# Administrative Law

## A Context and Practice Casebook

**Second Edition**

**2025 Supplement**

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# Introduction to 2025 Supplement

This supplement covers the period from July 2019, when the second edition of the course book went to press, through July 2025, 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!

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## 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); *see also Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (staying injunction against President's removal without cause of NLRB member; holding that government was likely to succeed on claim that President's executive power allowed removal). Thus, their independence is relative, not absolute.

# Chapter 2

# 2. Administrative Law Problem Solving

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## 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:

### 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*, 601 U.S. 416 (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 7

# 7. The Distinction between Legislative Rules and Non-Legislative Rules

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## A. Why It Matters Whether a Rule Is a Legislative or a Non-Legislative Rule

### 2. Other Differences between Legislative and Non-Legislative Rules

### pp. 137–138:

Please delete the entire subsection "d. Different Scope of Federal Judicial Review." This subsection has been superseded by recent Supreme Court case law discussed later in the book.

# Chapter 8

# 8. Agency Rulemaking Power

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

## pp. 159–174:

Please ignore the material in the book that starts at the bottom of page 159, with the paragraph beginning "In practice, federal statutes are almost never invalidated …" and going up through p. 174, "C. Other Limits on Statutes Granting Agencies Power to Make Legislative Rules."

Please read this instead:

In practice, federal statutes are never invalidated under the nondelegation doctrine today. Nonetheless, administrative lawyers must know the nondelegation doctrine for three reasons. First, the federal nondelegation doctrine can cause federal courts to interpret narrowly statutes that grant unusually broad rulemaking power to federal agencies. Second, the federal nondelegation doctrine may continue to put a meaningful limit on federal agencies' power to define *criminal* conduct. Third, the federal nondelegation doctrine conceptually resembles the analogous nondelegation doctrine that many state courts have interpreted their state constitutions to contain as a matter of the separation of powers required under those constitutions.

This section explores the nondelegation doctrine in three steps:

(1) Textual basis for federal nondelegation doctrine

(2) Modern nondelegation doctrine—Federal

(3) Modern nondelegation doctrine—State

(4) Private delegations

The objectives of this section are to help you answer these questions:

A. Where does the nondelegation doctrine come from?

B. What does it say?

C. When does it apply?

D. How does it work?

### 1. Textual Basis for Federal Nondelegation Doctrine

#### a. Textual Basis for Federal Separation of Powers Doctrine

The U.S. Constitution vests legislative power, executive power, and judicial power in three separate branches of the federal government. The vesting occurs in three separate Articles of the Constitution: Articles I, II, and III. Here are the vesting clauses of Articles I, II, and III:

**U.S. Const. art. I, §1**

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

**U.S. Const. art. II, §1**

The executive Power shall be vested in a President of the United States of America....

**U.S. Const. art. III, §1**

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

The U.S. Constitution's vesting of separate powers in separate branches, in separate articles of the Constitution, is the primary textual basis for construing the Constitution to require a separation of the three types of powers. The separation of powers doctrine is thus implied by the structure of the Constitution.

The separation of powers doctrine has several facets relevant to administrative law, one of which is the nondelegation doctrine.

## b. Textual Basis for Federal Nondelegation Doctrine

The textual basis for the nondelegation doctrine is in the vesting clause of Article I. Article I vests "all" legislative powers in Congress. Article I's vesting of "all" legislative power in a Congress has two related but distinct implications.

The clause implies, first, that Congress cannot give away (the term of art is "delegate") its legislative power to *anyone* else. Congress cannot delegate its legislative power to private persons, private entities, state or local governments, or entities within the executive or judicial branch created in Articles II and III. The clause seems to say to Congress not only "You get all the legislative power" but also "You must *keep* it all for yourself!" The clause seems to preclude delegation of federal legislative power to *any* agent.

