Administrative Law

A Context and Practice Casebook

Second Edition

2024 Supplement

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Introduction to 2024 Supplement

This supplement covers the period from July 2019, when the course book went to press, through July 2024, when this update was under preparation. I welcome your feedback on this supplement or the course book. Please send it to me at richard@uidaho.edu. Thank you.

Chapter 1

1. Welcome to Administrative Law!

B. What Are Administrative Agencies?

1. Administrative Agencies in the Everyday Sense

p. 7:

At the end of the paragraph beginning "One set of non-cabinet-level federal agencies . . .," please insert this sentence:

While independent agencies enjoy some independence from the President, the U.S. Constitution's separation-of-powers doctrine limits Congress's ability to insulate the heads of those agencies from presidential control. *See Collins v. Yellen*, 594 U.S. 220 (2021) (relying on *Seila Law, LLC v. Consumer Fin. Protection Bureau*, 591 U.S. 197 (2020) to invalidate, on separation of powers grounds, statutory restriction on President's power to remove the single Director who heads independent regulatory agency). Thus, their independence is relative, not absolute.

Chapter 2

2. Administrative Law Problem Solving

B. Sources of Agency Power

p. 30:

About three-quarters of the way down the page, after the citation to *Oklahoma v. U.S. Civil Serv. Comm'n*, please add another citation:

Accord Fed. Election Comm'n v. Cruz, 596 U.S. 289 (2022).

D. Enforcing Limits on Agency Power

p. 39:

In the middle of p. 39, ignore the existing subsection "3. The Legislative Branch" and read this version instead, because it contains a new sentence citing a new U.S. Supreme Court case:

3. The Legislative Branch

The legislative branch exerts control over administrative agencies by enacting statutes creating them in the first place and, in many instances, enacting later statutes modifying the agency's original powers and duties or giving the agency more powers and duties.

The legislature does not simply trust the agency to obey these statutes. Rather, the legislature (often acting through a legislative committee or subcommittee) oversees the agency's activities. One way the legislature does this is by oversight hearings on the agency's operation and its proposed budget. Usually, the legislature reviews and decides on the agency's budget every year, but some agencies operate under statutes that free their funding from yearly legislative review. *See Consumer Financial Protection Bureau v. Comm. Fin. Servs. Ass'n*, 144 S. Ct. 1474 (2024) (upholding federal statute that created a standing source of funding outside of the annual appropriation process for independent federal agency, and rejecting challenge that the statute violated the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7). Other means of oversight occur more informally, as legislators contact agency officials, often about complaints from constituents (or their constituents' lawyers).

Throughout this book you will learn about statutory limits on agency power. We will also allude to means by which legislatures enforce these limits and otherwise control agency action.

Chapter 5

5. Administrative Law, Federal Supremacy, and Cooperative Federalism

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B. When Must Federal Agencies and Officials Obey State and Local Law?

1. Federal Agencies and Officials Must Obey a State or Local Law If that Law Does Not Meaningfully Interfere with the Execution of Federal Law and Is Not Preempted by Federal Law.

b. Preemption of State and Local Law by Federal Statutes and Regulations

p. 110:

At the end of the first full paragraph, which begins "An administrative law case illustrating preemption. . .", please add this citation:

Cf. Glacier Northwest, Inc. v. Int'l Bhd. of Teamsters Local Union No. 174, 598 U.S. 771, 789–784 (2023) (holding that state tort claims arising from destruction of employer property related to labor dispute were not preempted by National Labor Relations Act).

Chapter 8

8. Agency Rulemaking Power

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

2. Modern Federal Delegation Doctrine

p. 164:

At the end of the fourth full paragraph—beginning "The 1935 cases of *Panama Refining* and *Schechter Poultry* . . ."—please insert this sentence:

For a lower court decision finding a violation of the nondelegation doctrine, see *Jarkesy v. SEC*, 34 F.4th 446, 459–463 (5th Cir. 2022) (holding that federal statutory provision violated nondelegation doctrine by delegating to SEC the unfettered right to choose whether to bring enforcement proceeding within the agency or in federal court), *aff'd*, 144 S. Ct. 2117 (2023). The U.S. Supreme Court granted certiorari and held that the SEC's use of agency adjudication to impose civil penalties violated the Seventh Amendment, U.S. Const. amend. VII, because it deprived Mr. Jarkesy and his company of a jury trial. The opinion is excerpted and discussed at length later in this supplement. The Court in *Jarkesy* did not address the nondelegation issue. 144 S. Ct. at 2127–2128.

4. Delegation of Power to Private Entities

p. 173:

At the end of the second full paragraph, which begins, "The leading case on federal statutes delegating powers to private entities . . .", please add these citations:

Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 423–435 (5th Cir. 2024) (addressing, and partly sustaining, private nondelegation challenge to federal statute, the Horseracing Integrity and Safety Act (HISA)).

Also on page 173, please add this citation at the end of the third full paragraph, which

begins, "The Due Process Clause does not forbid *all* private participation . . .":

Consumers' Research v. FCC. 67 F.4th 773, 795–97 (6th Cir. 2023) (relying on *Sunshine Anthracite Coal*, among other cases, to find "no private-delegation doctrine violation" in federal statute authorizing private entity, Universal Service Administrative Company, to have input on FCC rulemaking).

Chapter 9

9. Limits on Agency Rulemaking Power

A. Internal Limits on Agency Rulemaking Power

1. Internal Substantive Limits

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

pp. 181–182:

On the middle of p. 181 is the sentence "Here are examples of cases in which the U.S. Supreme Court held that an agency's legislative rule violated the agency legislation." Following that are summaries of three cases. Please ignore those summaries and read the ones below, which summarize newer cases.

- *Garland v. Cargill*, 602 U.S. 406 (2024)

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued a legislative rule that classified bump stocks as "machine guns" under the National Firearms Act of 1934, 26 U.S.C. § 5845(b). This classification triggered severe restrictions; indeed, federal law generally bans machine guns manufactured or imported after 1986. *See* 18 U.S.C. § 922(o). A bump stock is "an accessory for a semiautomatic rifle that allows the shooter to rapidly reengage the trigger (and therefore achieve a high rate of fire)." *Cargill*, 144 S. Ct. at 410. The Court held that a bump stock is not a machine gun (a term that is statutorily defined to include pieces of a machine gun), and that ATF's bump stock rule therefore exceeded ATF's authority. A bump stock is not a machine gun, the Court concluded, because it does not enable a person to "shoot, automatically more than one shot . . . by a single function of the trigger," as required by the statutory definition of "machine gun." *Id.* (quoting statute).

- *Biden v. Nebraska*, 143 S. Ct. 2355 (2023)

At the President's direction, the Secretary of Education created a program (in a set of legislative rules) that would enable 20 million people to have their federal student loans wholly or partly "forgiven"—i.e. canceled. The Secretary claimed that the loan forgiveness program was authorized by a statute that permits him or her to "waive or modify" any statutory provision in Title IV of the Education Act if he or she "deems" the waiver or modification "necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a). The Court rejected that claim of authority, holding that the loan-forgiveness program was more than a waiver or modification of Title IV; it "rewr[o]te the statute from the ground up." *Biden*, 143 S. Ct. at 2368. In so holding, the Court relied partly on *MCI Telecommunications Corp. v.*

American Telephone & Telegraph Co., 512 U.S. 218 (1994). In the *MCI* case, the Court had said that a statutory provision authorizing an agency to "modify" other statutory provisions "'does not authorize' basic and fundamental changes in the scheme designed by Congress.'" *Biden*, 143 S. Ct. at 2368 (quoting *MCI*, 512 U.S. at 225).

- *West Virginia v. EPA*, 597 U.S. 697 (2022)

This case concerned the EPA's Clean Power Plan Rule. The Rule rested on a Clean Air Act provision that authorizes the EPA to regulate power plants by "setting a 'standard of performance' for their emission of certain air pollutants." *Id.* at 706 (quoting 42 U.S.C. § 7411(a)(1)). The Act requires a standard of performance to reflect the "best system of emission reduction" that has been "adequately demonstrated." *Id.* (quoting statute).

The Clean Power Plan Rule addressed the emission of carbon dioxide from existing coal-fired power plants. In the Rule, the EPA concluded that "the best system of emission reduction" for these plants entailed a requirement that they "reduce their production of electricity, or subsidize increased generation by natural gas, wind, or solar sources." *Id.* This requirement would shift the generation of electricity in the U.S. from coal-fired power plants to other sources like natural-gas-fired power plants and solar power and wind power technology.

The Court held that this "generation shifting" requirement exceeded EPA's authority under the Clean Air Act. It wasn't a "standard of performance" within the meaning of the Act. The requirement didn't, for example, require individual coal-fired plants to adopt new technology or improve operating methods to reduce their carbon-dioxide emissions. And the Clean Air Act's term "system of emission reduction" didn't authorize "restructuring the Nation's overall mix of electricity generation." *Id.* at 720. Instead, the term generally had a plant-specific meaning, focusing on the process (system) for generating electricity within power plants.

B. External Limits on Agency Rulemaking Power

1. Constitutional Law

a. Substantive Limits

p. 185:

At the end of the paragraph. please insert this citation:

See also Cedar Point Nursery v. Hassid, 594 U.S. 139, 149–152 (2021) (holding that California regulation violated the Just Compensation Clause by giving labor unions uncompensated right to go onto privately owned agricultural land to solicit union support).

Chapter 12

12. Informal Rulemaking

C. The Federal Agency Publishes General Notice of Proposed Rulemaking

1. The Purposes and Express Requirements of APA § 553(b)

p. 259:

At the very bottom of p. 259, please add this short paragraph:

Besides the three required pieces of information described above, Congress added a fourth required piece of information in a recent amendment to § 553(b). As amended, the agency must also give "the Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language." Pub. L. No. 118-9, § 2 (July 25, 2023). It will be interesting to see how soon we will see lawsuits challenging the adequacy of these summaries, brought perhaps by people who lack the patience (and who can blame them?) to read proposed rules in their entirety.

C. The Federal Agency Considers Public Input on the Proposed Rule and Other Relevant Matters When Deciding on the Final Rule

1. What Is "[R]elevant"?

p. 278:

At the end of the second paragraph of this subsection, please insert this citation:

See, *e.g.*, *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 595 (D.C. Cir. 2022) (stating that agency must show that it "reasonably considered the relevant issues and factors, particularly those expressly mandated by statute.") (internal quotation marks omitted).

D. The Federal Agency Publishes the Final Rule Along with a Concise General Statement of Its Basis and Purpose

2. Concise General Statement

f. The Agency Must Explain Any "Change in Course"

p. 296:

After the first full paragraph, which begins "The Court agreed . . .", please add this new paragraph:

The Court cited *Encino Motorcars* in a more recent case involving an agency's failure to consider reliance interests when changing course: *Department of Homeland Security v. Regents of the Univ. of Calif.*, 591 U.S. 1 (2020) (*DHS v. Regents*), which is excerpted later in this supplement. *DHS v. Regents* concerned the rescission of a program known as "DACA," which stands for Deferred Action for Childhood Arrivals. The DACA program "allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal." *Id.* at 9. In 2017, DHS rescinded the agency memorandum establishing DACA, thereby rescinding the DACA program itself, but the U.S. Supreme Court held that the rescission was arbitrary and capricious. Quoting *Encino Motorcars*, the Court said, "When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 30 (internal quotation marks and citation omitted). But DHS "ignore[d]" the reliance interests of people who had received forbearance under DACA. *Id*. On remand, the Court made clear, DHS had to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 33.

On remand, however, DHS did not try to rescind DACA again. As of the date of this supplement, DACA's status is complicated. In brief, people who got forbearance from removal under the DACA program continue to enjoy the benefits of DACA status and can get that status renewed. But a lawsuit challenging the 2012 program prevents DHS from processing initial requests for DACA status received after October 2022. DACA's ultimate fate remains uncertain.

