Administrative Law

A CONTEXT AND PRACTICE CASEBOOK

2019 SUPPLEMENT

Richard Henry Seamon
PROFESSOR OF LAW
UNIVERSITY OF IDAHO COLLEGE OF LAW

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

Contents

Table of Cases

Table of Statutes, Rules, and Regulatory Material

Table of Secondary Material

Introduction to 2019 Supplement

This update covers the period June 2012, when the Course Book went to press, through June 2019, when the U.S. Supreme Court ended its last Term. It does not attempt to be exhaustive. Instead, it primarily includes major U.S. Supreme Court cases on:

- the nondelegation doctrine, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (Chapter 8);
- Article III standing, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) (Chapter 28);
- prudential standing, *Lexmark Int'l v. Static Control Components*, 572 U.S. 118 (2014) (Chapters 28 and 29);
- the *Chevron* doctrine, *King v. Burwell*, 135 S. Ct. 2480 (2015) (Chapter 32);
- *Auer* deference, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (Chapter 32); and
- the "arbitrary and capricious" standard, *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) (Chapter 34).

I'll include this and other material in the second edition of the Course Book, which I expect to publish later this year. If you've been using the first edition despite the lack of prior updates, you have my special thanks. I welcome everyone's feedback on this update or the Course Book. Please send it to me at richard@uidaho.edu. Thank you.

Chapter 7

The Distinction between Legislative Rules and Non-Legislative Rules

---

E. The Distinction between "Legislative" Rules and "Substantive" Rules

p. 142:

This new Exercise goes after Diagram 7-3 ("Types of Rules").

Exercise

The U.S. Commission on International Religious Freedom has a statutory duty to review government reports on violations of religious freedom in other countries and, in light of its review, to make policy recommendations to the President and other federal officials. 22 U.S.C. § 6432(a). Among its statutory powers is this one:

> **22 U.S.C. §6432a. Powers of the Commission**
>
> . . .
>
> (d) Administrative procedures
>
> The Commission may adopt such rules and regulations, relating to administrative procedure, as may be reasonably necessary to enable it to carry out the provisions of this subchapter.

Using Diagram 7-3, what type of rules does this statute authorize the Commission to make?

Chapter 8

Agency Rulemaking Power

B. The Nondelegation Doctrine as a Limit on Statutes Granting Federal Agencies Power to Make Legislative Rules

2. Modern Federal Nondelegation Doctrine

a. The Most Common Situation in Which the Nondelegation Doctrine Arises

pp. 154-157:

Please replace all of subsection 2.a with the following, which reflects the Court's most recent decision on the nondelegation doctrine:

The federal delegation doctrine limits the power of Congress. The doctrine therefore applies to federal *statutes*, not federal *agency* actions. Furthermore, not all federal statutes implicate the delegation doctrine. Instead, the delegation doctrine is implicated—and your delegation antennae should quiver—when a federal statute authorizes an agency or agency official to make *legislative* rules. In contrast, the doctrine is not implicated by statutes authorizing agencies to make *non-legislative* rules. Thus, to identify when a federal statute implicates the delegation doctrine, you must be able to determine when a federal statute authorizes an agency to make legislative rules. We presented material for making that determination in Chapter 7.C.

As the next case explains, a statute that empowers an agency to make legislative rules will violate the nondelegation doctrine if it does not give the agency an "intelligible principle" to follow when exercising that power. The case below also makes clear that the Court today is closely divided on the continued validity of the "intelligible principle" standard.

Exercise: *Gundy v. United States*

Please read *Gundy* with these questions in mind:

1. What agency action is being challenged in this case (remembering that the APA defines "agency" generally to include officials)? How does the delegation challenge relate to that challenge?
2. How would you paraphrase the "intelligible principle" standard articulated by the plurality, and its rationale?
3. By what reasoning does the plurality conclude that the statute at issue here satisfies the "intelligible principle" standard?

Gundy v. United States

139 S. Ct. 2116 (2019)

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

I

[Congress enacted the Sex Offender Registration and Notification Act (SORNA or Act) in 2006 to address the existing patchwork of sex-offender registration systems that had been created by the States with the encouragement of earlier federal statutes. SORNA requires someone convicted of a sex offense, including an offense against a child, to register in every State where he lives, works or studies and to keep that information up to date.] Any person required to register under SORNA who knowingly fails to do so (and who travels in interstate commerce) may be imprisoned for up to ten years. See 18 U.S.C. § 2250(a). . . .

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

> "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

. . .

Under [subsection (d) of SORNA § 20913], the Attorney General issued [a final rule in 2010] . . . specifying that SORNA's registration requirements apply in full to "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8897. . . .

Petitioner Herman Gundy is a pre-Act offender. [The Attorney General's 2010 final rule made SORNA's registration requirements applicable to Mr. Gundy. Mr. Gundy was convicted of failing to register under SORNA. In challenging his conviction, he argued that § 20913(d) of SORNA violates the nondelegation doctrine because it does not restrict the Attorney General's discretion about the extent to which to apply SORNA to pre-Act offenders like him.] . . .

II

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825). But the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." *Yakus v. United States*, 321 U.S. 414, 425 (1944). . . . "[I]n our increasingly complex society, replete with ever changing and more technical problems," this Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." [*Mistretta v. United States*, 488 U.S. 361, 372 (1989).] So we have held, time and again, that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible

principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Ibid.*

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. See, *e.g.*, *Whitman v. American Trucking Assns., Inc*., 531 U.S. 457, 473 (2001). . . .

. . . [In *Reynolds v. United States*, 565 U.S. 432, 435 (2012), the Court interpreted SORNA § 20913(d)] to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible. . . And revisiting that issue yet more fully today, we reach the same conclusion. The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues. Given that statutory meaning, Gundy's constitutional claim must fail. Section 20913(d)'s delegation falls well within permissible bounds. . . .

As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the delegee's exercise of authority. . . . Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee "the general policy" he must pursue and the "boundaries of [his] authority." *American Power & Light* [*Co. v. SEC*, 329 U.S. 90, 105 (1946)]. Those standards, the Court has made clear, are not demanding. . . . Only twice in this country's history . . . have we found a delegation excessive. . . . By contrast, we have over and over upheld even very broad delegations. . . . We have approved delegations to various agencies to regulate in the "public interest." [Citations omitted.] We have sustained authorizations for agencies to set "fair and equitable" prices and "just and reasonable" rates. [Citations omitted.] We more recently affirmed a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health." *Whitman*, 531 U.S., at 472 (quoting 42 U.S.C. § 7409(b)(1)). And so forth.

In that context, the delegation in SORNA easily passes muster. . . . The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature. Those issues arose, as *Reynolds* explained, from the need to "newly register[ ] or reregister[ ] 'a large number' of pre-Act offenders" not then in the system. And they arose, more technically, from the gap between an initial registration requirement hinged on imprisonment and a set of pre-Act offenders long since released. . . . That statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore. It falls well within constitutional bounds. . . .

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

JUSTICE ALITO, concurring in the judgment.

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

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

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

The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to

endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next? . . .

. . . At the time of SORNA's enactment, the nation's population of sex offenders exceeded 500,000, and Congress concluded that something had to be done about these "pre-Act" offenders too. But it seems Congress couldn't agree what that should be. The treatment of pre-Act offenders proved a "controversial issue with major policy significance and practical ramifications for states." [Citation omitted.] . . . Among other things, applying SORNA immediately to this group threatened to impose unpopular and costly burdens on States and localities by forcing them to adopt or overhaul their own sex offender registration schemes. So Congress simply passed the problem to the Attorney General. . . .

[The dissent rejected the plurality's view that the Act, its legislative history, and the Court's prior decision in *Reynolds* supported interpreting § 20913(d) as imposing a feasibility requirement or any other limits on the Attorney General when issuing rules on SORNA's applicability to pre-Act offenders. Lacking any limits, the dissent argued, § 20913(d) violated the nondelegation doctrine. In advancing that argument, the dissent also contended that the "intelligible principle" standard had been divorced from its original context to justify unconstitutional delegations of authority from Congress to executive-branch agencies and officials.]

Exercise: *Gundy* Revisited

1. Please look back at the plurality's formulation of the "intelligible principle" supplied by SORNA. Can you come up with an example of a rule that would have violated this principle?
2. The dissent emphasizes that the executive-branch recipient of the delegated authority in this case is the nation's chief prosecutor. What difference does that make?

Chapter 9

Limits on Agency Rulemaking Power

A. Internal Limits on Agency Rulemaking Power

1. Internal Substantive Limits

pp. 168-171:

Please replace all of subsection A.1 with the following:

a. Internal Substantive Limits on Agency Power to Make Legislative Rules

Courts will invalidate an agency rule if it violates the agency legislation. Judicial invalidation of agency rules occurs regularly, even though, as discussed in Chapter 34, courts often defer to an agency's interpretation of the agency legislation. When invalidating an agency rule, a court will sometimes say that the rule is "ultra vires"—beyond the agency's authority—or exceeds the agency's "jurisdiction." *See, e.g.*, *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 619 (1944) (rule was "ultra vires"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("[A]n agency may not bootstrap itself in to an area in which it has no jurisdiction."). Other times, the court will simply say that the agency's rule violates the agency legislation. These differences in wording are largely semantic. The U.S. Supreme Court has said of federal agencies:

> Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.

City of Arlington, Tex. v. FCC, 569 U.S. 290, 297 (2013); *cf.* 5 U.S.C. § 706(2)(C) (authorizing court to set aside agency action "in excess of statutory jurisdiction, authority, or limitations"); *id.* § 558(b) (stating that substantive rule or order may not be issued "except within jurisdiction delegated to the agency and as authorized by law").

Here are examples of cases in which the U.S. Supreme Court has held that an agency's legislative rule violated the agency legislation.

- *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018)

A federal statute authorizes the U.S. Patent and Trademark Office ("Patent Office") to hear petitions asserting that an existing patent is partly or wholly invalid. If the Patent Office decides a petition has potential merit, it "institutes" an adjudication called "inter partes review." A Patent Office regulation allowed the Patent Office to grant only "partial institution." Under the "partial institution" regulation, the Patent Office could decide to review only some of the patent claims challenged in a petition. The Court held that this regulation conflicted with the statute authorizing inter partes review. The regulation specifically conflicted, the Court explained, with the statutory provision requiring the Patent Office to issue a written decision "with respect to the patentability of *any* patent claim challenged by the petitioner." 138 S. Ct. at 1353 (quoting, with emphasis, 35 U.S.C. § 318(a)). The Court concluded that the word "any"

meant that the Patent Office had to address *every* patent claim challenged in the petition.