The vesting clause of Article I further implies, when read together with the vesting clauses of Articles II and III, that Congress is specifically forbidden from delegating its legislative power to any agent in the executive or judicial branches of the federal government. This would not only constitute an abdication of the authority vested in Congress but would also upset the balance of powers by shifting some of the Article I power to a different branch. The shifting of legislative power to some other branch could increase the other branch's cumulative powers, causing what in constitutional circles is called "aggrandizement" of that other branch at the expense of Congress. Alternatively, the shifting of legislative power from Congress to another branch could undermine the other branch's ability to exercise the power properly belonging to it; this could occur, for example, if the judicial branch were given legislative power that impaired its ability impartially to exercise its judicial power. That result would be described as "encroachment" in constitutional law circles. Either aggrandizement or encroachment can upset the equilibrium of power among the three branches, weakening the system of checks and balances and possibly violating the separation of powers doctrine.

Despite textual evidence of limits on Congress's power to delegate legislative power, the U.S. Supreme Court has upheld federal statutes giving federal agencies broad power to make legislative rules. Generally, the Court concludes these statutes are permissible because they don't really delegate legislative power. Rather, they delegate only "quasi-legislative" power. This distinction has permitted the Court to uphold broad statutory grants of legislative rulemaking

power to executive-branch agencies and officials while asserting that Congress cannot delegate its legislative power.

## 2. Modern Federal Nondelegation Doctrine

Subsection *a* below examines the most common situation in which the nondelegation doctrine arises, which is when the doctrine is used to challenge a federal statute that grants an agency broad power to make legislative rules. Subsection *b* below examines two other situations involving delegation issues: (i) when the nondelegation doctrine is used to interpret a statute; and (ii) when a statute delegates power to an agency to make legislative rules and prescribes criminal penalties for violations of those rules.

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

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

*(i) The* Consumers' Research *Opinion*

As the next case explains, a statute that empowers an agency to make legislative rules will violate the nondelegation doctrine if it does not give the agency an "intelligible principle" to follow when exercising that power.

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**Exercise: *Consumers' Research v. FCC***

Please read *Consumers' Research* with these questions in mind:

1. What statutory delegation is being challenged in this case? What legislative rule is implicated by that challenge?
2. How would you paraphrase the "intelligible principle" standard and its rationale?
3. By what reasoning does the majority conclude that the statute at issue here satisfies the "intelligible principle" standard?

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**FCC v. Consumers' Research**

145 S. Ct. 2482 (2025)

JUSTICE KAGAN delivered the opinion of the Court, in which ROBERTS, C.J., and SOTOMAYOR, KAVANAUGH, BARRETT, and JACKSON, J.J., joined.

[This case presents a constitutional challenge to Section 254 of the Telecommunications Act of 1996 (1996 Act). Section 254 of the 1996 Act authorizes the FCC to compel phone companies that provide interstate telecommunications services (carriers) to contribute to a "Universal Service Fund." The Fund subsidizes phone and internet service for poor people, people in rural areas, schools, libraries, and health care providers. The FCC decides how much each carrier must contribute to the Fund by establishing a "contribution factor." The contribution factor is a

fraction. The numerator is how much universal service will cost in a particular quarter, and the denominator is the carriers' revenue from interstate telecommunications over that same quarter. Carriers must pay that fraction of their revenues into the Fund. The carriers can pass along the costs of these contributions to their customers in the form of a universal service charge. These days, the contribution rate hovers around 37%.

The FCC gets help calculating, collecting, and disbursing contributions from a private, not-for-profit corporation called the Universal Service Administrative Company. This corporation, which the Court in the opinion excerpted below calls the "Administrator," is owned by an association of carriers. The 1996 Act doesn't provide for the Administrator; it's largely a creature of FCC regulations. Each quarter, the Administrator estimates the Fund's expenses and the carriers' revenue. It submits those figures to the 5-member commission that heads the FCC. The Commission publishes public notice of the proposed figures, and it then has fourteen days to revise them. If the Commission doesn't revise them, they are deemed approved.

