Administrative Procedure* (1941). …

Two prominent Supreme Court decisions of the 1940s put those principles into action. … Three years later, the Court decided *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111 (1944), another acknowledged "leading case." The Court again deferred, this time to an agency's construction of the term "employee" in the National Labor Relations Act. The scope of that term, the Court explained, "belong[ed] to" the agency to answer based on its "[e]veryday experience in the administration of the statute." The Court therefore "limited" its review to whether the agency's reading had "warrant in the record and a reasonable basis in law." Recall here that even the majority accepts that Section 706 was meant to "restate[ ] the present law" as to judicial review. Well then? It sure would seem that the provision allows a deference regime. …

The majority's next rejoinder—that "the Court was far from consistent" in deferring—falls equally flat. I am perfectly ready to acknowledge that in the pre-APA period, a deference regime had not yet taken complete hold. I'll go even further: Let's assume that deference was then an on-again, off-again function (as the majority seems to suggest). Even on that assumption, the majority's main argument—that Section 706 prohibited deferential review—collapses. Once again, the majority agrees that Section 706 was not meant to change the then-prevailing law. And even if inconsistent, that law cannot possibly be thought to have prohibited deference. Or otherwise said: "If Section 706 did not change the law of judicial review (as we have long recognized), then it did not proscribe a deferential standard then known and in use."

The majority's whole argument for overturning *Chevron* relies on Section 706. But the text of Section 706 does not support that result. And neither does the contemporaneous practice, which that text was supposed to reflect. So today's decision has no basis in the only law the majority deems relevant. It is grounded on air.

III

And still there is worse, because abandoning *Chevron* subverts every known principle of stare decisis. …

IV

Judges are not experts in the field, and are not part of either political branch of the Government.

— *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 865 (1984)

Those were the days, when we knew what we are not. When we knew that as between courts and agencies, Congress would usually think agencies the better choice to resolve the ambiguities and fill the gaps in regulatory statutes. Because agencies are "experts in the field." And because they are part of a political branch, with a claim to making interstitial policy. And because Congress has charged them, not us, with administering the statutes containing the open questions. At its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts.

Today, the majority does not respect that judgment. It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. (*See Chevron* itself.) It puts courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in

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regulatory statutes, and often of great import. What actions can be taken to address climate change or other environmental challenges? What will the Nation's health-care system look like in the coming decades? Or the financial or transportation systems? What rules are going to constrain the development of A.I.? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role. It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges.

And that claim requires disrespecting, too, this Court's precedent. There are no special reasons, of the kind usually invoked for overturning precedent, to eliminate *Chevron* deference. And given *Chevron*'s pervasiveness, the decision to do so is likely to produce large-scale disruption. All that backs today's decision is the majority's belief that *Chevron* was wrong—that it gave agencies too much power and courts not enough. But shifting views about the worth of regulatory actors and their work do not justify overhauling a cornerstone of administrative law. In that sense too, today's majority has lost sight of its proper role.

And it is impossible to pretend that today's decision is a one-off, in either its treatment of agencies or its treatment of precedent. … Once again, with respect, I dissent.

Notes

1. Now that *Chevron* is gone, what's left? It seems that *Skidmore* is still good law, but should we still call it a form of "deference"? How about *Hearst*'s deferential approach to the application of broad statutory terms to facts? Did the Chief Justice approve or disapprove? And what about *Auer* deference, which, as we saw in the last note following the *Chevron* excerpt, instructs courts to defer, at least under some circumstances, to an agency's reasonable interpretation of its own regulation?

2. History is complicated. It seems fair to say that the history of judicial deference to agency statutory constructions is a bit more complicated than might have suited the Chief Justice's rhetorical purposes. For instance, the Chief Justice, quoting Alexander Hamilton's dictum in *The Federalist No. 78*, declares that the "final 'interpretation of the laws' would be the proper and peculiar province of the courts.'" *Loper Bright*, 144 S. Ct. at 2257. The Chief Justice added the term, "final." Also, he did not mention that Hamilton also indicated in *No. 78* that courts should apply a deferential standard when reviewing legislation for constitutionality. *The Federalist No. 78* (observing that courts have a duty "to declare all acts contrary to the *manifest tenor* of the Constitution void") (emphasis added).

Supplementing *Marbury* on the topic of judicial interpretative supremacy, the Chief Justice quoted, among other authorities, *Decatur v. Paulding*, 39 U.S. 497, 515 (1840), to confirm that it is the judicial role to "interpret the act of Congress, in order to ascertain the rights of the parties." In *Decatur,* however, the Court went on to say:

> But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion, or judgment. Nor can it by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties.

Decatur, 39 U.S. at 515.

Applying these principles in *Decatur* itself, Chief Justice Taney concluded that the courts lacked jurisdiction to issue a writ of mandamus against the Secretary of the Navy ordering him to pay a pension because construction of the relevant congressional resolution had required the Secretary (with the help of the Attorney General) to exercise "judgment and discretion." Mandamus to enforce a law would lie only where its meaning was so clear that its implementation would be merely "ministerial." *Id.* at 516 (citing

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Kendall v. United States, 37 U.S. (12 Pet.) 524, 610 (1838)). *Decatur* thus stood for a departmentalist approach that insulated many executive statutory constructions from judicial review.