Chapter 17

17. Introduction to Agency Adjudication

E. The Distinction between the Agency as Adjudicator and the Agency as Litigant

1. Court Adjudications Not Preceded by an Agency Adjudication

a. The Agency as Plaintiff

p. 381:

In the fourth paragraph—which begins "An agency also may have to go initially to court . . ."—please insert this citation at the end of the paragraph:

Cf. AMG Capital Mg'mt., LLC v. Federal Trade Comm'n, 593 U.S. 67, 75–78 (2021) (holding that FTC lacked authority under agency statute to go directly into court to recover equitable monetary relief like restitution or disgorgement; Court relied partly on other statutory provisions authorizing FTC to seek monetary relief in court following administrative proceedings).

Chapter 18

18. Agency Adjudicatory Power

C. Federal Constitutional Restrictions on Statutory Grants of Adjudicatory Power to Federal Agencies

p. 399:

Please ignore everything starting with the subheading on p. 399, "2. Historical U.S. Supreme Court Case Law," up to, but not including, the heading on p. 408, "D. Modern State Law on Adjudicative Delegations to State Agencies," and read this instead:

2. U.S. Supreme Court Case Law

The U.S. Supreme Court apparently enjoys addressing how the U.S. Constitution constrains federal laws that grant adjudicatory power to federal agencies; it's decided many cases on this subject. We'll focus on the cases about what is now called the "public rights exception." We start with background. Then we excerpt a new, important case on the public rights exception, *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024). Lastly, we discuss *Jarkesy*'s significance. Spoiler alert: *Jarkesy* is a huge deal!

a. Background

In early cases, the Court upheld federal laws that delegated adjudicatory power to federal agencies and other non-Article III entities in three main situations. Non-Article III entities could serve (1) as military courts, (2) as territorial courts, and (3) as tribunals for adjudicating "public rights." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 65–68 (1982) The third situation, involving what is today called the public rights "exception," is the most important for modern administrative law, so we focus on that one.

The "public rights exception" is an exception to both Article III and the Seventh Amendment. In other words, it not only allows federal agencies to adjudicate matters without violating Article III; it also allows them to adjudicate matters without a jury, including matters as to which the Seventh Amendment would require a jury trial if the matter were tried in a federal court. *Oil States Energy Servs., LLC v. Greene's Energy Grp*., 584 U.S. 325, 345 (2018) ("[W]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.") (internal quotation marks omitted). You must by now be asking yourself about this double-barreled exception: "What exactly are public rights?" The answer to that question has changed over time.

In early cases, the Court defined "public rights" to mean noncriminal, statutory claims by or against the federal government. Examples of claims *by* the government that involved public rights were agency enforcement proceedings for regulatory violations—proceedings in which, for example, the government used agency adjudication to impose civil penalties on regulated entities for violating regulations. Examples of claims *against* the government that involved public rights included claims—e.g., by veterans—for government benefits. *See*, *e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 68 (1989)(Scalia, J., concurring in part) (public rights were long understood to include "rights of the public—that is, rights pertaining to claims brought by or against the United States"). In contrast, "private rights" concerned "the liability of one [private] individual to another." *Crowell v. Benson*, 285 U.S. 22, 51 (1932). *Crowell v. Benson* itself, for example, involved a claim for workers' compensation by a private person who was injured on the job against his private employer. (The Court in *Crowell* upheld a federal agency's adjudication of this workers' comp claim against a constitutional challenge on the ground that the agency under the relevant statute was acting merely as an "adjunct" to the federal courts. We won't explore this "adjunct" theory, which is distinct from the public rights exception.)

In later cases, the Court fudged the distinction between public rights and private rights by relying on the "public rights" case law to uphold agency adjudication of disputes between *private* parties, when those private-party disputes were "closely intertwined with a federal regulatory program Congress ha[d] power to enact." *Granfinanciera*, 492 U.S. at 55 & n.10. Two cases from the mid-1980s made this extension of the public rights case law.

The first case was *Thomas v. Union Carbide Agricultural Products Co*., 473 U.S. 568 (1985). *Thomas* arose under a federal law that comprehensively regulated pesticides and other chemicals used in farming. The law had a wonderful name: the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). FIFRA required pesticide manufacturers to submit data to the EPA proving that their products were safe. But FIFRA had a hack when it came to manufacturers' submission of this safety data: Once Manufacturer *A* had gotten EPA approval for its pesticide, if Manufacturer *B* sought approval for a chemically similar pesticide, Manufacturer *B* could get EPA to consider the safety data that had previously been submitted (and developed) by Manufacturer *A*. Of course, Manufacturer *B* had to pay Manufacturer *A* for this use of its costly, proprietary data. And if Manufacturer *A* and *B* couldn't agree on the amount of compensation, FIFRA required the compensation to be determined through binding arbitration (a form of adjudication). Arbitration decisions on these private disputes were subject to only limited review by Article III courts.

The Court in *Thomas* held that FIFRA's arbitration scheme did not violate Article III. Here's where the fudging came in: The Court said the right of one private manufacturer to compensation from another private manufacturer under FIFRA "is not purely a 'private' right, but bears many of the characteristics of a 'public right.'" *Id.* at 589. The compensation right closely resembled a "public right," the Court explained, because the public benefited from letting EPA consider the same data when reviewing multiple, chemically similar pesticides. This made the approval process more efficient in safeguarding public health. *Id.* at 589.

As for the technicality that the compensation right created by FIFRA wasn't *really* a public right, the Court criticized the public rights/private rights distinction as too formalistic. Instead of a formalistic approach, the Court said its case law on public rights established a "pragmatic" approach that prized "substance" over "form." *Id.* And under a pragmatic approach, it made sense for Congress to have decisions on data compensation under FIFRA's comprehensive regulatory

scheme determined outside the Article III branch.

The second case allowing agency adjudication of private rights is *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). There, the Court upheld a federal agency's adjudication of a claim by a commodity broker asserting that his customer owed the broker money. The broker's claim was based on state contract law. The broker asserted this state-law contract claim as a counterclaim, in response to his customer's filing an administrative complaint against the *broker*, in which the customer claimed that the broker had violated a *federal* law, the Commodity Futures Trading Act. The Court acknowledged that the broker's counterclaim against his client was "a 'private' right for which state law provides the rule of decision," and that, as such, it was "a claim of the kind assumed to be at the core of matters normally reserved to Article III courts." *Id.* at 853 (internal quotation marks omitted). Even so, the Court held that the adjudication of this state-law counterclaim by a federal executive agency, the Commodity Futures Trading Commission, did not violate Article III. *Id.* at 851–852.

As in *Thomas*, the Court in *Schor* relied on the public rights case law, which it read to reflect a "pragmatic" approach. The Court in *Schor* repeated its criticism from *Thomas* of "formalistic and unbending rules." *Schor*, 478 U.S. at 851, 853. In particular, the Court in *Schor* observed that in *Thomas*, it had "rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights." *Id.* at 853. Instead of drawing a sharp, determinative distinction between public and private rights, the Court in *Schor* understood its public rights precedent to require consideration of multiple factors:

> Among the factors upon which we have focused are [1] the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, [2] the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [3] the origins and importance of the right to be adjudicated, and [4] the concerns that drove Congress to depart from the requirements of Article III.

Id. at 851 (internal quotation marks omitted; bracketed numerals added). Notice that factor [4] reflects the Court's view that the Constitution lets Congress "*depart from* the requirements of Article III." *Id.* (emphasis added). By upholding FIFRA's arbitration scheme, despite its "depart[ing]" from Article III, the Court was obviously creating an exception to Article III. Hence the name public rights "exception."

And recall that under the Court's precedent, the Seventh Amendment does not create any "independent bar" to a federal agency's adjudication of "public rights" or, as extended in *Thomas* and *Schor*, of certain private rights that are "closely intertwined with a federal regulatory program Congress ha[d] power to enact." *Granfinanciera*, 492 U.S. at 55 & n.10. So the Court's "public rights" cases, and the extension of them in *Thomas* and *Schor*, established a broad exception from both Article III and the Seventh Amendment.

Exercise: The Traditional Public Rights/Private Rights Distinction

Let's get formalistic for a moment, with the aim of helping you understand the traditional distinction between public rights and private rights. Please explain whether the following agency adjudications involve "public rights" as that term was defined in the early cases described above.

1. The Federal Trade Commission determines in an enforcement proceeding that a company has engaged in an unfair and deceptive trade practice and must cease and desist.

2. At the end of an agency adjudication, the Department of the Interior issues a lease allowing a company to explore for oil and gas in an area of the Outer Continental Shelf, which is owned by the federal government.

3. The Social Security Administration determines in an adjudication that someone is not eligible for disability insurance payments from the government under the Social Security Act.

4. The U.S. Department of Labor determines in an adjudication that a private shipping company should pay benefits to one of its employees who was injured on the job and is therefore entitled to benefits under the federal Longshore and Harbor Workers' Compensation Act.

5. The federal Civil Board of Contract Appeals resolves through adjudication a contract dispute between a government contractor (a private company) and a federal agency.

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b. The *SEC v. Jarkesy* Opinion

In subsection **a**, we left off in the mid-1980s. Now fast forward 40-some years to *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), which we excerpt below. Whereas *Thomas* (1985) and *Schor* (1986) had extended the public rights case law, the Court in *Jarkesy* has now restricted it.

Exercise: *SEC v. Jarkesy*

Please consider these questions as you read the opinion below.

1. Why, do you think, Mr. Jarkesy wants a jury trial in federal court? And why doesn't the SEC want him to have one?

2. What two-part analysis does the Court use to decide whether the SEC's adjudication of its claim for civil penalties against Mr. Jarkesy and his company violates the Seventh Amendment?

3. According to the majority, how do you decide whether a claim involves "public rights" or "private rights"? What does the dissent say about how to distinguish them?

4. If you had to pick, would you describe the Court's analysis in *Jarkesy* as "pragmatic" or "formalistic"? (We don't use latter term pejoratively or the former term favorably; they're just the academic buzzwords.)

Securities and Exchange Commission v. Jarkesy

144 S. Ct. 2117 (2024)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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

I

A

[After] the Wall Street Crash of 1929, Congress passed . . . laws designed to combat securities fraud and increase market transparency. Three such statutes are relevant here: The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. . . . [T]heir pertinent provisions—collectively referred to by regulators as "the antifraud provisions"—target the same basic behavior: misrepresenting or concealing material facts. . . .

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

Procedurally, these forums differ in who presides and makes legal determinations, what evidentiary and discovery rules apply, and who finds facts. Most pertinently, in federal court a jury finds the facts, depending on the nature of the claim. See U. S. Const., Amdt. 7. . . .

Conversely, when the SEC adjudicates the matter in-house, there are no juries. Instead, the Commission presides and finds facts while its Division of Enforcement prosecutes the case. The Commission may also delegate its role as judge and factfinder to one of its members or to an administrative law judge (ALJ) that it employs. . . .

When a Commission member or an ALJ presides, the full Commission can review that official's findings and conclusions, but it is not obligated to do so. Judicial review is also available once the proceedings have concluded. But such review is deferential. By law, a reviewing court must treat the agency's factual findings as "conclusive" if sufficiently supported by the record, even when they rest on evidence that could not have been admitted in federal court.

In . . . 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), [which] "ma[de] the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court." H. R. Rep. No. 111–687, p. 78 (2010). In other words, the SEC may now seek civil penalties in federal court, or it may impose them through its own in-house proceedings.

Civil penalties rank among the SEC's most potent enforcement tools. These penalties consist of fines of up to $725,000 per violation. And the SEC may levy these penalties even when no investor has actually suffered financial loss.