The universal-service contribution scheme established by Section 254 of the1996 Act was challenged by a non-profit organization called Consumers' Research, a carrier, and a group of consumers. They petitioned for judicial review of the contribution factor for the first quarter of 2022; they filed the petition in the U.S. Court of Appeals for the Fifth Circuit. The en banc Fifth Circuit held that the scheme did indeed violate the U.S. Constitution. In the Fifth Circuit's view, the constitutional violation stemmed from "the *combination* of Congress's sweeping delegation to FCC and FCC's unauthorized subdelegation" to the Administrator. *Consumers' Research*, 606 U.S. at ___ (quoting Fifth Circuit's opinion; emphasis supplied by Fifth Circuit). The Fifth Circuit relied on this "double-layered delegation" rationale without deciding whether each component of the delegation was constitutional. The Court granted certiorari in the challenge brought by Consumers' Research and a separate case that presented the same question.

Before reaching the merits, the Court held that the cases were not moot even though both cases specifically challenged contribution factors for quarters that had come and gone. The Court concluded that the cases fell within the "capable of repetition yet evading review" exception to the mootness doctrine. In case you're unfamiliar with the doctrine and the exception, the exception allowed review in these cases because the carriers would continue in future quarters to be compelled to make contributions indefinitely under a scheme that they thought unconstitutional. The cases were therefore still alive because that ongoing situation could be remedied by a judgment in their favor.]

II

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. Accompanying that assignment of power to Congress is a bar on its further delegation: Legislative power, we have held, belongs to the legislative branch, and to no other. See *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 472 (2001). At the same time, we have recognized that Congress may "seek[ ] assistance" from its coordinate branches to secure the "effect intended by its acts of legislation." *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). And in particular, Congress may "vest[ ] discretion" in executive agencies to implement and apply the laws it has enacted—for example, by deciding on "the details of [their] execution." *Ibid*.; see *Wayman v. Southard*, 10 Wheat. 1, 46, 23 U.S. 1 (1825) ("[T]he maker of the law may commit something to the discretion of the other departments"); *Whitman*, 531 U.S. at 474–475 (A "degree of policy judgment" can "be left to those executing or applying the law").

To distinguish between the permissible and the impermissible in this sphere, we have long asked whether Congress has set out an "intelligible principle" to guide what it has given the agency to do. *J. W. Hampton*, 276 U.S. at 409. Under that test, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. The "guidance" needed is greater, we have explained, when an agency action will "affect the entire national economy" than when it addresses a narrow, technical issue (e.g., the definition of "country [grain] elevators"). *Ibid*. But in examining a statute for the requisite intelligible principle, we have generally assessed whether Congress has made clear both "the general policy" that the agency must pursue and "the boundaries of [its] delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). And similarly, we have asked if Congress has provided sufficient standards to enable both "the courts and the public [to] ascertain whether the agency" has followed the law. *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Div., Dept. of Labor*, 312 U.S. 126, 144 (1941). If Congress has done so—as we have almost always found—then we will not disturb its grant of authority….

A

[The Court rejected Consumers' Research's argument that a stricter test, or at least a stricter version of the intelligible-principle standard, should apply to Section 254 because it imposed a tax. The Court held that its precedent foreclosed that argument. In particular, it discussed *J.W. Hampton*—which involved an importer's nondelegation challenge to a tariff on imported barium oxide—and *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989), which involved a pipeline company's nondelegation challenge to a pipeline safety user fee.]

B

We therefore return to the usual intelligible-principle test to decide whether the universal-service contribution scheme violates the Constitution's nondelegation rule. The question is, again, whether Section 254 adequately guides the FCC in requiring contributions from carriers—whether it expresses the "general policy" the FCC must pursue in setting contribution amounts, as well as the "boundaries" it cannot cross. Here, that inquiry into the nature of the FCC's discretion involves what turn out to be two closely related questions. First, how much money can the FCC raise through contributions? And second, on what things can it spend those funds? We consider each in turn, and find that Congress answered both. Congress, that is, imposed ascertainable and meaningful guideposts for the FCC to follow when carrying out its delegated function of collecting and spending contributions from carriers.

1

As Consumers' Research notes, Section 254 … directs the FCC to collect the amount that is "sufficient" to support the universal-service programs Congress has told it to implement. §§ 254(b)(5), (d), (e). That language replicates or resembles the statutory terms Congress has used in other revenue-raising statutes.… See, *e.g.*, 12 U.S.C. § 243 (instructing the Federal Reserve Board to levy on banks "an assessment sufficient to pay its estimated expenses").