- *Michigan v. EPA*, 135 S. Ct. 2699 (2015)

EPA issued legislative rules limiting hazardous air pollutants emitted by coal- and oil-fired power plants. EPA determined that the rules were "appropriate and necessary" within the meaning of a provision in the Clean Air Act, 42 U.S.C. § 7412(n)(1)(A). In making this appropriate-and-necessary determination, EPA did not consider the costs of the regulations. The Court invalidated the rules, holding that the Clean Air Act provision on which EPA relied required EPA to consider costs. 135 S. Ct. at 2707.

- *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014)

EPA issued legislative rules requiring "stationary sources" like factories and power plants to get permits limiting their emission of greenhouse gases—i.e., carbon dioxide and five other substances that EPA believed contribute to global climate change. The EPA based those rules on statutory provisions in two Clean Air Act programs—one designed to prevent significant deterioration of air quality ("PSD" program), and the other designed to enforce comprehensive pollution limits on any "major source" of air pollution ("Title V" program). Both programs allowed EPA to require permits for some stationary sources that annually emitted more than a prescribed amount of "any air pollutant." EPA interpreted that term, as used in these programs, to include greenhouse gases. The Court rejected that interpretation and invalidated the rules that were based upon it.

* * *

The existence of internal substantive limits on agency rulemaking power is inevitable, given the delegation doctrine discussed in Chapter 8.B. The delegation doctrine says that, when Congress gives an agency power to make legislative rules, Congress must prescribe an "intelligible principle" for the agency to follow when exercising that power. To prescribe an intelligible principle, Congress must put substantive limits on the agency's rulemaking power. When a State's law includes a version of the delegation doctrine, state statutes granting legislative rulemaking power to state agencies likewise must put substantive limits on the agency's power.

b. Internal Substantive Limits on Agency Power to Make Non-Legislative Rules

A non-legislative, interpretive rule is invalid if it conflicts with the agency legislation that it is supposed to interpret. For example, the U.S. Equal Employment Opportunity Commission (EEOC) issued interpretive rules to give the public guidance on the federal statute known as Title VII. Title VII prohibits employment discrimination based on gender. An EEOC interpretive rule stated that employment discrimination based on a woman's being pregnant violated Title VII. The U.S. Supreme Court reviewed this rule in a lawsuit brought by an employee claiming that her employer discriminated against pregnant employees. The Court concluded that the EEOC interpretive rule was invalid because it misinterpreted Title VII. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140–146 (1976). One way to express this conclusion is to say that the EEOC's rule exceeded its interpretive authority (or "jurisdiction") under Title VII. An equally valid way to make the point is to say, simply, the EEOC's interpretation was wrong.[1]

[1]. In a sense, the EEOC got the last laugh. After the Court's decision, Congress amended Title VII expressly to ban discrimination based on pregnancy. *See* 42 U.S.C. § 2000e(k), added by Pub. L. No. 95-555, 92 Stat. 2076 (1978).

Chapter 10

The APA as a Source of Procedural Requirements for Agency Rulemaking

---

C. Step 2 of Analysis: If the APA Does Apply to the Agency, Do the APA's Rulemaking Requirements Apply to the Rule under Analysis?—Examining the APA Exemptions

1. Federal APA Rulemaking Exemptions

b. Subject-Matter Exemptions in Section 553(a)

(ii) Exemption for Agency Management or Personnel, Public Property, Etc.

p. 202:

A 2013 regulatory development requires a change to the third full paragraph on page 202, which begins, "The breadth of the proprietary functions exemption has been diminished in effect by agency-specific statutes, rules, and policy statements that subject rules otherwise covered by the exemption to the APA's rulemaking requirements. . . . "

This paragraph mentions the U.S. Department of Agriculture (USDA) as an agency that has a policy subjecting its rules to APA requirements even if those rules would otherwise fall within the APA exemption for proprietary functions. In 2013, the USDA revoked that policy. *See* 78 Fed. Reg. 64194 (Oct. 28, 2013). A good article discussing the original policy and criticizing the revocation is William Funk, *U.S. Department of Agriculture's Revocation of 40+-Year-Old Policy on Engaging in Notice-and-Comment Rulemaking*, Admin. & Reg. Law News, Winter 2014, at 17.

C. Step 2 of Analysis: If the APA Does Apply to the Agency, Do the APA's Rulemaking Requirements Apply to the Rule under Analysis?—Examining the APA Exemptions

1. Federal APA Rulemaking Exemptions

c. Exemptions for Interpretative Rules, Policy Statements, and Procedural Rules

(iii) "[I]nterpretative [R]ules" (Also Known as "Interpretive" Rules)

pp. 208-209:

Beginning on p. 208 below the centered asterisks, these two pages discuss the situation in which an agency changes the way it interprets one of its regulations. As discussed, the D.C. Circuit has held that an agency must sometimes use notice-and-comment rulemaking to change its interpretation of a regulation, even if the prior interpretation was an interpretative rule that was exempt from notice-and-comment requirements. The U.S. Supreme Court rejected the D.C. Circuit's approach in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206–1210 (2015). The Court observed that the APA does not require an agency to use notice-and-comment procedures to issue an interpretive rule in the first place; therefore, the Court reasoned, the APA cannot be construed to require the agency to use notice-and-comment procedures when it changes an interpretive rule.

Chapter 16

Legal Effect of a Valid Legislative Rule When Published

C. Federal Regulatory Preemption

1. Express Preemption

p. 337:

At the top of page 337, at the end of the carryover paragraph, please add this bullet point:

- After *Shanklin*, Congress clarified the preemptive effect of 49 U.S.C. § 20106(a). *See* Pub. L. No. 110-53, § 1528 ("Railroad Preemption Clarification"), 121 Stat. 453 (2007). As clarified in 2007, the express preemption provision says, "Nothing in [the FRSA] shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party . . . has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation." *Id.* § 20106(b)(1)(A). If this provision had been on the books at the time of Ms. Shanklin's lawsuit, it would have allowed her to recover by showing, for example, that the train that killed her husband was violating federal regulations establishing a speed limit for the fatal intersection.

Chapter 20

The Due Process Clauses as Sources of Procedural Requirements for Agency Adjudications

---

C. Question One: Does Due Process Apply?

4. The Deprivation Must Be a Deprivation of Life, Liberty, or Property

a. Property

p. 432:

Please add a new paragraph after the second full paragraph on page 432, which begins, "The U.S. Supreme Court has not settled whether applicants for government benefits have property interests protected by the due process before the government has found them eligible for the benefits.":.

Unlike the Supreme Court, lower federal courts have addressed whether applicants for—as distinguished from recipients of—government benefits have a property interest in those benefits. Most lower courts have held that applicants *do* have a property interest, as long as "the statutory scheme . . . mandates award of the benefit upon satisfaction of specified criteria." *Kapps v. Wing*, 404 F.3d 105, 116 (2nd Cir. 2005). A recent case so holding is *Barrows v. Burwell*, 777 F.3d 106 (2nd Cir. 2015). The plaintiffs were Medicare patients seeking inpatient hospital benefits under Medicare Part A. The court held that the plaintiffs could establish a property interest in those benefits by showing that the government has created "fixed and objective criteria" for doctors to apply when deciding whether to admit a Medicare patient into the hospital as an inpatient. *Id*. at 115. The key—consistently with the *Castle Rock* case discussed in the Course Book on page 433—is the existence of statutes and regulations that "meaningfully channel official discretion by mandating a defined administrative outcome." *Id*. (internal quotation marks and brackets omitted). By establishing fixed criteria for inpatient status, the plaintiffs could establish a property interest in receiving the benefits associated with that status.

Chapter 25

Agency Choice between Rulemaking and Adjudication

C. Exceptions to the Choice of Means Principle

1. Abuse of Discretion

p. 600:

Amend the citation at the end of the carryover paragraph on p. 600 to reflect subsequent history:

> "For a more recent case suggesting in dicta that an agency abused its discretion by using adjudication to adopt broadly applicable timetables, see *City of Arlington, Texas v. FCC*, 668 F.3d 229, 241-243 (5th Cir. 2012), *affirmed on other grounds*, 569 U.S. 290 (2013)."

3. Constitutional Considerations—Due Process and Equal Protection

b. Due Process

p. 604:

In a case issued after the Course Book went to press, the U.S. Supreme Court relied on due process to invalidate agency adjudications announcing a change in agency policy:

- *FCC v. Fox Television Stations, Inc.*, 569 U.S. 290 (2012)

Federal law bars "indecent" broadcasts. 18 U.S.C. § 1464. The FCC has authority to enforce this law by administrative enforcement proceedings against broadcasters for fines and other sanctions. Through these proceedings, the FCC developed the "fleeting expletives" policy, under which it did not treat as "indecent" the odd swear word or two, or brief nudity, in broadcasts. In 2002, however, the FCC changed this policy by bringing enforcement proceedings based on two television episodes in which a character said the word "shit" or "fuck," and a third television episode with brief nudity. The Court held that the orders entered in these proceedings violated the Due Process Clause because the broadcasters lacked fair notice that these incidents would expose them to penalties.

Chapter 26

Effect of Valid Agency Adjudicatory Decisions

C. Administrative Res Judicata

2. Requirements for Administrative Res Judicata

c. Statutory Modification of Administrative Res Judicata

Page 625:

After the first full paragraph on page 625, please add this new paragraph:

The Court applied the *Astoria* framework in *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015). *B & B Hardware* concerned adjudications by a federal agency called the Trademark Trial and Appeal Board (TTAB). The TTAB had authority under the Lanham Act to determine whether registration of a trademark should be denied because that trademark too closely resembles a previously registered trademark. In the adjudication under discussion, the TTAB refused to register Hargis Industries' "SEALTITE" trademark because of its similarity to B & B Hardware's previously registered "SEALTIGHT" trademark. The Court held that the TTAB's decision could have preclusive effect in a later federal-court lawsuit in which B & B sued Hargis for trademark infringement. The Court discerned no "evident" reason why Congress in the Lanham Act "would not want TTAB decisions to receive preclusive effect." *Id.* at 1305. Thus, nothing overcame the presumption that those decisions could indeed have preclusive effect.