B

Shortly after passage of the Dodd-Frank Act, the SEC began investigating Jarkesy and Patriot28 for securities fraud. . . . According to the SEC, Jarkesy and Patriot28 misled investors in at least three ways: (1) by misrepresenting the investment strategies that Jarkesy and Patriot28 employed, (2) by lying about the identity of the funds' auditor and prime broker, and (3) by inflating the funds' claimed value so that Jarkesy and Patriot28 could collect larger management fees. The SEC initiated an enforcement action, contending that these actions violated the antifraud provisions of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act, and sought civil penalties and other remedies.

. . . [T]he SEC opted to adjudicate the matter itself rather than in federal court. In 2014, the [SEC entered a] final order [that] levied a civil penalty of $300,000 against Jarkesy and Patriot28, directed them to cease and desist committing or causing violations of the antifraud provisions, ordered Patriot28 to disgorge earnings, and prohibited Jarkesy from participating in the securities industry and in offerings of penny stocks.

[On judicial review, Jarkesy and his company argued, among other things, that the SEC's adjudication of this matter violated his right to a jury trial under the Seventh Amendment. The Court granted certiorari.]

II

This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud. Our analysis of this question follows the approach set forth in *Granfinanciera [v. Nordberg*, 492 U.S. 33 (1989),] and *Tull v. United States*, 481 U.S. 412 (1987). The threshold issue is whether this action implicates the Seventh Amendment. It does. The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.

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

A

We first explain why this action implicates the Seventh Amendment.

1

The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474 (1935). [The Court briefly described the history of the jury trial right, including that "when the English continued to try [colonial] Americans without juries, the Founders cited the practice as a justification for severing our ties to England." 144 S. Ct. at 2128 (citing The Declaration of Independence ¶ 20).] . . .

2

By its text, the Seventh Amendment guarantees that in "[s]uits at common law, . . . the right of trial by jury shall be preserved." In construing this language, we have noted that the right is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. *Curtis v. Loether*, 415 U.S. 189, 193 (1974). As Justice Story explained, the Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." *Parsons [v. Bedford*, 28 U.S. 433, 446 (1830)]. The Amendment therefore "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Id*., at 447.

The Seventh Amendment extends to a particular statutory claim if the claim is "legal in nature." *Granfinanciera*, 492 U.S. at 53. As we made clear in *Tull*, whether that claim is statutory is immaterial to this analysis. In that case, the Government sued a real estate developer for civil penalties in federal court. The developer responded by invoking his right to a jury trial. Although the cause of action arose under the Clean Water Act, the Court surveyed early cases to show that the statutory nature of the claim was not legally relevant. "Actions by the Government to recover civil penalties under statutory provisions," we explained, "historically ha[d] been viewed as [a] type of action in debt requiring trial by jury." *Id*., at 418–419. To determine whether a suit is legal in nature, we directed courts to consider the cause of action and the remedy it provides. Since some causes of action sound in both law and equity, we concluded that the remedy was the "more important" consideration. *Id*., at 421.

In this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to "restore the status quo." *Tull*, 481 U.S. at 422. Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law." [Citing *Tull*.] The same is true here. [The Court concludes that the civil penalties sought by the SEC were designed to punish Mr. Jarkesy and his company. The Court rests this conclusion on factors specified in the securities statutes for determining the amount of civil penalties, which included "culpability, deterrence, and recidivism." The Court also relies on the fact that the SEC need not give any of the civil penalties it collects to the people who were defrauded.]

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

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

B

1

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

The Constitution prohibits Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Murray's Lessee v. Hoboken Land & Improvement Co*., 18 How. 272, 284 (1856). Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies. *Stern v. Marshall*, 564 U.S. 462, 484 (2011). These propositions are critical to maintaining the proper role of the Judiciary in the Constitution: "Under the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government adopted in the Constitution, the judicial Power of the United States cannot be shared with the other branches. *Id*., at 483 [internal quotation marks and citation omitted]. Or, as Alexander Hamilton wrote in The Federalist Papers, " 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " The Federalist No. 78, at 466 (quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773)).

On that basis, we have repeatedly explained that matters concerning private rights may not be removed from Article III courts. *Murray's Lessee*, 18 How. at 284; *Granfinanciera*, 492 U.S. at 51–52. A hallmark that we have looked to in determining if a suit concerns private rights is whether it "is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." [*Stern*, 564 U.S. at 484 (internal quotation marks omitted]). If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory.

At the same time, our precedent has also recognized a class of cases concerning what we have called "public rights." Such matters "historically could have been determined exclusively by [the executive and legislative] branches," *id*., at 493 (internal quotation marks omitted), even when they were "presented in such form that the judicial power [wa]s capable of acting on them," *Murray's Lessee*, 18 How. at 284. In contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in such a case.

The decision that first recognized the public rights exception was *Murray's Lessee*. In that case, a federal customs collector failed to deliver public funds to the Treasury, so the Government issued a "warrant of distress" to compel him to produce the withheld sum. 18 How. at 274–275. Pursuant to the warrant, the Government eventually seized and sold a plot of the collector's land. *Id*., at 274. Plaintiffs later attacked the purchaser's title, arguing that the initial seizure was void because the Government had audited the collector's account and issued the warrant itself without judicial involvement. *Id*., at 275.

The Court upheld the sale. It explained that pursuant to its power to collect revenue, the Government could rely on "summary proceedings" to compel its officers to "pay such balances of the public money" into the Treasury "as may be in their hands." *Id*., at 281, 285. Indeed, the Court observed, there was an unbroken tradition—long predating the founding—of using these kinds of

proceedings to "enforce payment of balances due from receivers of the revenue." *Id*., at 278; see id., at 281. In light of this historical practice, the Government could issue a valid warrant without intruding on the domain of the Judiciary. See *id*., at 280–282. The challenge to the sale thus lacked merit.

[The Court reviewed other, later cases on the public rights exception. They included cases involving foreign commerce, customs, and tariffs.]

This Court has since held that certain other historic categories of adjudications fall within the exception, including relations with Indian tribes, see *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011), the administration of public lands, *Crowell v. Benson*, 285 U.S. 22, 51, (1932), and the granting of public benefits such as payments to veterans, *ibid*., pensions, *ibid*., and patent rights, *United States v. Duell*, 172 U.S. 576, 582–583 (1899).

Our opinions governing the public rights exception have not always spoken in precise terms. This is an "area of frequently arcane distinctions and confusing precedents." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985) (internal quotation marks omitted). The Court "has not 'definitively explained' the distinction between public and private rights," and we do not claim to do so today. *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325, 334 (2018).

2

This is not the first time we have considered whether the Seventh Amendment guarantees the right to a jury trial "in the face of Congress' decision to allow a non-Article III tribunal to adjudicate" a statutory "fraud claim." [*Granfinanciera*, 492 U.S. at 37, 50.] We did so in *Granfinanciera*, and the principles identified in that case largely resolve this one.

Granfinanciera involved a statutory action for fraudulent conveyance. As codified in the Bankruptcy Code, the claim permitted a trustee to void a transfer or obligation made by the debtor before bankruptcy if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. § 548(a)(2)(A) (1982 ed., Supp. V). Actions for fraudulent conveyance were well known at common law. 492 U.S. at 43. . . . In 1984, however, Congress designated fraudulent conveyance actions "core [bankruptcy] proceedings" and authorized non-Article III bankruptcy judges to hear them without juries. *Id*., at 50.

The issue in *Granfinanciera* was whether this designation was permissible under the public rights exception. *Ibid*. We explained that it was not. . . . To determine whether the claim implicated the Seventh Amendment, the Court applied the principles distilled in *Tull*. We examined whether the matter was "from [its] nature subject to 'a suit at common law.' " 492 U.S. at 56. A survey of English cases showed that "actions to recover . . . fraudulent transfers were often brought at law in late 18th-century England." *Id*., at 43. The remedy the trustee sought was also one "traditionally provided by law courts." Id., at 49. Fraudulent conveyance actions were thus "quintessentially suits at common law." *Id*., at 56. . . .

We accordingly concluded that fraudulent conveyance actions were akin to "suits at common law" and were not inseparable from the bankruptcy process. *Id*., at 54, 56. The public rights exception therefore did not apply, and a jury was required.

3

Granfinanciera effectively decides this case. . . .

According to the SEC, these are actions under the "antifraud provisions of the federal securities laws" for "fraudulent conduct." App. to Pet. for Cert. 72a–73a (opinion of the Commission). They provide civil penalties, a punitive remedy that we have recognized "could only be enforced in courts of law." *Tull*, 481 U.S. at 422. And they target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles. In short, this action involves a "matter[] of private rather than public right." *Granfinanciera*, 492 U.S. at 56. Therefore, "Congress may not 'withdraw' " it " 'from judicial cognizance.' " *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee*, 18 How. at 284).

4

Notwithstanding *Granfinanciera*, the SEC contends the public rights exception still applies in this case because Congress created "new statutory obligations, impose[d] civil penalties for their violation, and then commit[ted] to an administrative agency the function of deciding whether a violation ha[d] in fact occurred." Brief for Petitioner 21 (internal quotation marks omitted). [But] . . . if the action resembles a traditional legal claim, its statutory origins are not dispositive.

The SEC's sole remaining basis for distinguishing *Granfinanciera* is that the Government is the party prosecuting this action. But we have never held that "the presence of the United States as a proper party to the proceeding is . . . sufficient" by itself to trigger the exception. *Northern Pipeline Constr. Co*., 458 U.S. at 69, n. 23 (plurality opinion). Again, what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. See *ibid*. . . .

5

The principal case on which the SEC and the dissent rely is *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). Because the public rights exception as construed in *Atlas Roofing* does not extend to these civil penalty suits for fraud, that case does not control. . . .

The litigation in *Atlas Roofing* arose under the Occupational Safety and Health Act of 1970 (OSH Act), a federal regulatory regime created to promote safe working conditions. The Act authorized the Secretary of Labor to promulgate safety regulations, and it empowered the Occupational Safety and Health Review Commission (OSHRC) to adjudicate alleged violations. If a party violated the regulations, the agency could impose civil penalties.

Unlike the claims in *Granfinanciera* and this action, the OSH Act did not borrow its cause of action from the common law. Rather, it simply commanded that "[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter." 84 Stat. 1593, 29 U.S.C. § 654(a)(2) (1976 ed.). These standards bring no common law soil with them. Rather than reiterate common law terms of art, they instead resembled a detailed building code. . . . The purpose of this regime was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law. . . .

Atlas Roofing concluded that Congress could assign the OSH Act adjudications to an agency because the claims were "unknown to the common law." 430 U.S. at 461. The case therefore does not control here, where the statutory claim is "in the nature of" a common law suit. *Id*., at 453 [internal quotation marks omitted]. . . .

* * *

A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator. Rather than recognize that right, the dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands. Jarkesy and Patriot28 are entitled to a jury trial in an Article III court. . . .

Justice GORSUCH, with whom Justice THOMAS joins, concurring.

. . . I write separately to highlight that other constitutional provisions reinforce the correctness of the Court's course. The Seventh Amendment's jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property. The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955). . . .

. . . No one denies that, under the public rights exception, Congress may allow the Executive Branch to resolve certain matters free from judicial involvement in the first instance. But, despite its misleading name, the exception does not refer to all matters brought by the government against an individual to remedy public harms, or even all those that spring from a statute. Instead, public rights are a narrow class defined and limited by history. . .

[Although the dissent relies on *Atlas Roofing*,] *Atlas Roofing*'s discussion of the jury-trial right, no less than its discussion of public rights, is difficult to square with precedent and original meaning. . . .