Consumers' Research argues that … the term "sufficient" does not do enough…. [I]t sets only "a floor—not a ceiling—on the FCC's revenue-raising power." Brief for Respondents 56. Or to put the point differently, Consumers' Research thinks that the statute gives the FCC power, all on its own, to raise [a] hypothetical $5 trillion. And not unreasonably, it thinks that would pose a constitutional problem.

But in fact the word "sufficient" sets a floor and a ceiling alike. An amount of money is

"sufficient" for a purpose if it is "[a]dequate" or "necessary" to achieve that purpose. Black's Law Dictionary 1447 (7th ed. 1999). That means, of course, that the FCC cannot raise less than is adequate or necessary to finance the universal-service programs Congress wants. But it also means that the FCC cannot raise more than that amount. Were the FCC to raise, say, twice as much as needed, the revenue would not be "sufficient" but instead excessive….

2

To say that much, though, takes us only halfway, because it raises the question: Sufficient for what? If Section 254's universal-service program is itself indeterminate—so that the FCC can turn it into anything the FCC wants—then the "sufficiency" ceiling will do no serious work. The FCC could operate—and collect contributions "sufficient" for—either the most barebones or the most extravagant program. But if Congress has given appropriate guidance about the nature and content of universal service, then that plus the "sufficiency" ceiling will defeat this challenge to the contribution system. For Congress will have provided intelligible principles to guide the FCC as it raises funds.

On this further, "for what" question, our nondelegation precedents provide context—showing what kinds of statutory schemes have passed, and what kinds have failed, the demand that Congress give adequate guidance. Those that have failed are fewer in number—in fact, only two—but offer object lessons about the amount of latitude Congress can confer. In one case, the statute empowered the President to bar the transport of petroleum products while "establish[ing] no criterion" and "declar[ing] no policy" for whether, when, or how he should do so. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935). The statute in the second case was even worse. It authorized the President to approve "codes of fair competition" for "the government of trade and industry throughout the country," yet imposed "few restrictions" and "set[ ] up no standards" aside from a "statement of the general aims of rehabilitat[ing], correct[ing,] and expand[ing]" the economy. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–522, 541–542 (1935). The law thus gave the President "virtually unfettered" authority to govern the Nation's trades and industries. *Id*., at 542.

At the same time, we have found intelligible principles in a host of statutes giving agencies significant discretion. So, for example, we upheld a provision enabling an agency to set air quality standards at levels "requisite to protect the public health." *Whitman*, 531 U.S. at 472. We sustained a delegation to an agency to ensure that corporate structures did not "unfairly or inequitably distribute voting power" among security holders. *American Power & Light*, 329 U.S. at 104. And we affirmed authorizations to regulate in the "public interest" and to set "just and reasonable" rates, because we thought the discretion given was not unbridled. See, *e.g*., *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–226 (1943); *FPC v. Hope Natural Gas Co*., 320 U.S. 591, 600 (1944). Of course, our cases did not examine those statutory phrases in isolation but instead looked to the broader statutory contexts, which informed their interpretation and supplied the content necessary to satisfy the intelligible-principle test. See, *e.g*., *National Broadcasting*, 319 U.S. at 226 ("It is a mistaken assumption" that the phrase "public interest" is "a mere general reference to public welfare without any standard to guide determinations"; rather, "[t]he purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary").

Section 254, for its part, provides the FCC with determinate standards for operating the universal-service program. The statute makes clear whom the program is intended to serve: those in rural and other high-cost areas (with a special nod to rural hospitals), low-income consumers, and schools and libraries. See §§ 254(b)(3), (6), (h)(1). And in provisions defining universal

service and stating the program's core "principles," the statute provides specific criteria for which services those statutory beneficiaries should receive. §§ 254(b), (c)(1). In deciding whether a service falls within the program's ambit, the FCC must consider whether the service has "been subscribed to by a substantial majority of residential customers." § 254(c)(1)(B). If that objective criterion is not met, the FCC generally may not subsidize the service. So too, the service must be one that can be made available to all consumers in all regions at "reasonable[ ] and affordable rates"—so more a basic than a budget-busting good. §§ 254(b)(1), (3). And still more, the service must be "essential to education, public health, or public safety"—a necessity, not a luxury, in order to live in the world. § 254(c)(1)(A). The conditions, each alone and together, have bite, creating a bounded program. Section 254 instructs the Commission to provide to an identified set of recipients a defined sort of benefit—widely used, generally affordable, and essential telecommunications services.