Chapter 28

Jurisdiction and Venue

C. Jurisdiction: Standing Requirements in Federal Court

2. Constitutional Standing Requirements

a. Injury in Fact

(iii) Fear

p. 662:

The Exercise on "Fear as Injury in Fact" on page 662 uses a case that the U.S. Supreme Court decided after the Course Book came out:

- *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013)

The Court held that plaintiffs lacked standing to challenge the constitutionality of a federal statute, 50 U.S.C. § 1881a, that authorizes federal government surveillance. Section 1881a comes from the Foreign Intelligence Surveillance Act. It authorizes the government to use surveillance methods including phone taps to get "foreign intelligence information" from people who are "not U.S. persons" and are reasonably believed to be outside the United States. The plaintiffs were U.S. persons—including lawyers, journalists, and human rights advocates—who feared that the government would surveil them under §1881a because of their contacts with non-U.S. persons who could be targeted for surveillance under §1881a. The Court determined that the plaintiffs' subjective fear of surveillance was unreasonable and hence not cognizable as injury in fact. In light of that determination, the Court rejected as irrelevant that plaintiffs had voluntarily incurred costs to avoid surveillance. The Court said that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." 568 U.S. at 416.

Despite the denial of standing in *Clapper v. Amnesty International*, the plaintiffs in a later got standing to challenge federal government surveillance by showing that the government actually collected metadata of their phone calls. *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 801 (2nd Cir. 2015).

C. Jurisdiction: Standing Requirements in Federal Court

3. Prudential Standing Requirements

pp. 667–668:

Please replace section C.3 with the following:

In the past, the Court has referred to "prudential" standing rules that exist over and above the three constitutional standing requirements of injury in fact, traceability, and redressability. These prudential standing rules were not required by the Constitution; the Court developed them as "self-imposed limits on the exercise of federal jurisdiction." *Allen v. Wright*, 468 U.S. 737, 751 (1984). There used to be three prudential standing rules, and they are summarized in the Court's 1984 decision in *Allen v. Wright*:

> [1] the general prohibition on a litigant's raising another person's legal rights, [2] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and [3] the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Id. (bracketed numerals added). These are known as [1] the general rule against third-party standing; [2] the rule against generalized grievances; and [3] the zone of interests test. But now there is only one prudential standing rule left, and its future is uncertain. You still must know about these rules, as well as their fate, because you'll find references to them in many administrative law cases and because they will continue to exist albeit in different form.

The Court discussed the three previously recognized prudential standing rules in *Lexmark International, Inc. v. Static Control Components, Inc*., 572 U.S. 118 (2014). The Court clarified in *Lexmark* that the rule against generalized grievances stems from Article III, and so isn't merely prudential, and the zone of interests test relates to the existence of a cause of action. As to the general rule against third-party standing, the Court said that rule is "hard[] to classify," and that its "proper place in the standing firmament can await another day." *Id.* at 127 n.3. In other words, the Court hasn't figured that one out yet.

C. Jurisdiction: Standing Requirements in Federal Court

4. Statutory "Standing" Requirements

pp. 669–684:

Please replace section C.4 with the following:

The federal APA and many special review statutes create causes of action authorizing judicial review of most final agency actions. In creating this cause of action, the APA and special review statutes usually specify *who* is entitled to judicial review. The federal APA, for example, creates a right of review for **"[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."** 5 U.S.C. § 702. To cite another example of a statute specifying who is entitled to judicial review, 16 U.S.C. § 825*l*(b) entitles "[a]ny party" to an adjudicatory proceeding before the Federal Energy Regulatory Commission to get judicial review of the order issued in that proceeding. This statute requires the person seeking judicial review first to have at least sought party status in the agency proceeding before seeking judicial review. These and other statutory restrictions on *who* can get judicial review of agency actions are often called statutory "standing" requirements. *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302 (2017).

Beware of this "standing" label, however, and always think of it as enclosed within quotation marks. Wariness is warranted because a statutory "standing" requirement does not really implicate a party's standing. Rather, it concerns the scope of the *cause of action* created by the statute. A party who does not meet a statutory "standing" requirement should have his or her federal-court complaint dismissed for failure to state a claim upon which relief can be granted (*see* Fed. R. Civ. P. 12(b)(6)), not for lack of subject matter jurisdiction (*see* Fed. R. Civ. P. 12(b)(1)). *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014).

Furthermore, it matters whether the defect in a plaintiff's complaint is the failure to state a claim or is, instead, the failure to establish subject matter jurisdiction. A court must take notice of the lack of subject matter jurisdiction even if no party raises it—i.e., "sua sponte," you Latin fans—and this defect can cause dismissal of the complaint at any point up until the court enters a final judgment in the case. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). In contrast, the failure to state a claim is a defect that can be waived if no other party raises it until an appeal. 5C Arthur R. Miller et al., Federal Practice and Procedure § 1392. Even more importantly, the dismissal of a complaint for lack of subject matter jurisdiction is usually not "on the merits," which means that the complaint can be re-filed. The dismissal of a complaint for failure to raise a claim, however, is usually "on the merits," which can mean that the complaint cannot be re-filed. *See* Fed. R. Civ. P. 41(b); *see also* 9 Arthur R. Miller et al., Federal Practice and Procedure § 2373.

All of this is to say that we should not even be discussing statutory "standing" requirements in this chapter on jurisdiction! But we're forced to do it because people, including judges, so often confuse having standing and having a cause of action. In our defense, we take up the issue of statutory "standing" requirements in the next chapter, which includes an exploration of the particular statutory "standing" requirement known as the "zone of interests" test. *See* Chapter 29 *infra*.

Chapter 29

Cause of Action

B. Sources of a Cause of Action for Review of Federal Agency Action

2. General Statutory Review

b. Limits on the Scope of the APA-Created Cause of Action

(iv) The Plaintiff Must Either Be [S]uffering [L]egal [W]rong [B]ecause of [A]gency [A]ction, or [Be] [A]dversely [A]ffected or [A]ggrieved by [A]gency [A]ction within the [M]eaning of a [R]elevant [S]tatute

p. 700:

Please replace the very short discussion on p. 700 with the following:

Section 702's first sentence entitles two categories of people to judicial review: people suffering **"legal wrong"** and people who are **"adversely affected or aggrieved within the meaning of a relevant statute."** 5 U.S.C. § 702. We'll consider each category.

The "legal wrong" concept relates to the "legal right" (or legal interest) test, which we have mentioned twice before in this chapter. We return to it in the hope that the third (and last) time is the charm. By extending its cause of action to a person suffering **"legal wrong,"** APA § 702 carries forward the old "legal right" (or legal interest) test for suing in federal court. That test required the plaintiff to show violation of a right protected by the common law of property, torts, and contracts, or a right "founded on a statute which confers a privilege." *Tennessee Elec. Power v. TVA*, 306 U.S. 118, 137 (1939). The main type of statutory "privilege" that could create a "legal right" was a statutorily granted monopoly, e.g., to operate a bridge or ferry, or to supply public power. The *Tennessee Electric Power* case illustrates the legal interest test.

The Tennessee Electric Power Company challenged, as unconstitutional, a federal statute that created a government corporation, the Tennessee Valley Authority (TVA), to generate and supply low-cost electric power in the southeastern States. The TVA would compete with—and threatened economic injury to—the Tennessee Electric Power Company (Tennessee Electric), a private power company. The Court held that Tennessee Electric could not sue because it had no "legal right" to be free from competition (like a statutory right to operate a monopoly); the challenged federal statute thus did not threaten it with any legal wrong. *Tennessee Elec.*, 306 U.S. at 137–142. The Court didn't dispute that, as a factual matter, Tennessee Electric faced an imminent threat of severe economic injury; but that factual injury didn't give it standing. *Id.* at 140 (relying on "prior decisions that the damage consequent on competition, otherwise lawful, is

in such circumstances damnum absque injuria [damage without wrongful act], and will not support a cause of action or a right to sue"). It needed, and lacked, a legal interest.

Three decades after *Tennessee Electric*, the Court construed the clause in APA § 702 that extends a cause of action not only to a plaintiff who has suffered **"legal wrong"** but also to a person who is **"adversely affected or aggrieved by agency action within the meaning of a relevant statute."** 5 U.S.C. § 702. The leading case construing the latter phrase is *Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). In that case, companies that sold data-processing services challenged a federal agency decision that allowed banks to sell data-processing services. The data-processing companies argued that the agency decision violated a federal statute that restricted the activities of banks. The Court upheld the data-processing companies' right to sue under federal APA § 702. The Court held that the companies had Article III standing because the agency decision caused them "injury in fact," meaning a threat of *actual* injury, as distinguished from injury to a legal right. The Court also held that the companies had a cause of action under the APA. That second holding relates to our current subject – the need for a cause of action—so we will focus on it some more.

The Court addressed what a plaintiff must show to have a cause of action under APA § 702 as a person who is **"adversely affected or aggrieved by agency action within the meaning of a relevant statute."** 5 U.S.C. § 702. The Court explained that the plaintiff must show that the interest that the plaintiff seeks to protect by bringing the lawsuit "is arguably within the *zone of interests* to be protected or regulated by the statute or constitutional guarantee in question." *Data Process Serv. Orgs*, 397 U.S. at 153 (emphasis added). The "statute or constitutional guarantee in question" was, in the case before the Court, the federal statute that restricted the activities of banks, because that was the law that the plaintiff companies argued the agency had violated. The Court held that this statute was arguably intended to protect the interests of the banks' would-be competitors. Thus, the plaintiffs were "arguably within the zone of interests" that the federal banking statute sought to protect and could accordingly assert a cause of action under APA § 702. *Id*. at 158.

The zone of interests test is not just a requirement for stating a cause of action under APA § 702. It also applies to causes of action created by other federal statutes. That is because the zone of interests test has common law roots. Like other common law limits, "Congress is presumed to legislate against the background of the zone-of-interests limitation," and the limitation (test) therefore "applies unless it is negated." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014); *see also id*. at 130 n.5 (noting common law origin of test). Below we summarize two cases in which the Court discussed the zone of interests test as applied to causes of action under statutes other than the federal APA.