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

Throughout our Nation's history, Congress has authorized agency adjudicators to find violations of statutory obligations and award civil penalties to the Government as an injured sovereign. The Constitution, this Court has said, does not require these civil-penalty claims belonging to the Government to be tried before a jury in federal district court. Congress can instead assign them to an agency for initial adjudication, subject to judicial review. This Court has blessed that practice repeatedly, declaring it "the 'settled judicial construction' " all along; indeed, " 'from the beginning.' " *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 460 (1977). Unsurprisingly, Congress has taken this Court's word at face value. It has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations. Congress had no reason to anticipate the chaos today's majority would unleash after all these years.

Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the Government in its sovereign capacity, also known as a public right. According to the majority, the Constitution requires the Government to seek civil penalties for federal-securities fraud before a jury in federal

court. The nature of the remedy is, in the majority's view, virtually dispositive. That is plainly wrong. This Court has held, without exception, that Congress has broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries. . . .

The practice of assigning the Government's right to civil penalties for statutory violations to non-Article III adjudication had been so settled that it become an undisputable reality of how our Government has actually worked. [Citation and internal quotation omitted.] That is why the Court has had no cause to address this kind of constitutional challenge since its unanimous decision in Atlas Roofing. The majority takes a wrecking ball to this settled law and stable government practice. To do so, it misreads this Court's precedents, ignores those that do not suit its thesis, and advances distinctions created from whole cloth.

c. Significance of *SEC v. Jarkesy*

Jarkesy holds that the Seventh Amendment prevents Congress from authorizing federal agencies to adjudicate private rights that are legal in nature. This includes claims by the federal government for civil penalties and other monetary relief that is "designed to punish or deter the wrongdoer," rather than "solely to restore the status quo," at least if those claims can "trace[] their ancestry to the common law," as do claims for securities fraud. *Jarkesy*, 144 S. Ct. at 2129, 2137.

Jarkesy is dense and confusing. This is partly because the test for whether a claim is "legal in nature" overlaps with (and sounds confusingly similar to) the test for whether a claim involves a "private right." Let's not go down that road; there lies madness. Instead, by reverse engineering, we can figure out what federal agencies *can* still be allowed to adjudicate "in-house" (subject to judicial review):

1. They can adjudicate claims that are not "legal in nature," including claims that are "equitable in nature," because the Seventh Amendment doesn't apply to equitable claims.
2. They can adjudicate claims that involve "public rights" because of the public rights exception.
3. They can probably adjudicate claims that *are* "legal in nature"—in the sense of involving claims for civil penalties designed to punish and deter—if the claims are based on causes of action that cannot trace their ancestry to the common law. That is because of *Atlas Roofing*.

Now let's take them one at a time.

The SEC's claims for civil penalties in *Jarkesy* were legal in nature because civil penalties designed to punish or deter the wrongdoer are a form of remedy that are legal in nature under the Court's precedent. But the government can still use agency adjudication to impose *equitable* remedies. Indeed, in addition to seeking civil penalties, the SEC asserted claims against Mr. Jarkesy and his company that would probably be characterized as equitable in nature. The final SEC order against them not only imposed "a civil penalty of $300,000 against Jarkesy and Patriot28," but also "directed them to cease and desist committing or causing violations of the antifraud provisions, ordered Patriot28 to disgorge earnings, and prohibited Jarkesy from participating in the securities industry and in offerings of penny stocks." *Jarkesy*, 144 S. Ct. at

2127. These are injunctive and restitutionary—i.e. equitable—in nature. See *Liu v. SEC*, 591 U.S. 71 (2020) (holding that disgorgement award in SEC civil enforcement action that did not exceed wrongdoer's net profits, and that was awarded for victims, was equitable relief). *Jarkesy* does not disturb the use of agency adjudication to impose remedies that are equitable in nature.

The SEC's claims in *Jarkesy* did not involve public rights and so didn't fall into the public rights exception. The Court did not "definitively explain[]" what public rights are. *Id*. at 2133. But it did identify some "historic categories of adjudications" that "fall within" the public rights exception. *Id*. They include cases involving foreign commerce, tariffs and customs, "relations with Indian tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights." *Id*. Federal agencies after *Jarkesy* can continue to adjudicate these matters, including through administrative adjudications to impose civil penalties.

The dissent in *Jarkesy* said there are "more than 200 [federal] statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations." *Id*. at 2155. Many of these civil penalties are probably "designed to punish or deter" wrongdoers. *Id.* at 2129. Does *Jarkesy* require agencies to seek such penalties only in federal court, where a jury is available?

The answer is no, not if *Atlas Roofing* remains good law. *Atlas Roofing* upheld the use of agency adjudication to impose civil penalties for violations of workplace safety rules. The Court in *Jarkesy* distinguished *Atlas Roofing* on the ground that the workplace safety rules did not "trace their ancestry" to the common law; the rules partook of a building code, not the common law. In contrast, the securities fraud claims in *Jarkesy* did replicate the common law. Because the *Jarkesy* Court found *Atlas Roofing* distinguishable, it had no need to decide whether *Atlas Roofing* was good law, but it suggested maybe not. In a footnote that we didn't include in the excerpt above, the majority opinion in *Jarkesy* agreed with the concurrence that "*Atlas Roofing* represents a departure from our legal traditions." *Jarkesy*, 144 S. Ct. at 2138 n.4. That doesn't sound good! But if *Atlas Roofing* is still good law, it would allow federal agencies to continue to use agency adjudication for civil penalties of a sort that have no common law analogue.

In sum, *Jarkesy* won't bar all in-house federal agency enforcement proceedings, but it will bar many, perhaps most, that seek civil penalties.

Exercise: *SEC v. Jarkesy*

Earlier in Chapter 18, we discussed *Athlone Industries, Inc. v. Consumer Product Safety Commission*, 707 F.2d 1485 (D.C. Cir. 1983). There, the court of appeals held that the Commission lacked statutory authority to use agency adjudication to impose civil penalties; the Commission had to go to federal court to seek them. See course book pp. 394–396. Of course, nothing in *Jarkesy* precludes a federal agency from filing a civil lawsuit in federal court to recover civil penalties for regulatory violations. Indeed, that is what the SEC will have to do from now on, after *Jarkesy*.

Please review the statutory provision that was at issue in *Athlone*, 15 U.S.C. § 2069 (reproduced on p. 395). Pay particular attention to the factors that the Commission must consider when seeking civil penalties in a federal court suit. *Id*. § 2069(b). After *Jarkesy*, could Congress

amend the statute to authorize the Commission to impose these civil penalties in an agency ("in-house") adjudication?

Exercise: Framework for Analyzing Adjudicative Delegations

Please construct an outline or graphic organizer (e.g., flow chart) for analyzing the constitutionality—under Article III and the Seventh Amendment—of federal statutes that grant adjudicatory power to federal agencies. To get you started, review the two part-framework that the Court in *Jarkesy* used.

Chapter 19

19. Limits on Agency Adjudicatory Power

A. Internal Limits on Agency Adjudicatory Power

2. Internal Substantive Limits

p. 415:

Please add another case summary after *Greater Missouri Medical Pro-Care Providers*:

- *Sackett v. EPA*, 598 U.S. 651 (2023)

Stick with us here: The Court in this case reversed an adjudicatory decision that rested on a legislative rule that conflicted with the statute that the rule was supposed to implement.

The EPA determined that Mr. and Ms. Sacketts' property had a wetland on it that the Sacketts had disturbed in violation of the Clean Water Act (CWA). The EPA issued a compliance order against them requiring them to restore the wetland or face big civil penalties. In 2012, the U.S. Supreme Court held that the EPA compliance order against the Sacketts was "final agency action" subject to judicial review under the federal APA. *See Sackett v. EPA*, 566 U.S. 120, 126–31 (2012), discussed in Exercise on p. 669 of course book.

In 2023, the Court held that the EPA compliance order rested on a legislative rule—namely, a rule defining the CWA term "waters of the United States"—that violated the CWA. The Court held that "the CWA "extends to only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that they are indistinguishable from those waters." 598 U.S. at 684 (most internal quotations omitted). The purported wetland on the Sacketts' property was "distinguishable from any possibly covered waters."

The Court's opinion invalidated not only the EPA compliance order against the Sacketts but also the legislative rule on which the order rested. Thus, EPA must wade back into the murky "waters of the United States" phrase in the CWA.

Chapter 20

20. The Due Process Clauses as Source of Procedural Requirements for Agency Adjudications

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D. Question Two: If Due Process Applies, What Process Is Due?

3. An Unbiased Decision Maker

b. Significance of *Withrow v. Larkin*

p. 456:

At the end of the first full paragraph—which begins "That final holding . . ."—please insert this citation:

Cf. Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 968 F.3d 1156, 1167–1168 (10th Cir. 2020) (relying on *Withrow* to hold that due process was not violated by fact that Commission adjudicated a matter involving a product while holding a rulemaking about the same product).

Chapter 28

28. Jurisdiction

B. Jurisdiction: Sovereign Immunity

1. Suits against the Federal Government and Its Agencies and Officials for Review of Federal Agency Action

P. 632:

At the first full paragraph on page 632, please add this sentence:

The Court recently reminded us that a statutory provision may both create a cause of action and waive sovereign immunity by explicitly authorizing suits against the government. Such explicit authority doesn't need to use the magic words "sovereign immunity" to be an effective waiver. *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42 (2024).

C. Jurisdiction: Standing Requirements in Federal Court

1. Constitutional (Article III) Standing Requirements

a. Injury in Fact

P. 633:

At the very bottom of the page, please add this paragraph:

The Court discussed the difference between easy and hard standing cases in *Food & Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024). The plaintiffs were pro-life doctors and medical organizations. They challenged the FDA's relaxation of restrictions on mifepristone, a drug used for chemical abortions. The Court held that they lacked standing. The Court emphasized that the FDA's action did not compel the plaintiffs to do anything or prohibit them from doing anything. This made it hard (indeed, impossible) to show standing. Speaking generally, the Court explained:

> Government regulations that require or forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements. So in those cases, standing is usually easy to establish. . . . By contrast, when (as here) a plaintiff challenges the government's "unlawful regulation (or lack of regulation) of someone else," "standing is not precluded, but it is ordinarily substantially more difficult to establish."

Id. at 382 (quoting *Lujan*). Discussing the particular plaintiffs before it, the Court continued:

> Because the plaintiffs do not prescribe, manufacture, sell, or advertise mifepristone or sponsor a competing drug, the plaintiffs suffer no direct monetary injuries from FDAs actions relaxing regulation of mifepristone. Nor do they suffer injuries to their property, or to the value of their property, from FDA's actions. Because the plaintiffs do not use mifepristone, they obviously can suffer no physical injuries from FDA's actions relaxing regulation of mifepristone.
>
> Rather, the plaintiffs say that they are pro-life, oppose elective abortion, and have sincere legal, moral, ideological, and policy objections to mifepristone being prescribed and used by others. The plaintiffs appear to recognize that those general legal, moral, ideological, and policy concerns do not suffice on their own to confer Article III standing to sue in federal court.

Id. at 385–386. Reflecting the difficulty of the standing issue in this case, both the district court and the court of appeals had upheld the plaintiffs' standing, only to be reversed by the Supreme Court. *Id*. at 377. *See also United States v. Texas*, 599 U.S. 670 (2023) (holding that States of Texas and Louisiana lacked standing to challenge federal immigration guidelines setting priorities for removal of foreign nationals present in the United States without lawful authorization).

p. 636:

In subsection a's first paragraph, please add this citation at the end of that paragraph:

See also TransUnion v. Ramirez, 594 U.S. 413, 424 (2021) (explaining that concrete-harm requirement can't be satisfied merely by showing defendant violated statutory requirements enforceable through private actions; courts must "ask[] whether plaintiffs have identified a close historical or common-law analogue for their asserted injury").

p. 638:

Please add this at the end of the first full paragraph:

See also Uzuegbunam v. Preczewski, 592 U.S. 279 (2021) (holding that plaintiff had standing to seek nominal damages for public college's violation of his First Amendment rights, even though injunctive relief for the completed violation was no longer available and he did not seek compensatory damages).