That limited conception of universal service is rooted in its history—except that the [current version of the] statute, as compared with the [original 1934 Act], holds the FCC to more specific requirements….

[The Court rejects Consumers' Research's argument that the criteria for universal service prescribed in Section 254 just need to be considered by the FCC; and that the FCC need not conclude that each service to be funded as part of universal service will actually satisfy each criterion.] … But the list of criteria the FCC "shall" consider resides in the very "definition" of the "services" it can subsidize. § 254(c)(1). The statute, read sensibly, does not tell the FCC to muse on those criteria before developing its own. Rather, it tells the FCC to "consider," as to any given service, whether it satisfies the listed criteria (and therefore can be subsidized). And that is, indeed, how the Solicitor General, representing the FCC, understands the provision. [Citations to oral argument transcript omitted.]

The dissent therefore fails in its related claim that the FCC can balance different universal-service criteria against each other—so, for example, fund a service because it is "essential to education" even though it has not been adopted "by a substantial majority" of customers. Again, the Solicitor General has represented in this Court that each of the criteria has to be met. [Citations to oral argument transcript omitted.] In any event, and yet more important, we must "exercise [our] independent judgment in deciding" what power Congress has conferred. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024) ….

We likewise see no constitutional issue in Section 254(c)(1)'s description of universal service as an "evolving level of telecommunications services that the Commission shall establish periodically" in light of "advances in telecommunications and information" services. According to Consumers' Research and the dissent, that language enables the FCC to "redefine universal service" over time as it and only it "sees fit." Brief for Respondents 8, 54; see *post*. But Congress's statement that universal service should "evolve" is itself a direction—and a near-inevitable one, given the reality of technological change….

Finally, we do not view as Consumers' Research does the provision in Section 254 enabling the FCC to articulate "[a]dditional principles," beyond the six listed [in the statute], to guide its universal-service programs. § 254(b)(7). [T]he added principles are ones the FCC "determine[s] are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter." As Consumers' Research sees it, the FCC can, through devising those principles, "rewrite its own authority." Brief for Respondents 50 (capitalization altered); see post …. But that is not so because, again, the added principles must be "consistent

with" the rest of the statute. They cannot change any of the statute's other principles, much less its conditions on what subsidies can go toward and who can receive them. The new principles can only operate, within those statutory parameters, to further channel the FCC's discretion. So they are a way to superimpose self-restraint on congressional restraint, which is hardly improper. And the provision's broadly framed reference to the "public interest" suggests nothing to the contrary. The public-interest requirement lies on top of the consistency requirement—connected with an "and," not an "or"—and anyway is complementary to it. For we have long held that "the words 'public interest' in a regulatory statute" do not encompass "the general public welfare" but rather "take meaning from the purposes of the regulatory legislation." *NAACP v. FPC*, 425 U.S. 662, 669 (1976). So the whole of the "[a]dditional principles" provision supplies a means of further implementing, rather than dispensing with, Congress's instructions.

In a sense, each of the arguments Consumers' Research and the dissent make about Section 254 suffers from the same flaw. At every turn, they read Section 254 extravagantly, the better to create a constitutional problem…. All in all, the arguments do not show … proper respect for a coordinate branch of Government. Statutes (including regulatory statutes) should be read, if possible, to comport with the Constitution, not to contradict it. See, *e.g.*, *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980) (plurality opinion); *West Virginia v. EPA*, 597 U.S. 697, 722–723 (2022).