- *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)

Lexmark makes laser printers and toner cartridges for those printers. Lexmark wanted customers to return the empty toner cartridges to Lexmark for re-use. To encourage their return, Lexmark created a "Prebate" program that gave customers a 20% discount on new Lexmark toner cartridges if the customers agreed to return them, when empty, to Lexmark. To enforce the Prebate agreements, Lexmark put microchips in the cartridges so they couldn't be used by remanufacturers. That worked all very well until Static Control Components devised microchips that mimicked Lexmark's, and that thereby enabled remanufacturers to use empty Lexmark cartridges that had been sold under its Prebate program. Lexmark sued Static Control for violating two federal statutes that need not concern us. It is Static Control's counterclaim that concerns us.

Static Control's counterclaim asserted that Lexmark had violated the federal Lanham Act by false advertising. According to Static Control, Lexmark had falsely advertised to customers and re-manufacturers that it was illegal for anyone except Lexmark to re-use cartridges sold under its Prebate program. The issue before the Court was whether Static Control arguably fell within the zone of interests protected by the Lanham Act provision that creates a cause of action for false advertising.

The Court held that Static Control did indeed satisfy the zone of interests test. First, the Court clarified that the test is not a prudential rule of standing. Instead, "[w]hether a plaintiff comes within the 'zone of interests' is an issue that requires [the court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." 572 U.S. at 127 (some internal quotation marks omitted). Here, therefore, the issue was whether Static Control had a cause of action under the Lanham Act provision creating a cause of action for false advertising. The Court found legislative history showing that the cause of action was meant to prevent unfair competition. Unfair competition, the Court determined, included the sort of conduct that Lexmark allegedly engaged in when it claimed that Static Control's business facilitated illegal activity. Of course, Static Control had to prove those allegations to win its lawsuit. Still, by making the allegations, Static Control had adequately pleaded a cause of action. Put another way, Static Control had alleged injury to the kind of interests that were arguably within the zone of interests that the Lanham Act's false-advertising cause of action sought to protect.

- *Bank of America Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296 (2017)

The City of Miami sued Bank of America and Wells Fargo claiming that these banks intentionally issued riskier mortgages, on less favorable terms, to African-American and Latino/a customers than to white, non-Latino/a customers. Miami sued under the federal Fair Housing Act (FHA), which creates a cause of action for "any person who . . . claims to have been injured by a discriminatory housing practice." *Id.* at 1301 (quoting statute). Miami claimed that it suffered economic injury because of the banks' discriminatory lending practices: Those practices led to massive mortgage foreclosures in the City, which depressed tax revenues and caused other economic injury to the City. The Court held that these injuries were arguably within the zone of interests that Congress sought to protect through the FHA's cause of action. The Court relied on precedent stating that the FHA creates an cause of action that extends to an exceptionally broad class of plaintiffs. The Court remanded the case, however, for further consideration of a separate issue: whether Miami could show that the banks' discriminatory lending practices proximately caused the City's economic injuries.

* * *

Because the zone of interests test limits statutory causes of action created by statutes besides the one created by the APA, we have arguably put this discussion of the test in the wrong place, since this portion of the chapter is supposed to focus just on the APA-created cause of action. In our defense, the zone of interests test has proved to be elusive in its origin, nature, and meaning. Indeed, by now you might have concluded that it should be called the "Twilight Zone of interests test."[2]

[2] The Twilight Zone was a fantasy/science fiction show that was created by Rod Serling and was first broadcast in the early 1960s. It was famous for its eerie opening music and introduction, one version of which was: "You unlock this door with the key of imagination. Beyond it is another dimension: a dimension of sound, a dimension of sight, a dimension of mind. You're moving into a land of both shadow and substance, of things and ideas. You've just crossed over into . . . the Twilight Zone." https://www.youtube.com/watch?v=ORbseYAkzRM.

Chapter 32

Questions of Law

B. Federal Agencies' Interpretation of Statutes They Administer

2. Modern Cases

e. The Significance of Mead

pp. 802–805:

Please replace section 2.e. with the following:

Mead establishes two pre-conditions for an agency's statutory interpretation to "qualif[y] for *Chevron* deference." 533 U.S. at 226; *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But before we get to those pre-conditions, please understand what *Mead* means when it talks about an agency interpretation "qualify[ing] for *Chevron* deference." When an agency interpretation "qualifies for *Chevron* deference," that just means that the interpretation should be analyzed under the two-step *Chevron* analysis; it doesn't mean the interpretation automatically gets deference. On the contrary, the *Chevron* analysis require the agency interpretation to be rejected (at the first step) if it contradicts "the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, or (at the second step) if it is unreasonable. Thus, an agency interpretation that survives *Mead*'s two pre-conditions—which constitute what's called "*Chevron* Step Zero"—is a finalist, but not yet a winner, in the *Chevron* sweepstakes.

The two pre-conditions for an agency interpretation to get past step zero and accordingly to be analyzed under *Chevron* two-step analysis are that [1] "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 218. When you read them in isolation, you might think they apply whenever, but only when, an agency has an express statutory grant of authority to make legislative rules and uses that grant. But you would be wrong.

True, an agency's statutory interpretation almost always qualifies for *Chevron* deference if it's embodied in a legislative rule. That was the situation in *Chevron* itself, as well as in many other cases in which the Court has given *Chevron* deference to agencies' interpretations of their statutes. *E.g.*, *Cuozzo Speed Tech., LLC v. Lee*, 136 S. Ct. 2131, 2142–2144 (2016). Indeed, it will be rare for a legislative rule *not* to qualify for *Chevron* deference, especially if it's issued using the APA's notice-and-comment (or for that matter formal) rulemaking procedures. There is one exception, however, which was established in *King v. Burwell*, 135 S. Ct. 2480 (2015),

which is excerpted later in this supplement. The exception has become known as the "major questions" exception. It applies in "extraordinary cases" where the legal question addressed by the agency's interpretation has "deep economic and political significance" and is "central to" a statutory scheme. *Id*. at 2488–2489. Thus, not *all* legislative rules get *Chevron* deference.

By the same token, an agency interpretation embodied in a *non*-legislative rule can sometimes qualify for *Chevron* deference. True, the tariff ruling in *Mead* was treated like the paradigm types of non-legislative rules: "policy statements, agency manuals, and enforcement guidelines." *Mead*, 533 U.S. at 234. And the ruling did not qualify for *Chevron* deference. Before concluding that it did not, however, the Court in *Mead* examined the statutory scheme, the agency's practice, and agency regulations describing the rulings' legal effect. Furthermore, the Court in an earlier case gave *Chevron* deference to an agency interpretation that was originally expressed in an agency manual of guidance material. *Barnhart v. Walton*, 535 U.S. 212, 219–220 (2002). Thus, non-legislative rules can get *Chevron* deference.

An agency can also get *Chevron* deference for a statutory interpretation developed through agency adjudication. The Court in *Mead* said that in many cases it had given *Chevron* deference to agency interpretations made in formal adjudications. 533 U.S. at 230. More generally, the Court said that express statutory grants of adjudicatory power are "a very good indicator of delegation meriting *Chevron* treatment." *Id.* at 229. An agency's statutory interpretation can also sometimes get *Chevron* deference if the interpretation was developed in an informal adjudication. That is clear from the Court's citation in *Mead* of a case in which the Court gave *Chevron* deference to an agency interpretation developed in informal adjudication. *Id.* at 231 (citing *NationsBank v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995) (Comptroller of Currency interpreted banking statute in informal adjudication approving bank's application to sell annuities)).

While many types of agency action can get *Chevron* deference, *Mead* suggests that the type of agency action matters a lot. *Mead* emphasized that the "overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." 533 U.S. at 230. Its reasoning suggests that agency interpretations rendered in *formal* rulemaking will likewise typically deserve *Chevron* deference. In contrast, an agency is not guaranteed *Chevron* deference for interpretations developed in non-legislative rules or informal adjudication.

The type of agency action is not the only factor relevant to whether an agency's statutory interpretation gets *Chevron* deference. The breadth or importance of the statutory-interpretation question also matters. In many cases giving *Chevron* deference to agency statutory interpretations, the Court cited the "interstitial" nature of the interpretative issue as a factor favoring *Chevron* deference. *E.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013). Indeed, most cases in which the Court has given *Chevron* deference involve agency interpretation of what one scholar has called "micro-meaning" issues as distinguished from "macro-meaning" issues. John H. Reese, *Bursting the* Chevron *Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 Fordham L. Rev. 1103, 1109 (2004). By the same token, the last major case on the *Chevron* doctrine suggests that *Chevron* deference does not apply to some unusually important questions of statutory interpretation.

B. Federal Agencies' Interpretation of Statutes They Administer

2. Modern Cases

P. 805

Please insert the following new subsection before Section C ("Federal Agencies' Interpretation of Their Own Rules").:

f. *King v. Burwell*

In *King v. Burwell*, the Court held that courts shouldn't give *Chevron* deference to agency interpretations of some unusually important issues of statutory interpretations. In reading the opinion, please try to figure out when, and why, an important question of statutory interpretation disqualifies an agency interpretation for *Chevron* deference.

King v. Burwell

135 S. Ct. 2480 (2015)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market. First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.

In addition to those reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not.

This case is about whether the Act's interlocking reforms apply equally in each State no matter who establishes the State's Exchange. Specifically, the question presented is whether the Act's tax credits are available in States that have a Federal Exchange.

I. . .

C

. . . [T]he Act requires the creation of an "Exchange" in each State where people can shop for insurance, usually online. . . . An Exchange may be created in one of two ways. First, the Act provides that "[e]ach State shall ... establish an American Health Benefit Exchange ... for the State." . . . Second, if a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services "shall ... establish and operate such Exchange within the State." . . .

The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange. The Act initially provides that tax credits "shall be allowed" for any "applicable taxpayer." . . . The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable

Care Act." 26 U.S.C. §§ 36B(b)–(c) (emphasis added) [hereafter referred to as "Section 36B"].

The IRS addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges. 77 Fed.Reg. 30378 (2012). As relevant here, the IRS Rule provides that a taxpayer is eligible for a tax credit if he enrolled in an insurance plan through "an Exchange," 26 CFR § 1.36B–2 (2013), which is defined as "an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by [the U.S. Department of Health and Human Services, i.e.,] HHS," 45 CFR § 155.20 (2014). At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34 States have elected to have HHS do so. . . .