P. 640:

Near the bottom of p. 640, above the asterisks, please add this summary of a recent case illustrating the "third party problem" discussed in the course book:

- *Murthy v. Missouri*, 144 S. Ct. 1972 (2024)

The plaintiffs sued the government claiming that government officials pressured social media platforms to censor speech that the government deemed to be "misinformation" or "disinformation." The plaintiffs argued that this pressure caused the censorship to be "state action," even though the social media platforms are private companies, and that the censorship violated the First Amendment right to free speech. *See* U.S. Const. amend. I. The Court held that the plaintiffs lacked standing. A major problem was that the plaintiffs' asserted injuries

> depend on the *platform[s']* actions—yet the plaintiffs do not seek to enjoin the platforms from restricting any posts or accounts. They seek to enjoin *Government agencies and officials* from pressuring or encouraging the platforms to suppress protected speech in the future.

Id. at 1986 (emphasis in original). The Court explained that "[t]he one-step-removed, anticipatory nature of [plaintiffs'] alleged injuries" required them to show that the government's pressure tactics would likely cause the platforms in the immediate future to censor either the plaintiffs' speech or speech that the plaintiffs wanted to receive. The Court determined that the plaintiffs could not make this showing. *Id.*

Chapter 29

29. Cause of Action

D. Preclusion of Review

1. Presumption of Reviewability

a. Federal Law

p. 666:

In the first paragraph, after the first sentence's citation to *Mach Mining*, please add this citation after the "*see also*" signal:

Am. Hosp. Ass'n v. Becerra, 596 U.S. 724 (2022).

2. Preclusion of Judicial Challenges to Agency Action

a. Federal Law

(ii) Statutory Preclusion

p. 669:

After the carryover paragraph, please insert this summary of one recent case in which the U.S. Supreme Court held that a federal statute precluded review of agency action and another recent case in which the Court held that a special review statute did not preclude federal-question jurisdiction over a constitutional challenge.

- *Patel v. Garland*, 596 U.S. 328 (2022)

Mr. and Ms. Patel entered the United States illegally and later applied under federal law for a form of relief from removal known as "discretionary adjustment of status." That relief would have made them lawful permanent residents. The United States Custom and Immigration Service

(USCIS) denied the relief because Mr. Patel had falsely stated on a driver's license application that he was a U.S. citizen. When the federal government later sought to remove the Patels based on their illegal entry, Mr. Patel re-applied for discretionary adjustment of status and argued to an Immigration Judge that he put the false information on his driver's license application by mistake. The Immigration Judge and the Board of Immigration Appeals rejected his application, after which he sought judicial review.

The issue before the Court was whether judicial review was statutorily precluded. The Court said yes. The relevant statutory provision generally prohibits judicial review of "any judgment regarding the granting of relief." 8 U.S.C. § 1255(a)(2)(B)(i). The Patels argued that the word "judgment" did not preclude judicial review of factual findings by the agency—referring, here, to findings about whether Mr. Patel deliberately lied about his citizenship on the driver's license application or just made a mistake. The Court held that the term "judgment" in the statute included factual findings; therefore, judicial review was precluded.

- *Axon Enterprise, Inc. v. Federal Trade Comm'n*, 598 U.S. 175 (2023)

The Federal Trade Commission (FTC) started administrative enforcement proceedings against two different entities, one of which was Axon Enterprises. While the FTC proceeding against Axon was pending, Axon sued in federal district court, invoking federal question jurisdiction and arguing that the proceeding was conducted under statutory provisions that violated the separation of powers. The FTC argued, however, that the district court lacked subject matter jurisdiction over Axon's constitutional challenge; jurisdiction was precluded, the FTC maintained, by a special review statute authorizing judicial review of FTC adjudicatory decisions in the federal courts of appeals. The Court rejected that argument and upheld the district court's jurisdiction to hear Axon's constitutional challenge. It held that the challenge was not the type of challenge that Congress intended to assign exclusively to the federal courts of appeals.

Chapter 30

30. Timing

A. Finality

2. The General Framework for Determining If an Agency Action Is Final

p. 680:

In the first paragraph, right after the citation to *Hawkes*, please add this citation:

See also Salinas v. U.S. Railroad Retirement Bd., 592 U.S. 188, 195 (2021) (stating same two-part test for finality).

3. Recurring Situations Raising Finality Issues

c. Finality of Agency Advice Letters and Guidance Documents

p. 685:

At the end of the first full paragraph—which begins "The divided opinion in *Soundboard* . . ."—please add this citation:

See also POET Biorefining, LLC v. EPA, 970 F.3d 392, 404–405 (D.C. Cir. 2020) (citing *Soundboard* in analyzing finality of EPA Guidance under special review statute limiting judicial review of "final action" by EPA).

C. Exhaustion

1. The Traditional Exhaustion Doctrine and Statutory Alteration of It

p. 700:

At the end of the carryover paragraph, please add this citation:

See also Luna Perez v. Sturgis Pub. Sch., 598 U.S. 142 (2023) (exhaustion provision in the Individuals with Disabilities Education Act (IDEA) did not bar lawsuit seeking damages under the Americans with Disabilities Act because damages were not available under the IDEA).

3. Issue Exhaustion

p. 704:

At the end of the first paragraph. please insert this citation:

See also Carr v. Saul, 593 U.S. 83 (2021) (extending rationale of *Sims*, which refused to apply issue-exhaustion requirement to SSA Appeals Council proceedings, to SSA proceedings before an ALJ).

p. 707:

At the top of page 707, switch out all of section F with what's below. Even the title of this section has changed because of a recent Supreme Court case making it important to distinguish between statutes of limitations and statutes of repose.

F. Statutes Limiting the Time Period for Seeking Review of Agency Action

Earlier sections of this chapter discussed doctrines that tell you when it's too soon to seek judicial review of agency action. This section introduces you to laws that tell you when it's too late. These laws almost always take the form of statutes, and in administrative law as in other areas of law, they go by one of two names: "statutes of limitations" and "statutes of repose." These two types of time-restricting statutes differ in the way that start a time clock running.

A statute of limitations specifies a time period that starts running based on when a particular plaintiff's cause of action "accrues"—i.e., comes into existence. Often, this is when the plaintiff suffers the injury that creates the right to sue. The statutes of limitations for most torts, for example, start running when the plaintiff has suffered physical injury or property damage because of the defendant's assertedly tortious act.

A statute of repose specifies a time period that starts running when the defendant has done the last wrongful deed that gives rise to the lawsuit. For example, a statute of repose might require a product liability suit against the manufacturer of a defective product to be brought within 10 years after first sale of the product. That 10-year period operates regardless of when the plaintiff is injured by the product. For example, a plaintiff who is injured by a product *11* years after its first sale is out of luck—even if that plaintiff sues the day after her injury!

Our unfortunate plaintiff's situation shows that statutes of repose focus on protecting defendants from stale suits; they can bar suits even by diligent plaintiffs like ours. Statutes of

limitations, on the other hand, focus on ensuring that plaintiffs don't "sleep on their rights." For that reason, a statute of limitations could not thwart our unfortunate plaintiff who sues the day after her injury; a statute of repose could.

Just as in torts law, in administrative law you'll find both statutes of limitations and statutes of repose.

For example, lawsuits based on the APA-created cause of action are generally subject to the statute of limitations in 28 U.S.C. § 2401(a). Section 2401(a) says in relevant part, "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *Id.* The U.S. Supreme Court confirmed that § 2401(a) operates as a statute of limitations in *Corner Post, Inc. v. Board. of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024). Corner Post, which ran a truck stop/convenience store, sued under the APA seeking review of a federal regulation issued in 2011. Corner didn't bring its suit until *2021*. The lower courts dismissed Corner Post's suit as untimely because it was brought more than 6 years after the regulation was issued. But the U.S. Supreme Court reversed, holding that the 6-year period in § 2401(a) didn't start running until Corner Post suffered injury due to the regulation, which was when the regulation started costing it money. This was because § 2401 is a statute of limitations, the Court said, not a statute of repose. Like statutes of limitations in torts, the clock started running when the plaintiff was injured, rather than when the defendant engaged in the assertedly wrongful conduct. *Corner Post*, 144 S. Ct. at 2452.

Special review statutes often include time-restricting provisions that, because they are exclusive, displace the broadly worded § 2401(a). And those time-restricting provisions can take the form of statutes of repose. An example is the special review provision for challenging workplace safety standards issued by the Occupational Safety and Health Administration (OSHA). It says,

> Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard.

29 U.S.C. § 655(f). Section 655(f)'s 60-day period starts running when OSHA issues a standard. If you can now explain why this is a statute of repose rather than a statute of limitations, you have beaten the clock!

You can expect to find in the States a similar combination of statutes of limitations and statutes of repose: Actions seeking review of state agency action under the state APA may be subject to a general statute of limitations. Actions under special review statutes may be subject to a separate statute of limitations. Here, too, the time limits can be quite short. For example, the North Carolina APA requires petitions for review of agency decisions in contested cases to be filed within thirty days after service of the decision. N.C. Gen. Stat. Ann. § 150B-45(a). The statute does, however, grant relief from that time limit "[f]or good cause shown." Id. § 150B-45(b). As a further example, many state APAs put a two-year time limit for judicial challenges asserting an agency promulgated a rule without following the required rulemaking procedures. See, e.g., Ga. Code Ann. § 50-13-4(d).

Once you identify the applicable time-restricting provision, more questions may arise like: When does its clock begin to run and when does it stop? In this vein, a recurring, important question arises when someone requests that an agency reconsider (or rehear or reopen) its decision. Does the reconsideration request toll the running of the limitations period? The federal APA says the answer is usually "yes" in actions under the federal APA:

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5 U.S.C. § 704. Actions reviewable

. . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application . . . for any form of reconsideration . . .

As discussed above, this sentence means that you generally don't have to seek any form of reconsideration to exhaust administrative remedies. The sentence also means that a request for reconsideration generally tolls the statute of limitations, and, indeed, prevents judicial review pending the agency's disposition of the request. *See Stone v. INS*, 514 U.S. 386, 392 (1995); *ICC v. Locomotive Eng'rs*, 482 U.S. 270, 284–285 (1987). This tolling rule codifies the "ordinary judicial treatment of agency orders under reconsideration." *Stone*, 514 U.S. at 393. But Congress can, and has, altered this treatment for actions seeking judicial review under statutes other than the federal APA. *Id*. at 393–403 (holding that, under Immigration and Nationality Act, request for reconsideration of deportation order didn't toll running of limitations period); *see also*, *e.g*., 16 U.S.C. § 825l(b) (requiring people to seek rehearing of agency orders before seeking judicial review). The broader point is that once you identify the relevant statute of limitations or statute of repose, you may have to answer other questions about how it applies in your case.

Exercise: Statutes of Limitation for Judicial Review of Agency Action

The National Marine Fisheries Service (NMFS) issued regulations under the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (MSA), 16 U.S.C. §§ 1801–1891d. The regulations reopened a Hawaii-based fishery that fishes for swordfish. The fishery had been closed down by NMFS for five years because its prior operations had harmed sea turtles. NMFS issued regulations reopening the fishery because NMFS concluded the sea turtle population had recovered enough, and the fishery technology had improved enough, to allow the fishery to operate without threatening the sea turtle population too much.

Five months after NMFS issued the regulations, the Turtle Island Restoration Network filed a lawsuit challenging them in federal district court. Turtle Island's complaint did not claim a violation of the Magnuson Act. Instead, it asserted violations of NEPA, the Migratory Bird Treaty Act, the Endangered Species Act, and the federal APA. NMFS moved to dismiss the lawsuit as untimely based on 16 U.S.C. § 1855(f)(1), which says that "regulations issued under" the MSA "shall be subject to judicial review . . . if a petition for such review is filed within thirty days after the date on which the regulations are promulgated." Turtle Island contends that this thirty-day time limit doesn't apply because it is not asserting a violation of the MSA. Please evaluate the timeliness of the lawsuit. *See Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937

(9th Cir. 2006).