III

The next question Consumers' Research raises is whether a different delegation, now from the Commission to the Administrator (which, recall, is a private, not-for-profit corporation), independently flouts a constitutional command. Here, Consumers' Research invokes what is commonly called the private nondelegation doctrine. In the leading case of *Carter v. Carter Coal Co*., 298 U.S. 238, 310–311 (1936), this Court struck down a statute authorizing certain coal producers to set maximum hours and minimum wages for the rest of the industry. We explained that the statute involved "delegation in its most obnoxious form" because it was made to "private persons whose interests" are often "adverse to the interests of others." *Id*., at 311. Consumers' Research contends that the FCC has in like manner conferred governmental power on a private party, by (in its description) giving the Administrator carte blanche to set the contribution factor, which then determines what individual carriers pay into the Fund. See Brief for Respondents 3–4, 75.

*Carter Coal*, though, has a counterpart case, addressing how Government agencies may rely on advice and assistance from private actors. In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940) this Court considered a statute, enacted in response to *Carter Coal*, permitting boards of coal companies to propose minimum coal prices to a Government agency for "approv[al], disapprov[al], or modifi[cation]." That arrangement, we held, was "unquestionably valid." 310 U.S. at 399. After all, we explained, the private boards "function[ed] subordinately to" the agency and were subject to its "authority and surveillance." *Ibid*. As long as an agency thus retains decision-making power, it may enlist private parties to give it recommendations.

Here, the Administrator is broadly subordinate to the Commission. The FCC appoints the Administrator's Board of Directors and approves its budget. See 47 C.F.R. §§ 54.703(b)–(c), § 54.715(c). The Administrator "may not make policy," and must carry out all its tasks "consistent with" the FCC's rules, "orders, written directives, and other instructions." § 54.702(c); Memorandum of Understanding Between the Federal Communications Commission and the

Universal Service Administrative Company 2 (Oct. 17, 2024) (Memorandum of Understanding). And anyone aggrieved by an action of the Administrator may seek de novo review by the Commission. §§ 54.719–54.725. So in the relationship between the two, the Commission dominates.

And critically, that is as true in determining the contribution factor as in other matters: Although the Administrator plays an advisory role, the Commission alone has decision-making authority…. [T]he Commission is, throughout, the final authority—just as the agency was in *Sunshine Anthracite*. The Administrator, following the FCC's rules, makes recommendations. But the Commission decides whether or how to use them in setting the contribution factor.

IV

Consumers' Research almost wholly ignores the basis of the decision below: that the "*combination*" of Congress's grant of authority to the FCC and the FCC's reliance on the Administrator for financial projections violates the Constitution, even if neither one does so alone. See 109 F.4th at 778 (emphasis in original). But because that theory accounts for the decision we are reviewing, we cannot close without addressing it briefly.

[The Court rejects the theory.] … A law violates the traditional (or call it, for comparison's sake, "public") nondelegation doctrine when it authorizes an agency to legislate. And a law—whether a statute or, as here, a regulation—violates the private nondelegation doctrine when it allows non-governmental entities to govern. Those doctrines do not operate on the same axis (save if it is defined impossibly broadly). So a measure implicating (but not violating) one does not compound a measure implicating (but not violating) the other, in a way that pushes the combination over a constitutional line. "Two wrong claims do not make one that is right." *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 457 (2009). If a regulatory scheme authorizes neither executive legislation nor private governance, it does not somehow authorize an unlawful amalgam. Contra the Fifth Circuit, a meritless public nondelegation challenge plus a meritless private nondelegation challenge cannot equal a meritorious "combination" claim….

We accordingly reverse the judgment of the Court of Appeals for the Fifth Circuit and remand for further proceedings consistent with this opinion.

JUSTICE KAVANAUGH, concurring.

…

I join the Court's opinion and write separately to make two points. First, I will briefly outline what I understand to be the background and rationale behind the intelligible principle test that the Court has long used to assess congressional delegations of authority to the Executive Branch. Second, I will explain why congressional delegations to independent agencies—as distinct from delegations to the President and executive agencies—raise substantial questions under Article II of the Constitution.

I

A

From the start in 1789, Congress has delegated to the President the power to exercise discretion and policymaking authority when implementing legislation. Those delegations have been a regular feature of American Government ever since.