II

. . . The parties dispute whether Section 36B authorizes tax credits for individuals who enroll in an insurance plan through a Federal Exchange. Petitioners [are four people who, because of low income, would be exempt from having to buy health insurance on Virginia's Federal Exchange as long as they didn't get tax credits that would have the effect of raising their income. They] argue that a Federal Exchange is not "an Exchange established by the State under [Section 36B of the Act]," and that the IRS Rule therefore contradicts Section 36B. . . . The Government responds that the IRS Rule is lawful because the phrase "an Exchange established by the State under [Section 36B of the Act]" should be read to include Federal Exchanges. . . .

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. . . . Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. . . . This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Ibid.*

This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. *Utility Air Regulatory Group v. EPA*, . . . 134 S.Ct. 2427, 2444 . . . (2014) (quoting *Brown & Williamson*, 529 U.S., at 160). It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. *See Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006). This is not a case for the IRS.

It is instead our task to determine the correct reading of Section 36B. [The Court determined that the text of § 36B of the Act is ambiguous. After examining it in the context of the entire Act, however, the Court held that § 36B makes tax credits available to people in States with a State or a Federal Exchange. Thus, the Court agreed with the IRS's position.]

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting. . . [omitted].

* * *

King applied *Chevron* step zero in refusing to give *Chevron* deference to the IRS's statutory interpretation. Step zero requires a determination of whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226–227. Congress did delegate to the IRS broad authority to make "all needful rules and regulations for the enforcement" of the Tax Code. 26 U.S.C. § 7805. And the IRS relied on this

delegation to make the rule that defined the term "Exchange" to include Federal Exchanges for purposes of statutory tax credits. 77 Fed. Reg. 30385. But that reliance was misplaced, the Court determined. The IRS's interpretation did not qualify for *Chevron* deference because, despite the breadth of the IRS's statutory grant of rulemaking power, it didn't grant power to address the specific question of statutory interpretation before the Court in *King*. There was no delegation for that question.

Why not? Apparently because (1) that question had "deep economic and political significance"; (2) it was "central to th[e] statutory scheme"; and (3) the IRS had "no expertise in crafting health insurance policy of th[e] sort" underlying the statutory interpretation question. Those circumstances, especially the first two, led the Court to conclude that if "Congress wished to assign that question to an agency, it surely would have done so expressly." In addition, the IRS's lack of expertise apparently disqualified its interpretation for respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Even so, the Court ended up agreeing with the IRS's interpretation. But only after conducting de novo review.

King teaches us to be careful about this statement in *Mead*: "[A] very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed." 533 U.S. at 229. *King* shows that even a broad, express grant of rulemaking power may not delegate power to address unusually important questions of statutory interpretation, especially ones as to which the agency lacks expertise. *See also Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). More broadly, *King* might show discomfort on the Court with *Chevron* deference because of the way it undermines the courts' responsibility for "saying what the law is." *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (expressing concern about "the way in which" *Chevron* "has come to be understood and applied"); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("Whether *Chevron* should remain is a question we may leave for another day").

Exercise: *Chevron* Analysis

Please construct a flow chart, graphic organizer, or outline that shows when and how to apply the *Chevron* doctrine.

C. Federal Agencies' Interpretation of Their Own Rules

pp. 805–809:

Please replace section C with the following:

In Section B, we discussed the *Chevron*/*Mead* doctrine, which federal courts use to review federal agencies' interpretation of the *statutes* they administer. Now we examine how federal courts review federal agencies' interpretation of the *rules* (regulations) they issue. For this latter situation federal courts use what is called "*Auer* deference," after a 1997 case applying it: *Auer v. Robbins*, 519 U.S. 452 (1997). You will also sometimes hear this doctrine called "*Seminole Rock* deference," after an earlier case applying it: *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). As conventionally understood, *Auer* deference generally requires federal courts to uphold a federal agency's interpretation of the agency's own rule unless the interpretation is "plainly erroneous or inconsistent with" the text of the rule. We explore *Auer* deference by focusing on a recent case discussing it, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

1. The *Kisor* Opinion

Exercise: *Kisor v. Wilkie*

As you read the opinion, please keep these questions in mind:

1. What agency action is at issue?
2. What is *Auer* deference, and when should it apply?
3. On what grounds does Justice Gorsuch rely in arguing for overruling *Auer*?

Kisor v. Wilkie
139 S. Ct. 2400 (2019)

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

This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. See *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The only question presented here is whether we should overrule those decisions . . . We answer that question no. . . . But even as we uphold [*Auer* deference], we reinforce its limits. . . . On remand, the Court of Appeals should decide whether it applies to the agency interpretation at issue.

I

. . . Kisor is a Vietnam War veteran seeking disability benefits from the Department of Veterans Affairs (VA). He first applied in 1982, alleging that he had developed post-traumatic stress disorder (PTSD) [from] . . . a military action called Operation Harvest Moon. . . . The VA . . . denied Kisor benefits. [In] . . . 2006, when Kisor moved to reopen his claim. Based on a new psychiatric report, the VA this time agreed that Kisor suffered from PTSD. But it granted him benefits only from the date of his motion to reopen, rather than (as he requested) from the date of his first application.

The Board of Veterans' Appeals—a part of the VA . . .—affirmed that timing decision, based on its interpretation of an agency rule. Under the VA's regulation, the agency could grant Kisor retroactive benefits if it found there were "relevant official service department records" that it had not considered in its initial denial. See 38 C.F.R. § 3.156(c)(1) (2013). The Board acknowledged that Kisor had come up with two new service records, both confirming his participation in Operation Harvest Moon. But according to the Board, those records were not "relevant" because they did not go to the reason for the denial—that Kisor did not have PTSD. . . . The Court of Appeals for Veterans Claims, an independent Article I court that initially reviews the Board's decisions, affirmed for the same reason.

The Court of Appeals for the Federal Circuit also affirmed, but it did so based on deference to the Board's interpretation of the VA rule. Kisor had argued to the Federal Circuit that to count as "relevant," a service record need not (as the Board thought) "counter[] the basis of the prior denial"; instead, it could relate to some other criterion for obtaining disability benefits. The Federal Circuit found the regulation "ambiguous" as between the two readings. . . . Because that was so, the court believed *Auer* deference appropriate: The agency's construction of its own regulation would govern unless "plainly erroneous or inconsistent with the VA's regulatory framework." Applying that standard, the court upheld the Board's reading—and so approved the denial of retroactive benefits.

We then granted certiorari. . . ..

II.A [Part II.A is a plurality opinion, garnering a total of 4 votes]

. . . Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. . . . Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction. But often, ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule "may be so specialized and varying in nature as to be impossible"—or at any rate, impracticable—to capture in its every detail. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Or a "problem[] may arise" that the agency, when drafting the rule, "could not [have] reasonably foresee[n]." *Id.*, at 202. . . .

Consider these examples:

- In a rule issued to implement the Americans with Disabilities Act (ADA), the Department of Justice requires theaters and stadiums to provide people with disabilities "lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, App. A, p. 563 (1996). Must the Washington Wizards construct wheelchair seating to offer lines of sight over spectators when they rise to their feet? Or is it enough that the facility offers comparable views so long as everyone remains seated? See *Paralyzed Veterans of Am. v. D. C. Arena L. P.*, 117 F.3d 579, 581–582 (CADC 1997).
- The Transportation Security Administration (TSA) requires that liquids, gels, and aerosols in carry-on baggage be packed in containers smaller than 3.4 ounces and carried in a clear plastic bag. Does a traveler have to pack his jar of truffle pâté in that way? See *Laba v. Copeland*, 2016 WL 5958241, *1 (WDNC, Oct. 13, 2016).
- The Mine Safety and Health Administration issues a rule requiring employers to report occupational diseases within two weeks after they are "diagnosed." 30 C.F.R. § 50.20(a) (1993). Do chest X-ray results that "scor[e]" above some level of opacity count as a "diagnosis"? What level, exactly? See *American Min. Congress v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1107–1108 (CADC 1993).

- An FDA regulation gives pharmaceutical companies exclusive rights to drug products if they contain "no active moiety that has been approved by FDA in any other" new drug application. 21 C.F.R. § 314.108(a) (2010). Has a company created a new "active moiety" by joining a previously approved moiety to lysine through a non-ester covalent bond? See *Actavis Elizabeth LLC v. FDA*, 625 F.3d 760, 762–763 (CADC 2010) . . .
- Or take the facts of *Auer* itself. An agency must decide whether police captains are eligible for overtime under the Fair Labor Standards Act. According to the agency's regulations, employees cannot receive overtime if they are paid on a "salary basis." 29 C.F.R. § 541.118(a) (1996). And in deciding whether an employee is salaried, one question is whether his pay is "subject to reduction" based on performance. *Ibid.* A police department's manual informs its officers that their pay might be docked if they commit a disciplinary infraction. Does that fact alone make them "subject to" pay deductions? Or must the department have a practice of docking officer pay, so that the possibility of that happening is more than theoretical? 519 U.S. at 459–462.

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

. . . In answering that question, we have often thought that a court should defer to the agency's construction of its own regulation. For the last 20 or so years, we have referred to that doctrine as *Auer* deference, and applied it often. . . . But the name is something of a misnomer. . . . Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond. See *United States v. Eaton*, 169 U.S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution . . . is entitled to the greatest weight"). . . .

We have explained *Auer* deference . . . as rooted in a presumption . . . that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. See *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151–153 (1991). Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. See *id.*, at 151. In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. . . . We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151. . . .

B [Part II.B. is the opinion of the Court, garnering a total of 5 votes.]

. . . *Auer* deference is not the answer to every question of interpreting an agency's rules. . . .

First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. . . . [T]he core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. . . .

And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984). . . . 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." . . . [I]t must come within the zone of ambiguity the court has identified after employing all its interpretive tools. . . . Under *Aue*r, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." *[City of] Arlington v. FCC*, 569 U.S. 290, 296, (2013). . . .

Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. . . .

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. *Mead*, 533 U.S. at 257–259, and n. 6 (Scalia, J., dissenting). . . . Of course, the requirement of "authoritative action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers. So, for example, we have deferred to "official staff memoranda" that were "published in the Federal Register," even though never approved by the agency head. The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context. See, *e.g.*, *Paralyzed Veterans*, 117 F.3d at 587 (refusing to consider a "speech of a mid-level official" as an "authoritative departmental position"). . . . If the interpretation does not do so, a court may not defer.