Chapter 33

33. The "Arbitrary and Capricious" Standard

B. What Does the Arbitrary and Capricious Standard Mean?

p. 753:

At the bottom of the page, we present five requirements for agency action to satisfy the "arbitrary and capricious" standard of review. The first of the requirements has been described as requiring that "agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). For an example of a case in which the Court held that an agency did not satisfy this "reasonable explanation" requirement, see *Ohio v. EPA*, 144 S. Ct. 2040 (2024) (EPA disapproved 20 States' plans for implementing EPA rule combatting interstate air pollution and proposed uniform federal implementation plan for these 20 States; Court held that States challenging the federal implementation plan were likely to succeed because of EPA's failure to explain why, if some of the 20 States succeeded in reversing EPA's disapproval of their implementation plans, the federal plan would still be justified for the remaining States).

C. Leading Cases on the Arbitrary and Capricious Standard

p. 754:

The first paragraph of section C refers to "three leading" cases on the A&C standard. The Court in 2020 decided a fourth such case, which we excerpt below, following a shortened excerpt of *Department of Commerce v. New York*.

p. 759:

At the very bottom of page 759, please add a citation at the end of the sentence that reads, "The 'administrative record' consists of all material on which the agency based its action."

But cf. Blue Mtns. Diversity Project v. Jeffries, 72 F.4th 991, 996 (9th Cir. 2023) (joining the D.C. Circuit in holding that agency's deliberative materials are generally not part of the administrative record that must be produced for judicial review, "absent impropriety or bad faith by the agency") (citing *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019)).

3. Department of Commerce v. New York

a. The *Department of Commerce* Opinion

pp. 775–784:

First, please forgive the major typo in subheading 33.C.3, and in the Exercise on p. 774, which misidentify the respondent: It should be New York, not the United States.

Second, please replace the excerpt on pp. 775–784 with the following excerpt.

Department of Commerce v. New York

588 U.S. 752 (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.] . . .

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 got and that had many demographic questions, including about citizenship. The 2010 census questionnaire omitted a question about citizenship and almost all other questions seeking demographic information, leaving them questions instead for a different form, the American Community Survey (ACS), which was sent to 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). . . . DOJ . . . 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 (1) 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 (2) 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. . . .

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. . . . The second group of plaintiffs consisted of several non-governmental organizations that work with immigrant and minority communities. . . . [These plaintiffs—who are respondents in the U.S. Supreme Court—alleged violations of the Enumeration Clause and the federal APA, among other claims.] . . .

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. . . . [The district court granted respondents' motion to order the government to complete the record, 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.. . . [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.]

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).] . . .

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. . . .

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). . . .

. . . 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 Secretary opted . . . 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.

. . . [T]he 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 [district] court improperly substituted its judgment for that of the agency. . . .

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). . . . 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. . . . 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. . . .

. . . [U]nlike 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.

. . . 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. . . . We do not hold that the agency decision here was substantively invalid. But . . . [r]easoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction. . . .

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

[Justice Thomas concurred in the majority's holding that the decision to include a citizenship question on the census questionnaire was not substantively invalid, but dissented from the majority's holding that the explanation for that decision was inadequate, stating:]

The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. . . .

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 ALITO, concurring in part and dissenting in part.

[Justice Alito concluded that the Secretary's decision was unreviewable because it was "committed to agency discretion by law" under APA § 701(a)(2).]

p. 785:

After the first sentence of the first paragraph, please add this citation:

See, *e.g.*, *Transp. Div. of Int'l Sheet Metal Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1178–1179 (9th Cir. 2021) (interpreting *Dep't of Commerce v. New York* to entail "four steps for reviewing whether an agency's stated reasons for taking action are pretextual").

p. 786:

Please add the following after the exercise on p. 786.

4. Department of Homeland Security v. Regents of the University of California

Department of Homeland Security v. Regents of the University of California

591 U.S. 1 (2020)

[Editor's summary: In 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. The program allowed certain aliens who entered the United States without lawful authorization while they were children to stay in the United States; this forbearance from being removed from the United States is known as deferred action. DHS encouraged people to apply for deferred action under DACA. For an application to be granted, the applicant had to meet certain criteria, such as having refrained from serious crime, that made him or her "low priority" for removal. Successful applicants got individualized determinations granting them deferred action for renewable periods of three years. They also qualified for work authorization and for Social Security and Medicare benefits. DHS announced DACA in a 2012 memo that was published without any prior public notice or opportunity to comment.

In 2014, DHS issued another memo. It relaxed the eligibility requirements of DACA and created a deferred action program for aliens who were unlawfully present in the United States but whose children were U.S. citizens or lawful permanent residents. The new program was known as DA***P***A (Deferred Action for Parents of Americans and Lawful Permanent Residents).

Twenty-six States, led by Texas, got a nationwide preliminary injunction preventing implementation of the 2014 "DAPA Memorandum." The Fifth Circuit affirmed the preliminary injunction on two grounds. It held, first, that the plaintiffs were likely to succeed in their claim that the memo was a substantive, legislative rule that was procedurally invalid because of DHS's failure to follow the federal APA's notice-and-comment procedures. Second, the Fifth Circuit held that the APA required DAPA to be set aside as "contrary to law" because it was "manifestly contrary to" the Immigration and Nationality Act (INA). An equally divided Court affirmed the Fifth Circuit's decision. *United States v. Texas*, 136 S. Ct. 2271 (2016) (*per curiam*). The DAPA Memorandum was never implemented before DHS rescinded it in June 2017, after a change in presidential administration.

In September 2017, the U.S. Attorney General, Jeff Sessions, sent a letter to Acting DHS Secretary Elaine Duke advising her that DHS should rescind DACA as well. General Sessions' letter said that DACA had the "same legal . . . defects" as DAPA. Rather than outright rescission, however, General Sessions' letter urged DHS to "consider an orderly and efficient wind-down process." The day after getting the letter, Acting DHS Secretary Duke issued a memo stating that DACA "should be terminated" based on the decisions in the DAPA litigation and General Sessions' letter. The Duke memo provided for a winding down of the program rather than an immediate revocation of all grants of the deferred action status that, by then, gone to about 700,000 DACA recipients.

The rescission of DACA was challenged in lawsuits brought in three different federal district courts by, among other plaintiffs, the Regents of the University of California, the National Association for the Advancement of Colored People, and individual DACA recipients. The suits alleged, among other claims, that DACA's rescission violated the APA and the equal protection guarantee of the Fifth Amendment. In one of the suits, the district court granted partial summary judgment in favor of the plaintiffs (who are respondents in the U.S. Supreme Court), holding that Acting Secretary Duke's explanation for the rescission was inadequate. The district court stayed its order, however, to permit Duke's successor, Secretary Kirstjen Nielsen, to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority."

In response, Secretary Nielsen issued a memorandum giving three reasons why she believed "the decision to rescind the DACA policy was, and remains, sound." First, she agreed with the Attorney General that DACA was contrary to law. Second, she said that, in any event, DACA was "legally questionable" and on that ground along should be rescinded. Third, she cited several policy reasons for rescission, including that (1) class-based immigration relief should be granted by Congress, rather than through executive non-enforcement; (2) DHS should exercise prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) DHS should send a public message that the immigration laws would be enforced against all classes and categories of aliens. The Nielsen memo, unlike the Duke memo, acknowledged "asserted reliance interests" in DACA's continuation but determined that they did not "outweigh" the reasons supporting rescission.

The district court to which the Nielsen memo was addressed held that its explanation for rescission was inadequate. That court and the other two district courts ruled against DHS. DHS appealed to three separate federal circuits. After one of those circuits, the Ninth, affirmed the ruling against DHS, the Court granted certiorari in all three cases and consolidated them.]

. . . The issues raised here are (1) whether the APA claims are reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.

II

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so. . . . [The Court explained the "reasoned decision making" requirement imposed by the APA's "arbitrary and capricious" standard of judicial review.]

But before determining whether the rescission was arbitrary and capricious, we must first address the Government's contentions that DHS's decision is unreviewable under the APA and outside this Court's jurisdiction.

A

[DHS argued that the decision to rescind DACA was unreviewable under the APA. Relying on *Heckler v. Chaney*, 470 U.S. 821 (1985), DHS likened DACA to an agency's decision not to undertake enforcement action, a decision that is presumptively "committed to agency discretion by law" and therefore unreviewable under APA § 701(a)(2). DHS reasoned that just as a policy of not taking enforcement action is unreviewable, so is the rescission of that policy. The Court rejected that argument, holding that "the DACA program is more than a non-enforcement policy." For one thing, under DACA, DHS adjudicated individual applications for DACA status and determined whether or not to take an "affirmative act" by approving DACA status. This was more than just passive refusal to taken enforcement action. For another thing, "[t]he benefits attendant to deferred action [in the form of eligibility to work and to get government benefits] provide further confirmation" that DACA is not just a non-enforcement policy. The Court concluded that DACA's rescission "is subject to review under the APA."]

B

[DHS also argued that judicial review was barred by two jurisdictional provisions in the INA. The Court rejected that argument as well.]

III

A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency's explanation. [DHS argued that the Court should consider not only Acting Secretary Duke's memo announcing the rescission in September 2017 but also the memo submitted by Secretary Neilsen nine months later in response to the district court's invitation to provide a fuller explanation. The Court rejected that argument.]

It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." [Citation omitted.] If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer "a fuller explanation of the agency's reasoning at the time of the agency action." [Citations omitted.] This route has important limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may

elaborate later on that reason (or reasons) but may not provide new ones. *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (*per curiam*). Alternatively, the agency can "deal with the problem afresh" by taking new agency action. *SEC v. Chenery Corp*., 332 U.S. 194, 201 (1947). . . . An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

[The Court determined that DHS took the first route by purporting to elaborate on Acting Secretary Duke's original rationale for rescission. The problem was, Secretary Neilsen's memorandum cited reasons that weren't in Acting Secretary Duke's memo. So it was more than merely an elaboration, yet it was not "deal[ing] with the problem afresh" by taking new action. It was therefore illegitimate, and the Court accordingly considered only Acting Secretary Duke's original explanation for rescinding DACA.] . . . The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. . . .

B

We turn, finally, to whether DHS's decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke's justification for the rescission was succinct: "Taking into consideration" the Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason, she concluded—without elaboration—that the "DACA program should be terminated."

[Respondents renew the argument that prevailed in the lower courts: namely, that "the Duke Memorandum does not adequately explain the conclusion that DACA is unlawful, and that this conclusion is, in any event, wrong." The Court declined to address that argument because the legality of DACA was, by statute, a matter for the Attorney General, *not* the DHS Secretary, to decide, and the present cases challenged only the DHS Secretary's decision. Accordingly, the Court was not convinced that the cases before it were "proper vehicles for" addressing whether or not DACA was lawful. In short, the Court ducked that question.]

. . . Instead we focus our attention on respondents' . . . argument . . . that Acting Secretary Duke "failed to consider … important aspect[s] of the problem" before her. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983).

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. . . .

But Duke did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General's legal reasoning left off. The Attorney General concluded that "the DACA policy has the same legal . . . defects that the courts recognized as to DAPA." App. 878. So, to understand those defects, we look to the Fifth Circuit, the highest court to offer a reasoned opinion on the legality of DAPA. That court described the "core" issue before it as the "Secretary's decision" to grant "eligibility for benefits"—including work authorization, Social Security, and

Medicare—to unauthorized aliens on "a class-wide basis." [Citations omitted.] The Fifth Circuit's focus on these benefits was central to every stage of its analysis. . . .