It also bears noting that, long before *Chevron*, the Supreme Court issued opinions that seemed to go further than *Skidmore* respect in terms of instructing courts to defer to agency statutory constructions. *See, e.g., Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) ("True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful."); *Schell v. Fauche*, 138 U.S. 562, 572 (1891) ("In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.").

3. Respect v. deference. At what point, for the Chief Justice, does suitable respect veer into unacceptable deference? How did *Chevron* cross this line?

4. What does § 706 mean? Section 706 of the APA instructs that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

Why does Chief Justice Roberts think that this language requires independent, de novo review of agency statutory interpretations? Why does Justice Kagan think otherwise?

5. Are there gaps? Does it take policymaking to fill them? The Chief Justice asserted that courts, confronted with statutory ambiguity, "do not throw up their hands because 'Congress's instructions have' supposedly 'run out,' leaving a statutory 'gap.'" 144 S. Ct. at 2266 (quoting Justice Kagan's dissent). He added that "[c]ourts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning," which is fixed at enactment. *Id.* How, according to the Chief Justice, can we be so sure that such a "single, best meaning" exists? Is he persuasive on this point? Is he correct that agencies, unlike courts, "have no special competence in resolving statutory ambiguities"? *Id.*

Justice Kagan, by contrast, insisted that in some contexts the law does indeed "run out" and that the task of filling the law's gaps necessarily partakes of policymaking that, as a default rule, should be left to agencies within the bounds of reason. Justice Kagan gave five examples of typical *Chevron* questions in a bullet point list. Litigants and judges likely poured thousands of hours into litigating each of these questions. At a glance, though, do these seem like they can be answered by finding a "single, best meaning"?

6. From *Chevron* gaps to *Loper Bright* delegations? In an important passage, Chief Justice Roberts explains:

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[ ]" to an agency the authority to give meaning to a particular statutory term. *Batterton v. Francis*, 432 U.S. 416, 425, (1977). Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman v. Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan v. EPA*, 576 U.S. 743, 752 (2015), such as "appropriate" or "reasonable."
>
> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," H. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 27 (1983), and ensuring the agency has engaged in "'reasoned decisionmaking'" within those boundaries, *Michigan*, 576 U.S. at 750; *see also Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). By doing so, a

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court upholds the traditional conception of the judicial function that the APA adopts.

Almost immediately after issuance of the Court's decision in *Loper Bright*, Professor Adrian Vermeule posted an article contending that much of the hand wringing over the overturning of *Chevron* was overblown and that *Loper Bright* delegations would soon be substituting for *Chevron* deference. Adrian Vermeule, Chevron *By Any Other Name* (June 28, 2024) ("[M]any, most or even all of the cases that were previously called '*Chevron* deference' cases can now be relabeled as '*Loper Bright* delegation' cases"), available at https://thenewdigest.substack.com/p/chevron-by-any-other-name).

7. Was *Chevron* deference constitutional? We included just a snippet from Justice Thomas's concurrence insisting that *Chevron* was a constitutional train wreck. What was his key Article III objection? His Article I objection? Do either of these have any traction with you?

8. How much did any of this ever matter? Standards of review instruct judges how to think as they review agency actions. Administrative law devotes considerable energy to developing and refining these standards. But do they affect outcomes very much? It is one thing for a judge to *think* that she is applying a standard of review. It is another thing for that standard of review to *affect* the judge's thinking in a way that changes outcomes. It could be that, regardless of the ostensible standard of review, case outcomes are driven by other factors — such as the persuasiveness of the agency's analysis, the complexity and technical difficulty of the agency's decision, the judge's respect for the particular agency, the agency's consistency over time, the judge's ideology, and so on.

A study by Eskridge and Baer that examined all 1104 of the cases decided by the Supreme Court between the 1983 and 2005 terms in which the Court assessed an agency's statutory construction suggests that deference doctrines may have limited practical effects. Remarkably, the win rate for *Skidmore* cases was 73.5% and for *Chevron* cases was 76.2%. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1142 (2008). *See also* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 173–74 (2010) (surveying empirical studies on affirmance rates; observing that courts affirmed in *Chevron* cases about two-thirds of the time and that the rate for *Skidmore* cases, "though lower than *Chevron,* [was] not notably so"). The conclusion that deference doctrines do not actually matter much should, however, take heed of Barnett and Walker's 2017 study, which examined 1558 instances of judicial review of agency statutory constructions by the circuit courts. This study found that "agency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56%) or, especially, de novo review (38.5%)." Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

Empirical studies of agency "win rates" are informative, but one must be careful not to over-read them. It could be the case, for instance, that agencies pushed for more aggressive statutory constructions when they had *Chevron* on their side as opposed to *Skidmore*. Also, courts did not choose randomly between applying *Chevron* and *Skidmore*, and there are good reasons to think that *Skidmore* might have been applied to interpretations that, taken as a group, were relatively weak. The upshot here is that, after decades of debate, we do not have a clear handle on how much deference doctrines matter to actual case outcomes.

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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.

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.*