Next, the agency's interpretation must in some way implicate its substantive expertise. . . . That point is most obvious when a rule is technical; think back to our "moiety" or "diagnosis" examples. . . . Some interpretive issues may fall more naturally into a judge's bailiwick. Take one requiring the elucidation of a simple common-law property term, see *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292–293 (CA10 1978), or one concerning the award of an attorney's fee, see *West Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239 (CA4 2003). Cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–650 (1990) (declining to award *Chevron* deference when an agency interprets a judicial-review provision). When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that 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." *Christopher [v. SmithKline Beecham Corp*., 567 U.S. 142, 155 (2012)]. And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. . . . We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one. . . . Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. See *Christopher*, 567 U.S. at 155–156. Here too the lack of "fair warning" outweighed the reasons to apply *Auer*.

The general rule, then, is not to give deference to agency interpretations advanced for the first time in legal briefs. But we have not entirely foreclosed that practice. *Auer* itself deferred to a new regulatory interpretation presented in an amicus curiae brief in this Court. There, the agency was not a party to the litigation, and had expressed its views only in response to the Court's request. "[I]n the circumstances," the Court explained, "[t]here [was] simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462.

The upshot of all this goes something as follows. When it applies, *Auer* deference gives

an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase "when it applies" is important—because it often doesn't. As described above, this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. . . .

III

That brings us to the lone question presented here—whether we should abandon the longstanding doctrine just described. . . . None of [Kisor's] arguments provide good reason to doubt *Auer* deference. And even if that were not so, Kisor does not offer the kind of special justification needed to overrule *Auer*, and *Seminole Rock*, and all our many other decisions deferring to reasonable agency constructions of ambiguous rules. . . .

A [Part III.A is a plurality opinion, garnering a total of 4 votes.]

Kisor first attacks *Auer* as inconsistent with the judicial review provision of the Administrative Procedure Act (APA). See 5 U.S.C. § 706. . . . Section 706 of the Act, governing judicial review of agency action, states (among other things) that reviewing courts shall "determine the meaning or applicability of the terms of an agency action" (including a regulation). According to Kisor, . . . Courts under *Auer* . . . "abdicate their office of determining the meaning" of a regulation.

To begin with, that argument ignores the many ways, discussed above, that courts exercise independent review over the meaning of agency rules. As we have explained, a court must apply all traditional methods of interpretation to any rule, and must enforce the plain meaning those methods uncover. . . .

And even when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in "determin[ing] the meaning" of an ambiguous rule. 5 U.S.C. § 706. One possibility, as Kisor says, is to review the issue de novo. But another is to review the agency's reading for reasonableness. . . .

Kisor next claims that *Auer* circumvents the APA's rulemaking requirements. Section 553, as Kisor notes, mandates that an agency use notice-and-comment procedures before issuing legislative rules. See 5 U.S.C. §§ 553(b), (c). But the section allows agencies to issue "interpret[ive]" rules without notice and comment. . . . [C]onsider, Kisor argues, what happens when a court gives *Auer* deference to an interpretive rule. The result, he asserts, is to make a rule that has never gone through notice and comment binding on the public. Or put another way, the interpretive rule ends up having the "force and effect of law" without ever paying the procedural cost.

But . . . interpretive rules, even when given *Auer* deference, do not have the force of law. An interpretive rule itself never forms "the basis for an enforcement action"—because, as just noted, such a rule does not impose any "legally binding requirements" on private parties. An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment. And in all the ways discussed above, the meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency's interpretation. . . .

To supplement his two APA arguments, Kisor turns to policy. . . . According to Kisor, *Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. . . .

But the claim has notable weaknesses, empirical and theoretical alike. First, . . . [n]o real evidence—indeed, scarcely an anecdote—backs up the assertion. . . . And even the argument's

theoretical allure dissipates upon reflection. . . . "[R]egulators want their regulations to be effective, and clarity promotes compliance." [Citation omitted.] Too, regulated parties often push for precision from an agency, so that they know what they can and cannot do. And ambiguities in rules pose risks to the long-run survival of agency policy. Vagueness increases the chance of adverse judicial rulings. And it enables future administrations, with different views, to reinterpret the rules to their own liking. Add all of that up and Kisor's ungrounded theory of incentives contributes nothing to the case against *Auer*.

Finally, Kisor [argues] . . . that *Auer* deference violates "separation-of-powers principles." . . . *Auer* does no such thing. In all the ways we have described, courts retain a firm grip on the interpretive function. . . .

B. [Part III.B concludes that *Auer* and *Seminole Rock* should not be overruled because of stare decisis. This Part was the opinion of the Court, garnering a total of 5 votes.]

IV

. . . [W]e hold that a redo is necessary for two reasons. First, the Federal Circuit jumped the gun in declaring the regulation ambiguous. . . . And second, the Federal Circuit assumed too fast that *Auer* deference should apply in the event of genuine ambiguity. As we have explained, that is not always true. . . .

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

CHIEF JUSTICE ROBERTS, concurring in part.

[Chief Justice Roberts concurred in the parts of Justice Kagan's opinion that (1) described limits on *Auer* deference and (2) concluded on *stare decisis* grounds that it and earlier decisions underlying it should not be overruled.]

[He also wrote separately to] suggest that the distance between the majority and JUSTICE GORSUCH is not as great as it may initially appear. The majority catalogs the prerequisites for, and limitations on, *Auer* deference. . . . JUSTICE GORSUCH, meanwhile, lists the reasons that a court might be persuaded to adopt an agency's interpretation of its own regulation. . . . Accounting for variations in verbal formulation, those lists have much in common. . . .

One further point: Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. See *Chevron*. . . . I do not regard the Court's decision today to touch upon the latter question.

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

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

[We excerpt below portions of Justice Gorsuch's opinion in which 3 other Justices—Thomas, Alito, and Kavanaugh—joined.]

I. How We Got Here. . .

Before the mid-20th century, few federal agencies engaged in extensive rulemaking, and those that did rarely sought deference for their regulatory interpretations. But when the question arose, this Court did not hesitate to say that judges reviewing administrative action should decide all questions of law, including questions concerning the meaning of regulations. As Justice BRANDEIS put it, "[t]he inexorable safeguard which the due process clause assures is . . . that there will be opportunity for a court to determine whether the applicable rules of law . . . were observed." [Citing *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936) (concurring opinion).] Unsurprisingly, the government's early, longstanding, and consistent interpretation of a statute, regulation, or other legal instrument could count as powerful *evidence* of its original public meaning. But courts respected executive interpretations only because and to the extent "they embodied understandings made roughly contemporaneously with . . . enactment and stably maintained and practiced since that time," not "because they were executive as such." [Citation omitted.]

. . . [In *Skidmore*, the question was] was whether the time overnight employees spent waiting to respond to fire alarms could amount to compensable overtime under the Fair Labor Standards Act. The lower courts had held as a matter of law that it could not. In an opinion by Justice Jackson, this Court reversed. The Court first held, based on its own independent analysis, that "no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time." Only then did the Court consider "what, if any, deference courts should pay" to the views of the Administrator of the Labor Department's Wage and Hour Division. And on that question the Court reaffirmed the traditional rule that an agency's interpretation of the law is "not controlling upon the courts" and is entitled only to a weight proportional to "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." At the time, the influential administrative law scholar Kenneth Culp Davis considered this "[a]n entirely reliable statement" of the law. [Citation omitted.]

[Justice Gorsuch argues that *Auer* deference originated in *Seminole Rock*'s dictum about giving "controlling weight" to agency interpretations of ambiguous agency rules.]

II. The Administrative Procedure Act

. . . [R]emarkably, until today this Court has never made any serious effort to square the *Auer* doctrine with the APA. Even now, only four Justices make the attempt. And for at least two reasons, their arguments are wholly unpersuasive. . . .

A

The first problem lies in § 706. That provision instructs reviewing courts to "decide all relevant questions of law" and "set aside agency action ... found to be ... not in accordance with law." Determining the meaning of a statute or regulation, of course, presents a classic legal question. But in case these directives were not clear enough, the APA further directs courts to "determine the meaning" of any relevant "agency action," including any rule issued by the agency. The APA thus requires a reviewing court to resolve for itself any dispute over the proper interpretation of an agency regulation. A court that, in deference to an agency, adopts something other than the best reading of a regulation isn't "decid[ing]" the relevant "questio[n] of law" or "determin[ing] the meaning" of the regulation. Instead, it's allowing the agency to dictate the answer to that question. In doing so, the court is abdicating the duty Congress assigned to it in the APA. . . .

The case before us doesn't arise under the APA, but the statute that governs here is

plainly modeled on the APA and contains essentially the same commands. It directs a reviewing court to "decide all relevant questions of law" and to "set aside any regulation or any interpretation thereof" that is "not in accordance with law." 38 U.S.C. § 7292(d)(1). . . .

B

. . . *Auer* is also incompatible with the APA's instructions in § 553. That provision requires agencies to follow notice-and-comment procedures when issuing or amending legally binding regulations (what the APA calls "substantive rules"), but not when offering mere interpretations of those regulations. . . .

Auer effectively nullifies the distinction Congress drew here. Under *Auer*, courts must treat as "controlling" not only an agency's duly promulgated rules but also its mere interpretations—even ones that appear only in a legal brief, press release, or guidance document issued without affording the public advance notice or a chance to comment. For all practical purposes, "the new interpretation might as well be a new regulation. . . . [Citation omitted.]

III. The Constitution

. . . *Auer* . . . sits uneasily with the Constitution. Article III, § 1 provides that the "judicial Power of the United States" is vested exclusively in this Court and the lower federal courts. A core component of that judicial power is "the duty of interpreting [the laws] and applying them in cases properly brought before the courts." [Quoting *Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018) (plurality opinion), and *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).] As Chief Justice Marshall put it, "[i]t is emphatically the province and duty of the judicial department to say what the law is." [Quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).] And never, this Court has warned, should the "judicial power . . . be shared with [the] Executive Branch." [Citation omitted.] Yet that seems to be exactly what *Auer* requires. . . .