But there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision). And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. As it explained, the "challenged portion of DAPA's deferred-action program" was the decision to make DAPA recipients eligible for benefits. [Citation omitted.] . . . [T]he Fifth Circuit observed that "the states do not challenge the Secretary's decision to 'decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.'" [Citations omitted.] And the Fifth Circuit underscored that nothing in its decision or the preliminary injunction "requires the Secretary to remove any alien or to alter" the Secretary's class-based "enforcement priorities." [Citation omitted.] In other words, the Secretary's forbearance authority was unimpaired.

. . . Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." 116 Stat. 2178, 6 U.S.C. § 202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation. . . .

. . . [T]he rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke "entirely failed to consider [that] important aspect of the problem." *State Farm*, 463 U.S. at 43.

That omission alone renders Acting Secretary Duke's decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). When an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, [579 U.S. 211, 222] (2016) (quoting [*FCC v.*] *Fox Television*, 556 U.S. [502, 515 (2009)]). "It would be arbitrary and capricious to ignore such matters." *Id.*, at 515. Yet that is what the Duke Memorandum did.

. . . To the Government and lead dissent's point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it. . . .

IV

[The Court held that respondents failed to state a viable claim of an equal protection violation, because their allegations did not "raise a plausible inference that an invidious discriminatory purpose"—namely, hostility toward Hispanics—"was a motivating factor."]

* * *

. . . The appropriate recourse is . . . to remand to DHS so that it may consider the problem anew.

[There were four separate opinions concurring in part and dissenting in part. Justice Sotomayor agreed that DACA's rescission violated the APA but would have allowed respondents a chance on remand to develop their equal protection claim. Justice Thomas, joined by Justices Alito and Gorsuch, agreed that respondents failed to state a viable equal protection claim but disagreed that the rescission violated the APA. Justice Alito wrote to emphasize his view that the federal courts had delayed the implementation of DACA's rescission for almost an entire presidential term "without holding that DACA cannot be rescinded." Justice Kavanaugh's separate opinion argued that the majority should have considered the Nielsen memo.]

Exercise: *Department of Homeland Security* Revisited

The majority cites the following cases that we cited or discussed (or both) earlier in the course book:

- *Heckler v. Chaney*, 470 U.S. 821 (1985)
- *Camp v. Pitts*, 411 U.S. 138 (1973)
- *SEC v. Chenery Corp*., 332 U.S. 194 (1947)
- *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29 (1983)
- *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016)
- *FCC v. Fox Television Stations*, 556 U.S. 502 (2009)

Please review these cases and explain in your own words how their principles affected the analysis in this case. The objective of this exercise is to have you use the Court's decision as a chance to review several fundamental principles of federal administrative law.

Chapter 34

34. The *Chevron* Doctrine and State Counterparts

Overview

p. 789:

Please replace the second paragraph of the Overview with these three paragraphs:

In a nutshell, the federal courts generally review questions of law de novo. There are two situations, however, when the courts will often give weight to an agency's interpretation of the law.

The first is when a federal agency has interpreted the statute that it is responsible for administering. This first situation used to be governed by what's called "the *Chevron* doctrine," after the case originating it, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the Court review the EPA's interpretation of a statutory phrase in the Clean Air Act. But the Court overruled *Chevron*, and rejected the *Chevron* doctrine, in 2024. Even so, an agency's interpretation of a statute that it is responsible for administering will still get special treatment, as we will see.

The second situation is when a federal agency interprets one of its legislative rules. For that situation, the Court uses an approach known as "*Auer* deference," or, more recently, as "*Kisor* deference," which are named after (can you guess?) the cases that originated and refined the approach, respectively.

B. Federal Agencies' Interpretation of Statutes They Administer

p. 792:

Starting right after the title for section B ("B. Federal Agencies' Interpretation . . ."), replace all of the introduction to Section B, up to "1. *The* Skidmore Case," with this:

Federal courts used to use the "*Chevron* doctrine" to review a federal agency's interpretation of a statute that the agency administers. The doctrine was named after *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the Court reviewed an EPA regulation to decide if that regulation reflected a proper interpretation of the Clean Air Act. Roughly speaking, the *Chevron* doctrine required federal courts to accept—to use the lingo, "defer to"—an agency's interpretation of an ambiguous statutory provision if the

interpretation was reasonable, even if it wasn't the interpretation that the court would have adopted itself. But the *Chevron* doctrine is now dead.

The Court overruled *Chevron* and rejected the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). The Court in *Loper Bright* also told federal courts to go back to the pre-*Chevron* approach to reviewing federal agencies' interpretation of the statutes that they administer. The pre-*Chevron* approach came, famously, from *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Below, we excerpt and explore *Skidmore* and then *Loper Bright*.

Both cases involve judicial review of a federal "agency's" (which, remember, can include an *official's*) interpretation of a statute that the agency was responsible for administering:

- *Skidmore* involved an interpretation of the Fair Labor Standards Act by the Administrator of the Wage and Hour Division of the U.S. Department of Labor.
- *Loper Bright* involved an interpretation of the Magnuson-Stevens Fishery Conservation and Management Act by the National Marine Fisheries Service.

p. 797:

Please ignore the material that starts on page 797—with the subheading "2. *The* Chevron Case"— and goes up to the section heading on page 816—"C. State Agencies' Interpretations of Statutes They Administer." Instead, read this:

2. *The* Loper Bright *Case*

a. Background on the *Loper Bright* Case

As we've said, the Court in *Loper Bright* rejected the *Chevron* doctrine and told federal courts to return to the pre-*Chevron* approach to reviewing federal agencies' interpretations of the statutes that they administer. What this actually means will become clearer after you've read the *Loper Bright* excerpt in new subsection 2.b below. First, you'll benefit from understanding the difference between two key concepts: "deference" and "respect."

The Court discussed the concepts in *Chevron* and *Skidmore*. In *Chevron*, the Court required a federal court to "defer" to a federal agency's interpretation of an ambiguous statutory provision. In contrast, the pre-*Chevron* case of *Skidmore* required a federal court to "respect" a federal agency's interpretation of an ambiguous statutory provision. In this setting, to "defer" meant to accept, to treat as binding; to "respect" means to give whatever persuasive weight seems appropriate under the circumstances. "Deferring" to an agency interpretation means that the *agency* gets to decide what a statute means. "Respecting" an agency interpretation means that the court still gets to decide. The Court emphasizes this difference in *Loper Bright*., as we will see.

The difference between deference and respect resembles the difference between binding precedent and persuasive precedent. The U.S. Court of Appeals for (say) the Ninth Circuit is bound only by decisions of the U.S. Supreme Court on matters of federal law. You could say that the

Ninth Circuit must "defer to"—it must accept—U.S. Supreme Court decisions. The Ninth Circuit is *not* bound by decisions of the U.S. Court of Appeals for (say) the Fourth Circuit, though it can treat Fourth Circuit decisions as persuasive precedent; it can give them "respect." The difference between binding precedent and persuasive precedent is more than just a matter of degree; it's a difference in kind. Thus, the Ninth Circuit will get in trouble if it says, of a squarely binding decision of the U.S. Supreme Court, "We appreciate the input, but we're going to go in a different direction." It can say that to the Fourth Circuit, but not to the Supremes!

So too, the difference between a court giving "deference" to an agency interpretation and giving it "respect" reflects a difference in kind, not just a difference in degree. As will see in the opinion below.

b. The *Loper Bright* Opinion

Exercise: *Loper Bright*

Please read *Loper Bright* with these questions in mind:

1. Ignoring for a moment the central question of the *Chevron* doctrine's validity, how does this case involve an agency's interpretation of the statute that it administers?
2. On what ground does the Court invalidate the *Chevron* doctrine?
3. Who wins the case? Is it a total victory? (Yes, that *is* a leading question.)

Loper Bright Enterprises v. Raimondo

144 S. Ct. 2244 (2024)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Since our decision in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), we have sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

I

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

at 843. The reviewing courts in each of the cases before us applied *Chevron*'s framework to resolve in favor of the Government challenges to the same agency rule.

A

Before 1976, unregulated foreign vessels dominated fishing in the international waters off the U.S. coast. . . . Recognizing the resultant overfishing and the need for sound management of fishery resources, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (MSA). [As amended,] the MSA . . . claimed "exclusive fishery management authority over all fish" within [200 nautical miles of the coast], known as the "exclusive economic zone." § 1811(a). The National Marine Fisheries Service (NMFS) administers the MSA under a delegation from the Secretary of Commerce.

The MSA established eight regional fishery management councils composed of representatives from the coastal States, fishery stakeholders, and NMFS. See 16 U.S.C. §§ 1852(a), (b). The councils develop fishery management plans, which NMFS approves and promulgates as final regulations. See §§ 1852(h), 1854(a). In service of the statute's fishery conservation and management goals, see § 1851(a), the MSA requires that certain provisions—such as "a mechanism for specifying annual catch limits . . . at a level such that overfishing does not occur," § 1853(a)(15)—be included in these plans, see § 1853(a). The plans may also include additional discretionary provisions. See § 1853(b). For example, plans may "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment," § 1853(b)(4); "reserve a portion of the allowable biological catch of the fishery for use in scientific research," § 1853(b)(11); and "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery," § 1853(b)(14).

Relevant here, a plan may also require that "one or more observers be carried on board" domestic vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." § 1853(b)(8). The MSA specifies three groups that must cover costs associated with observers: (1) foreign fishing vessels operating within the exclusive economic zone (which must carry observers); (2) vessels participating in certain limited access privilege programs, which impose quotas permitting fishermen to harvest only specific quantities of a fishery's total allowable catch; and (3) vessels within the jurisdiction of the North Pacific Council, where many of the largest and most successful commercial fishing enterprises in the Nation operate. In the latter two cases, the MSA expressly caps the relevant fees at two or three percent of the value of fish harvested on the vessels. And in general, it authorizes the Secretary to impose "sanctions" when "any payment required for observer services provided to or contracted by an owner or operator . . . has not been paid." § 1858(g)(1)(D).

The MSA does not contain similar terms addressing whether Atlantic herring fishermen[, who are before the Court in these consolidated cases,] may be required to bear costs associated with any observers a plan may mandate. And at one point, NMFS fully funded the observer coverage the New England Fishery Management Council required in its plan for the Atlantic herring fishery. See 79 Fed. Reg. 8792 (2014). In 2013, however, the council proposed amending its fishery management plans to empower it to require fishermen to pay for observers if federal funding became unavailable. Several years later, NMFS promulgated a rule approving the amendment. See 85 Fed. Reg. 7414 (2020).

With respect to the Atlantic herring fishery, the Rule created an industry funded program that aims to ensure observer coverage on 50 percent of trips undertaken by vessels with certain types of permits. . . . If NMFS determines that an observer is required, but declines to assign a Government-paid one, the vessel must contract with and pay for a Government-certified third-party observer. NMFS estimated that the cost of such an observer would be up to $710 per day, reducing annual returns to the vessel owner by up to 20 percent.

B

[Two sets of plaintiffs, including "family businesses that operate in Atlantic herring fishery," challenged the Rule in federal court] under the MSA, 16 U.S.C. § 1855(f), which incorporates the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. In relevant part, they argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan. [The lower federal courts rejected these arguments and upheld the Rule, relying on the *Chevron* doctrine. The U.S. Supreme Court granted certiorari, not to decide whether the Rule itself was valid, but to decide whether the *Chevron* doctrine was properly used to analyze its validity.]

II

A

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

The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." *Id*., No. 78, at 525 (A. Hamilton). . . . To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. *Id*., at 522.

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). . . . When the meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur v. Paulding*, 14 Pet. 497, 515 (1840).