. . . Under the APA, substantive rules issued by federal agencies through notice-and-comment procedures bear "the 'force and effect of law'" and are part of the body of federal law, binding on private individuals, that the Constitution charges federal judges with interpreting. Yet *Auer* tells the judge that he must interpret these binding laws to mean not what he thinks they mean, but what an executive agency says they mean. Unlike Article III judges, executive officials are not, nor are they supposed to be, "wholly impartial." They have their own interests, their own constituencies, and their own policy goals—and when interpreting a regulation, they may choose to "press the case for the side [they] represen[t]" instead of adopting the fairest and best reading. *Auer* thus means that, far from being "kept distinct," the powers of making, enforcing, and interpreting laws are united in the same hands—and in the process a cornerstone of the rule of law is compromised. . . .

JUSTICE KAVANAUGH, with whom JUSTICE ALITO joins, concurring in the judgment.

[Justice Kavanaugh wrote separately to emphasize that he agreed with Chief Justice Roberts that (1) "the distance between the majority and Justice Gorsuch is not as great as it may initially appear" and (2) the merits and demerits of *Auer* deference are distinct from those of *Chevron* deference.]

2. Significance of *Kisor*

Kisor affects *Auer* deference in three ways: by (1) complicating it; (2) restricting it; and (3) undermining it.

Auer deference has gone from a game of checkers to one of chess. *Auer* used to require federal courts to ask at most two pretty easy questions: Is the agency rule ambiguous, and, if so, is the agency's interpretation of that rule reasonable? As to the first question, *Kisor* seems to require a rule to be *very* ambiguous before deference might be appropriate, thereby replacing a

binary inquiry—"It either is ambiguous or it ain't"—with one that recognizes multiple degrees of ambiguity. For example, *Kisor* raises the question whether a court should consider a rule to be ambiguous if it has two possible interpretations but one interpretation seems better than the other. Before *Kisor*, the Court treated this situation as one of ambiguity. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). But now that situation is (well . . .) ambiguous. Furthermore, even if a rule is ambiguous (enough), that doesn't mean that *Auer* deference is appropriate. Instead, the agency interpretation still must clear at least three more hurdles to get *Auer* deference. Please go back and check our math on this. And if you are really brave, try creating a flow chart for applying *Auer* deference, and consider whether the doctrine should still be called one that provides in some situations for "deference."

In the process of complicating *Auer*, the Court in *Kisor* seems to have restricted it. For one thing, the Court intends that from now on, courts will find rules to be ambiguous less often than they used to. In the case before it, in fact, the Court concluded that the court of appeals had "jumped the gun" in finding the VA rule ambiguous. On remand and in future cases, lower courts are expected to exhaust all interpretive methods before they find ambiguity. For another thing, even genuinely ambiguous rules won't trigger deference if the ambiguity doesn't implicate the agency's expertise; or the agency's interpretation is not authoritative; or is not "fair and considered" (whatever that means). Perhaps the Court in *Kisor* wants courts to decide that it's usually easier just to interpret the darned rule instead of trying to figure out whether the agency's interpretation should get deference under the new restrictions for granting it!

Lower courts are all the more likely to be hesitant to grant *Auer* deference considering *Auer's* shaky status after *Kisor*. In *Kisor*, four Justices wrote to defend *Auer* as correct; another four Justices wrote to argued it's wrong. Chief Justice Roberts voted to sustain *Auer* deference, as limited by Justice Kagan's opinion, on grounds of *stare decisis*. Based on the uncertain status of *Auer*, lower courts and lawyers might be wise to treat *Auer* deference like *Skidmore* respect. Meaning that, ultimately, an agency's interpretation of its rule has the "power to persuade"—a power the existence and strength of which depends on many things—it doesn't alter the court's duty to decide the *correct* interpretation of the agency rule. *Skidmore*, 323 U.S. at 140.

Exercise: Rationalizing and Applying *Auer* Deference

Please read or review the Chapter Problem for Chapter 7. Then, explain in your own words whether the Department of Education's interpretation of its rule should get *Auer* deference. If you can't make a decision without more information, identify what more information you need.

Chapter 34

The "Arbitrary and Capricious" Standard

C. Leading Cases on the Arbitrary and Capricious Standard

p. 860:

After section C.2—and before section D—please add the following new subsection:

3. *Department of Commerce v. United States*

a. The *Department of Commerce* Opinion

Exercise: *Department of Commerce v. United States*
Please keep these questions in mind as you read the opinion below:
1. What agency action is being challenged?
2. Why does the majority hold that the agency action is invalid?
3. Please review the discussion of the *State Farm* opinion in the Course Book on p. 856 for the description of when agency action will normally be considered "arbitrary and capricious" standard. How does the decision in this case fit within that description?

Department of Commerce v. New York
139 S. Ct. 2551 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Secretary of Commerce decided to reinstate a question about citizenship on the 2020 census questionnaire. A group of plaintiffs challenged that decision. . . .

I

A

. . . [T]o apportion Members of the House of Representatives among the States, the Constitution requires an "Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct." Art. I, §2, cl. 3; Amdt. 14, §2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census "in such form and content as he may determine." 13 U. S. C. §141(a). The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce. See §§2, 21.

The population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States and to draw electoral districts. . . . [The census has long been used also to gather demographic data on matters like people's age, education, citizenship, and income level.] The Census Act obliges everyone to answer census questions truthfully and requires the Secretary to keep individual answers confidential, including from other Government agencies. §§221, 8(b), 9(a).

There have been 23 decennial censuses from the first census in 1790 to the most recent in

2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. . . . [To encourage people to complete the census, the Census Bureau eventually developed two versions, a short form that everyone got and that didn't ask about citizenship, and a long form that only some households received and that many demographic questions, including about citizenship.]

In 2010, the year of the latest census, the format changed again. All households received the same questionnaire, which asked about sex, age, race, Hispanic origin, and living arrangements. The more detailed demographic questions previously asked on the long-form questionnaire, including the question about citizenship, were instead asked in the American Community Survey (or ACS), which is sent each year to a rotating sample of about 2.6% of households.

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

B

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire. The Secretary stated that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (or VRA)—specifically the Act's ban on diluting the influence of minority voters by depriving them of single-member districts in which they can elect their preferred candidates. . . . [DOJ explained in its request that] the existing citizenship data from the American Community Survey was not idea [partly because] [i]t was not reported at the level of the census block, the basic component of legislative districting plans. . . . DOJ therefore formally requested reinstatement of the citizenship question on the census questionnaire. . . .

The Secretary's memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action. [The memo said that the Secretary eventually settled on an approach that blended the Census Bureau's preferred approach, which was to use the ACS data and develop a model for determining citizenship on a census-block level and the Secretary's preferred approach, which included the citizenship question on the census itself.] . . .

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

C

Shortly after the Secretary announced his decision, two groups of plaintiffs filed suit in

Federal District Court in New York, challenging the decision on several grounds. The first group of plaintiffs included 18 States, the District of Columbia, various counties and cities, and the United States Conference of Mayors. They alleged that the Secretary's decision violated the Enumeration Clause of the Constitution and the requirements of the Administrative Procedure Act. The second group of plaintiffs consisted of several non-governmental organizations that work with immigrant and minority communities. They added an equal protection claim. The District Court consolidated the two cases. Both groups of plaintiffs are respondents here.

The Government moved to dismiss the lawsuits. . . . The District Court dismissed the Enumeration Clause claim but allowed the other claims to proceed.

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

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

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

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

The District Court held a bench trial and . . . ruled that the Secretary's action was arbitrary and capricious, based on a pretextual rationale, and violated certain provisions of the Census Act. On the equal protection claim, however, the District Court concluded that respondents had not met their burden of showing that the Secretary was motivated by discriminatory animus. . . . [The government appealed to the Second Circuit and also petitioned the U.S. Supreme Court to grant certiorari before the Second Circuit decided the appeal. The

Court granted the petition and accordingly the case skipped over the Second Circuit and went directly to the Court.]

II

[The Court held that at least some of the plaintiffs had Article III standing.] Several States with a disproportionate share of noncitizens, for example, anticipate losing a seat in Congress or qualifying for less federal funding if their populations are undercounted. These are primarily future injuries, which "may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks omitted). . . .

III

The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary's decision. The text of that clause "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,' " and Congress "has delegated its broad authority over the census to the Secretary." [Quoting *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996).] . . .

We look . . . to Congress's broad authority over the census, as informed by long and consistent historical practice. . . . Since 1790, Congress has sought, or permitted the Secretary to seek, information about matters as varied as age, sex, marital status, health, trade, profession, literacy, and value of real estate owned. Since 1820, it has sought, or permitted the Secretary to seek, information about citizenship in particular. Federal courts have approved the practice of collecting demographic data in the census. . . .

That history matters. . . . In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. . . .

IV

A

. . . The Government . . . argues that the Secretary's decision was not judicially reviewable under the Administrative Procedure Act in the first place [because, under APA § 701(a)(2), it is **"committed to agency discretion by law."**] . . .

We disagree. To be sure, the Act confers broad authority on the Secretary. . . .

But [the Act's provisions] do not leave his discretion unbounded. In order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review, we have read the §701(a)(2) exception for action committed to agency discretion "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.' " *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U. S. ——, ——, 139 S.Ct. 361, 370 (2018) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). And we have generally limited the exception to "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,' " *id.*, at 191, such as a decision not to institute enforcement proceedings, *Heckler v. Chaney*, 470 U.S. 821, 831–832 (1985), or a decision by an intelligence agency to terminate an employee in the interest of national security, *Webster v. Doe*, 486 U.S. 592, 600–601.

The taking of the census is not one of those areas traditionally committed to agency discretion. . . .

Nor is the statute here drawn so that it furnishes no meaningful standard by which to judge the Secretary's action. . . . [T]he Census Act constrains the Secretary's authority to

determine the form and content of the census in a number of ways. . . .

B

At the heart of this suit is respondents' claim that the Secretary abused his discretion in deciding to reinstate a citizenship question. We review the Secretary's exercise of discretion under the deferential "arbitrary and capricious" standard. See 5 U. S. C. §706(2)(A). Our scope of review is "narrow": we determine only whether the Secretary examined "the relevant data" and articulated "a satisfactory explanation" for his decision, "including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). We may not substitute our judgment for that of the Secretary, *ibid*., but instead must confine ourselves to ensuring that he remained "within the bounds of reasoned decisionmaking," *Baltimore Gas & Elec. Co. v. [NRDC]*, 462 U.S. 87, 105 (1983).

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

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

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

The Bureau explained that the "relative quality" of the citizenship data generated by each approach would depend on the "relative importance of the errors" in each, but it was not able to "quantify the relative magnitude of the errors across the alternatives." The Bureau nonetheless recommended using administrative records alone because it had "high confidence" that it could develop an accurate model for estimating the citizenship of the 35 million people for whom administrative records were not available, and it thought the resulting citizenship data would be of superior quality. But when the time came for the Secretary to make a decision, the model did not yet exist, and even if it had, there was no way to gauge its relative accuracy. As the Bureau put it, "we will most likely never possess a fully adequate truth deck to benchmark" the model—which appears to be bureaucratese for "maybe, maybe not." *Id*., at 146. The Secretary opted instead for the approach that would yield a more complete set of data at an acceptable rate of accuracy, and would require estimating the citizenship of fewer people.

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

JUSTICE BREYER would conclude otherwise, but only by subordinating the Secretary's policymaking discretion to the Bureau's technocratic expertise. JUSTICE BREYER'S analysis treats the Bureau's (pessimistic) prediction about response rates and (optimistic) assumptions about its data modeling abilities as touchstones of substantive reasonableness rather than simply evidence for the Secretary to consider. He suggests that the Secretary should have deferred to the Bureau or at least offered some special justification for drawing his own inferences and adopting his own assumptions. But the Census Act authorizes the Secretary, not the Bureau, to make policy choices within the range of reasonable options. And the evidence before the Secretary hardly led ineluctably to just one reasonable course of action. It called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty. . . . It is not for us to ask whether his decision was "the best one possible" or even whether it was "better than the alternatives." *FERC v. Electric Power Supply Assn.*, 577 U. S. ——, ——, 136 S.Ct. 760, 782 (2016). . . . [The Court accordingly reverses the district court's ruling that the Secretary's decision was arbitrary and capricious because it was not adequately supported by the evidence.]

C

The District Court also ruled that the Secretary violated two particular provisions of the Census Act, §6(c) and §141(f). . . . [The Court rejects these arguments based its de novo interpretation of those statutes and accordingly reverses the District Court's decision on that issue.]

V

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

We start with settled propositions. First, in order to permit meaningful judicial review, an agency must "disclose the basis" of its action. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–169 (1962); see also *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.").

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

Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons. See *Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1185–1186 (CA10 2014) (rejecting argument that "the agency's subjective desire to reach a particular result must necessarily invalidate the result, regardless of the objective evidence supporting the agency's conclusion"). Relatedly, a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations

or prompted by an Administration's priorities. Agency policymaking is not a "rarified technocratic process, unaffected by political considerations or the presence of Presidential power." *Sierra Club v. Costle*, 657 F.2d 298, 408 (CADC 1981). Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).

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

The District Court invoked that exception in ordering extra-record discovery here. . . .

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

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

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

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

The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. . . .

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

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary's telling, Commerce was simply acting on a routine data

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

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (CA2 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. See *Florida Power & Light Co. v. Lorio*n, 470 U.S. 729, 744 (1985). We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.

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

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

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

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

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

could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the Administrative Procedure Act (APA). . . .

The law requires a more impartial approach. Even assuming we are authorized to engage in the review undertaken by the Court—which is far from clear—we have often stated that courts reviewing agency action owe the Executive a "presumption of regularity." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The Court pays only lipservice to this principle. . . . [At this point, Justice Thomas drops a footnote explaining that he and Justice Kavanaugh joint in Parts I through IV of the Court's opinion, but dissent from Part V, finding pretext; Justice Gorsuch dissents not only from Part V but also from Parts IV-A, which held that the Secretary's decision was not **"committed to agency discretion by law"** under APA § 701(a)(2).]

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

. . . I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire and that a remand to the agency is appropriate on that ground. But I write separately because I also believe that the Secretary's decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA). . . .

[Justice Breyer explained that he could find no evidence that the approach approved by Secretary Ross would produce more accurate data on citizenship than the Census Bureau's proposed approach; all the evidence was to the contrary. Justice Breyer also concluded that Secretary Ross did not adequately explain why he discounted the evidence that was contrary to his decision, nor did the Secretary address the other problems with the approach that he approved.]

In these respects, the Secretary failed to consider "important aspect[s] of the problem" and "offered an explanation for [his] decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. . . [The Secretary's failure to consider the contrary evidence] provides a sufficient basis for setting the decision aside.

JUSTICE ALITO, concurring in part and dissenting in part.

. . . To put the point bluntly, the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons. Of course, we may determine whether the decision is constitutional. But under the considerations that typically guide this Court in the exercise of its power of judicial review of agency action, we have no authority to decide whether the Secretary's decision was rendered in compliance with the Administrative Procedure Act (APA). . . . [Justice Alito concluded that the Secretary's decision is unreviewable because it was **"committed to agency discretion by law"** under APA § 701(a)(2).]

b. Significance of *Department of Commerce*

The Court's decision in *Department of Commerce* is too new to assess its significance fully. But its main significance seems to be its establishment of a "pretext" principle. That principle bars an agency from offering a "contrived" explanation for its action for purposes of judicial review. The rationale for this principle is that a contrived explanation disables courts from effectively reviewing the agency's decision to ensure it's the product of reasoned decision making. Reasoned decision making, as we've discussed throughout the book, is a central element of APA-type judicial review of agency action to determine whether it's arbitrary and capricious.

We will discuss three things about the pretext principle: its novelty, its relationship to agencies' institutional decisionmaking, and its implications for judicial review based on the "administrative record."

First, the pretext principle is indeed new at the U.S. Supreme Court level. The Court derived it from two "settled propositions": "First, in order to permit meaningful judicial review, an agency must 'disclose the basis' of its action." And "[s]econd, in reviewing agency action, a court is ordinarily limited to evaluation the agency's contemporaneous explanation in light of the existing administrative record." The idea that an agency must explain its decision to make judicial review possible goes back to *Overton Park*. In *Overton Park*, the Secretary had not explained why he decided to route Interstate 40 through the park, so on remand one of the things the district court might have to do was "require some explanation." 401 U.S. at 420. The Court emphasized in the later case of *Camp v. Pitts*, however, that usually the court must accept the agency's "contemporaneous explanation":

> Unlike *Overton Park*, in the present case there was contemporaneous explanation of the agency decision. The explanation may have been curt, but it surely indicated the determinative reason for the final action: the finding that a new bank was an uneconomic venture in light of the banking needs and the banking services already available in the surrounding community. The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding.

411 U.S. 138, 143 (1973). Given reviewing courts' dependence on agencies' "contemporaneous explanations," the Court in *Department of Commerce* reasoned that "[a]ccepting contrived reasons would defeat the purpose of the [judicial review] enterprise." 139 S. Ct. at 2576. The reasoning makes sense, but Justice Thomas was right to say that the pretext principle is new or, to use the pejorative term, "unprecedented." *Id.* (Thomas, J., concurring in part and dissenting in part).

Second, to say that the agency's explanation cannot be "contrived" does not mean it must be *complete* and *apolitical*. As discussed in earlier chapters, agency decision making differs from judicial decision making because it is an institutional, and often an openly political, process. The Court in *Department of Commerce* accordingly recognized that the Secretary's decision was shaped by many "affected parties" and "other agencies." *Id.* at 2574. In this sense it was institutional. The Court also observed that agency decisions "are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others)." *Id.* at 2573. In this sense, agency decisions are often political. Recognizing the "sometimes involved nature of Executive Branch decisionmaking," the Court said, "[A] court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Id*. at 2573. Nor may a court "set side an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." *Id.* The point is that the agency need not bare its soul in the "contemporaneous explanation" supplied for judicial review; it must, however, avoid affirmative misrepresentations about the reasons for its action.

Third, the pretext principle doesn't alter the general rules that (1) judicial review is limited to the administrative record and (2) parties may not seek discovery outside of the record to probe "the mental processes of administrative decisionmakers." *Id*. at 2573–2574 (quoting *Overton Park*, 401 U.S. at 420. The Court in *Overton Park* added that extra-record discovery should occur only on a "strong showing of bad faith or improper behavior." *Id.* at 2574. The

Court in *Department of Commerce* held that this showing had not been made when the district court there ordered extra-record discovery. *Id*. Instead, "the most that was warranted was the [district court's] order to complete the administrative record." *Id.* Even so, the Court reviewed the extra-record evidence; the cat was out of the bag. But the Court was careful to disapprove the extra-record discovery that the lower court ordered. The disapproval accords not only with *Overton Park*, but also *United States v. Morgan*, 313 U.S. 409, 421–422 (1941) (discussed in Chapter 24.A)

Exercise: *Department of Commerce* Revisited

While the *Department of Commerce* case was pending before the Court, the plaintiffs in that case claimed to have uncovered (in separate litigation) the "real" reason for the Secretary's decision to put a citizenship question on the census. They claimed that the real reason was to allow state legislatures controlled by Republicans to draw legislative districts based on the number of citizens, a result that was expected to hurt Hispanic voters. *See* NYIC Respondents' Motion for Limited Remand at 4, *Dep't of Commerce v. N.Y.*, 139 S. Ct. 2551 (2019) (No. 18-966).

1. Under the Court's decision in *Department of Commerce*, what would the plaintiffs have to show to conduct discovery in that case for evidence of the "real reason" for the Secretary's decision?

2. What standard of proof would the district court use to determine whether this evidence proved the real reason?

3. If the district court agreed that the real reason was what the plaintiffs claimed, how should it decide the case?

Chapter 35

Specialized Review Situations; Judicial Remedies

A. Specialized Review Situations

3. Agency Denial of Request to Rehear, Reconsider, or Reopen Prior Decision

p. 868:

The first paragraph on page 868 discusses agencies' power to rehear cases. Contrary to that paragraph, a 2015 decision suggests that agencies have "inherent" power to rehear cases. The court in that case held, however, that the agency legislation superseded any such power. *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86-89 (D.C. Cir. 2015). The court's reference to "inherent" power does not mean that agencies have powers besides the ones granted by law. Instead, it means that a statutory provision authorizing an agency to decide a matter may be interpreted implicitly to allow an agency, after deciding a matter, to change its mind.

B. Remedies

4. Harmless Error

p. 883:

The citation in this bullet point on page 883 should be revised to reflect subsequent history:

- *City of Arlington, Texas v. Federal Communications Commission*, 668 F.3d 229 (5th Cir. 2012), *aff'd on other grounds*, 569 U.S. 290 (2013)