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, in *Edwards' Lessee v. Darby*, 12 Wheat. 206 (1827), the Court explained that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id*., at 210.

Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. See *Dickson*, 15 Pet. at 161. That is because "the longstanding 'practice of the government'"—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.' " *NLRB v. Noel Canning*, 573 U.S. 513, 525, (2014) (first quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); then quoting *Marbury*, 1 Cranch at 177). The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently ... the draftsmen of the laws they [were] afterwards called upon to interpret." *United States v. Moore*, 95 U.S. 760, 763 (1878).

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

B

The New Deal ushered in a "rapid expansion of the administrative process." *United States v. Morton Salt Co*., 338 U.S. 632, 644 401 (1950). But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment. . . .

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

But the Court did not extend similar deference to agency resolutions of questions of law. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." *United States v. American Trucking Assns., Inc*., 310 U.S. 534, 544 (1940). . . .

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

On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. For example, in *Gray v. Powell*, 314 U.S. 402 (1941), the Court deferred to an administrative conclusion that a coal-burning railroad that had arrangements with several coal mines was not a coal "producer" under the Bituminous Coal Act of 1937. Congress had

"specifically" granted the agency the authority to make that determination. *Id*., at 411. The Court thus reasoned that "[w]here, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched" so long as the agency's decision constituted "a sensible exercise of judgment." *Id*., at 412–413. Similarly, in *NLRB v. Hearst Publications, Inc*., 322 U.S. 111 (1944), the Court deferred to the determination of the National Labor Relations Board that newsboys were "employee[s]" within the meaning of the National Labor Relations Act. The Act had, in the Court's judgment, "assigned primarily" to the Board the task of marking a "definitive limitation around the term 'employee.' " *Id*., at 130. The Court accordingly viewed its own role as "limited" to assessing whether the Board's determination had a " 'warrant in the record' and a reasonable basis in law." *Id*., at 131.

Such deferential review, though, was cabined to factbound determinations like those at issue in *Gray* and *Hearst*. Neither *Gray* nor *Hearst* purported to refashion the longstanding judicial approach to questions of law. In *Gray*, after deferring to the agency's determination that a particular entity was not a "producer" of coal, the Court went on to discern, based on its own reading of the text, whether another statutory term—"other disposal" of coal—encompassed a transaction lacking a transfer of title. See 314 U.S. at 416–417. The Court evidently perceived no basis for deference to the agency with respect to that pure legal question. And in *Hearst*, the Court proclaimed that "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." 322 U.S. at 130–131. At least with respect to questions it regarded as involving "statutory interpretation," the Court thus did not disturb the traditional rule. It merely thought that a different approach should apply where application of a statutory term was sufficiently intertwined with the agency's factfinding.

Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. Instead, just five years after *Gray* and two after *Hearst*, Congress codified the opposite rule: the traditional understanding that courts must "decide all relevant questions of law." 5 U.S.C. § 706.

C

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Morton Salt*, 338 U.S. at 644. . . .

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." § 706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action, § 706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they

interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 does mandate that judicial review of agency policymaking and factfinding be deferential. See § 706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); § 706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

. . . [B]y directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference.

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. According to both the House and Senate Reports on the legislation, Section 706 "provide[d] that questions of law are for courts rather than agencies to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946) (emphasis added); accord, S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). . . .

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

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983), and ensuring the agency has engaged in " 'reasoned decisionmaking' " within those boundaries, *Michigan*, 576 U.S. at 750 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)); see also *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29 (1983). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

III

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

A

Chevron, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. The question in the case was whether an EPA regulation "allow[ing] States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' " was consistent with the term "stationary source" as used in the Clean Air Act. 467 U.S. at 840. To answer that question of statutory interpretation, the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action.

The first step was to discern "whether Congress ha[d] directly spoken to the precise question at issue." *Id*., at 842. The Court explained that "[i]f the intent of Congress is clear, that is the end of the matter," *ibid*., and courts were therefore to "reject administrative constructions which are contrary to clear congressional intent," *id*., at 843, n. 9. To discern such intent, the Court noted, a reviewing court was to "employ[] traditional tools of statutory construction." *Ibid*.

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." *Id*., at 843. In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Ibid*. (footnote omitted). A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," *ibid*., even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding," *ibid*., n. 11. That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme, EPA's "detailed and reasoned" consideration, the policy-laden nature of the judgment supposedly required, and the agency's indirect accountability to the people through the President. *Id*., at 843, 844, and n. 14, 865.

Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that EPA's interpretation was "entitled to deference." *Id*., at 865. It did not matter why Congress, as the Court saw it, had not squarely addressed the question, see *ibid*., or that "the agency ha[d] from time to time changed its interpretation," *id*., at 863. The latest EPA interpretation was a permissible reading of the Clean Air Act, so under the Court's new rule, that reading controlled.

. . . Eventually, the Court decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740–741 (1996).

B

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The "law of deference" that this Court has built on the foundation laid in *Chevron* has instead been "[h]eedless of the original design" of the APA. *Perez*, 575 U.S. at 109 (Scalia, J., concurring in judgment).

1

Chevron defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide all relevant questions of law" and "interpret . . . statutory provisions." § 706 (emphasis added). It requires a court to ignore, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. *Chevron*, 467 U.S. at 843, n. 11. And although exercising independent judgment is consistent with

the "respect" historically given to Executive Branch interpretations, see, e.g., *Edwards' Lessee*, 12 Wheat. at 210; *Skidmore*, 323 U.S. at 140, *Chevron* insists on much more. It demands that courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time. . . .

Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. . . Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron*'s presumption does not, because "[a]n ambiguity is simply not a delegation of law-interpreting power. Chevron confuses the two." C. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 445 (1989). . . . [M]any or perhaps most statutory ambiguities may be unintentional. . . .

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

2

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

Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor[v. Wilkie*, 588 U.S. 558, 578 (2019)]. We thus observed that "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Ibid*. *Chevron*'s broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. Indeed, the Government and, seemingly, the dissent continue to defend the proposition that *Chevron* applies even in cases having little to do with an agency's technical subject matter expertise.

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. "[M]any statutory cases" call upon "courts [to] interpret the mass of technical detail that is the ordinary diet of the law," *Egelhoff v. Egelhoff*, 532 U.S. 141, 161 (Breyer, J., dissenting), and courts did so without issue in agency cases before *Chevron*. [Moreover, agency] expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

. . . The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. . . .

Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event,

there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. . . .

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

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

3

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

Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality. We have said that *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–227. In practice, that threshold requirement—sometimes called *Chevron* "step zero"—largely limits *Chevron* to "the fruits of notice-and-comment rulemaking or formal adjudication." 533 U.S. at 230. [The Court describes other situations in which, after *Chevron*, the Court restricted its applicability.]

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

The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*'s fictional presumption of congressional intent was always unmoored

from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. . . .

IV

The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. . . . [T]he *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision," *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019)—all weigh in favor of letting *Chevron* go.

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

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

It is so ordered.

Justice THOMAS, concurring.

I join the Court's opinion in full because it correctly concludes that *U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), must finally be overruled. . . .

I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers, as I have previously explained at length. . . .

Justice GORSUCH, concurring.

. . . Today, the Court places a tombstone on *Chevron* no one can miss. . . . I write separately to address why the proper application of the doctrine of *stare decisis* supports that course.

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

[The original opinion drops a footnote after Justice Jackson's name to indicate that she recused herself from one of the cases that was consolidated before the Court.]

For 40 years, *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress

has done so, that is the end of the matter; the agency's views make no difference. But if the court finds, at the end of its interpretive work, that Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. . . .

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

Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies. . . .

And the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second. (If opinions had titles, a good candidate for today's would be Hubris Squared.) *Stare decisis* is, among other things, a way to remind judges that wisdom often lies in what prior judges have done. It is a brake on the urge to convert "every new judge's opinion" into a new legal rule or regime. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 388, (2022) (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting) (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (7th ed. 1775)). *Chevron* is entrenched precedent, entitled to the protection of *stare decisis*, as even the majority acknowledges. . . . A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power. . . .

Exercise: *Loper Bright* Revisited

1. What should the lower courts do on remand in the two cases that were consolidated and decided by the Court in *Loper Bright*?

2. After reading *Loper Bright*, you might be excited to read the original opinion in *Chevron*. (Or not.) Lucky you will find an excerpt of it in the course book on pp. 798–804. If you read the excerpt, you'll see that the folks challenging the EPA rule at issue in that case petitioned for judicial review, not under the APA, but under 42 U.S.C. § 7607(b)(1). In other words, Section 7607(b)(1), not the APA, supplied the cause of action in *Chevron*. So how can the Court in *Loper Bright* criticize *Chevron* for not mentioning the APA? Why was the AAPA relevant in *Chevron*? (Hint: The answer relates to what we call "an APA-type action." See pp. 713–717.)

3. Why is the dissent so mad? And how does the Court's decision in *Dobbs* come into it?

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c. The Significance of *Loper Bright*

Loper Bright holds that, in an APA-type action, a federal court cannot defer to a federal agency's interpretation of the statute that it administers, even if the relevant statutory provision is ambiguous. The court can, however, give respect (weight) to the agency's interpretation, with the amount of weight depending on "all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Ultimately, this means that a court in this situation uses the good old de novo standard for this type of legal question.

Why? The answer is "because § 706 of the APA requires it." For federal court review of federal agency action, Section 706 codifies the *Marbury* tradition that courts get to say what the law is.

There's a twist. The majority's opinion in *Loper Bright* suggests that Congress can modify the *Marbury* tradition. The majority said that, in *Gray*, it had "applied *deferential* review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency." *Loper Bright*, 144 S. Ct. at 2259 (emphasis added). Similarly, the *Loper Bright* majority said that in *Hearst*, "the Court *deferred* to the determination of the National Labor Relations Board that newsboys were 'employee[s]' within the meaning of the National Labor Relations Act" because "[t]he Act had, in the [*Hearst*] Court's judgment, 'assigned primarily' to the Board the task of marking a "definitive limitation around the term 'employee.' " *Loper Bright*, 144 S. Ct. at 2259 (emphasis added); *see also id.* at 2260 (stating that despite *Gray* and *Hearst*, "the Court was far from consistent in reviewing deferentially even such factbound statutory determinations"). To say that the Court gave "deference" in *Gray* and *Powell* means that the Court in those cases *accepted* the agency's statutory interpretation, rather than merely giving it weight. As the *Loper Bright* majority saw it, *Gray* and *Hearst* thus involved the agency, not the court, "saying what the law is." The *Loper Bright* majority's seeming acceptance of *Gray* and *Hearst* implies that Congress can modify the *Marbury* tradition, at least when an agency is interpreting a statutory provision in a "factbound" situation under interpretive authority plainly granted by Congress. *See Loper Bright*, 144 S. Ct. at 2259 ("Such deferential review, though, was cabined to factbound determinations like those at issue in *Gray* and *Hearst*."); *id.* at 2260 ("In any event, the Court was far from consistent in reviewing deferentially even such factbound statutory determinations.").

This twist is enough to show that we can't yet fully assess the significance of *Loper Bright*.

If nothing else, though, *Loper Bright* will probably embolden folks to challenge federal agencies' statutory interpretations more often, and require federal courts to do more work to decide these challenges. On the latter score, the *Chevron* doctrine required courts to accept agency interpretations of ambiguous statutes if they were "reasonable" or "permissible"—i.e., if they were "good enough for government work."[1] *Loper Bright* requires courts to decide what statutes really mean, a determination that usually requires more effort.

End of Supplement

[1] For an interesting, possibly true account of this phrase's origin, see FedManager, Partner Columns, *Reclaiming 'Good Enough for Government Work'* (Mar. 27, 2024), at *https://www.fedmanager.com/news/reclaiming-good-enough-for-government-work*.