The Court has generally permitted such delegations. As to the text of the Constitution, the Court has rejected arguments that the President impermissibly wields legislative power when

exercising discretion or policymaking authority delegated by Congress. Instead, the Court has reasoned that the President ordinarily exercises "executive Power" under Article II when implementing legislation—even if he employs discretion or policymaking authority when doing so and even if the Executive Branch issues legally binding regulations. See, *e.g.*, *Mistretta v. United States*, 488 U.S. 361, 386, n. 14 (1989) ("[R]ulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch")….

Although the Court has ruled that congressional delegations to the President are permissible as a matter of constitutional text and history, the Court has not said that "anything goes" with respect to those delegations….

But the question of where to draw that line can be difficult: At what point does a broad statutory delegation transform from (i) a permissible grant of discretion or policymaking authority for the President to exercise when implementing legislation into (ii) an impermissible delegation of legislative power?...

For 97 years, the intelligible principle test set forth in *J. W. Hampton* has formed the foundation of the Court's nondelegation doctrine. Under the test, as then-Justice Rehnquist succinctly framed it, Congress may "lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases." *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 675 (1980) (opinion concurring in judgment)….

To be clear, the intelligible principle test is not toothless. But it does operate in a way that respects the President's Article II authority to execute the laws—that is, to exercise discretion and policymaking authority within the limits set by Congress and without undue judicial interference. See, *e.g.*, *Whitman*, 531 U.S. at 472–476; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate")…. The intelligible principle test has had staying power—perhaps because of the difficulty of agreeing on a workable and constitutionally principled alternative, or because it has been thought that a stricter test could diminish the President's longstanding Article II authority to implement legislation.

… I agree with how the Court has applied the test in this case.

…

II

Congressional delegations to independent agencies, as distinct from delegations to the President and executive agencies, raise substantial Article II issues….

Critiques of broad congressional delegations sometimes focus on officials described as "unaccountable bureaucrats." But that label does not squarely fit delegations to executive agencies. In those circumstances, the President and his subordinate executive officials maintain control over the executive actions undertaken pursuant to a delegation. And the President is elected by and accountable to all the American people. See *Myers v. United States*, 272 U.S. 52, 123 (1926)….

Rather, the problems with delegations to "unaccountable" officials primarily arise from delegations to independent agencies. Independent agencies are headed by officers who are not removable at will by the President and who thus operate largely independent of Presidential supervision and direction. Those independent agency heads are not elected by the people and are

not accountable to the people for their policy decisions. Unlike executive agencies supervised and directed by the President, independent agencies sit uncomfortably at the outer periphery of the Executive Branch….

If the FCC were an independent agency, … then a serious Article II delegation problem would arise, in my view. [Justice Kavanaugh observes that, although the FCC is commonly regarded as an independent agency, "at oral argument in this case, the Government correctly pointed out that the FCC formally is not an independent agency because 'the FCC does not have statutory for-cause removal protections'—in other words, no statutory text restricts the President's authority to remove FCC Commissioners at will. Tr. of Oral Arg. 54. And as the Government indicated, this Court's usual practice, given the text and structure of Article II, is not to infer for-cause removal protections from statutory silence."].

… Congressional delegations of policymaking authority to independent agencies raise significant Article II issues. In an appropriate case, this Court should address that problem.

JUSTICE JACKSON, J., concurring.

… I write separately to express my skepticism that the private nondelegation doctrine—which purports to bar the Government from delegating authority to private actors—is a viable and independent doctrine in the first place. Nothing in the text of the Constitution appears to support a per se rule barring private delegations. And recent scholarship highlights a similar lack of support for the doctrine in our history and precedents. See, *e.g.*, A. Volokh, The Myth of the Federal Private Nondelegation Doctrine, 99 Notre Dame L. Rev. 203 (2023)….

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

Within the federal government, Congress "alone has access to the pockets of the people." The Federalist No. 48, p. 334 (J. Cooke ed. 1961) (J. Madison). The Constitution affords only our elected representatives the power to decide which taxes the government can collect and at what rates. See Art. I, § 8, cl. 1. Throughout the Nation's history, Congress has almost invariably respected this assignment. As this Court observed some decades ago, it would represent "a sharp break with our traditions" for Congress to abdicate its responsibilities and "besto[w] on a federal agency the taxing power." *National Cable Television Assn., Inc. v. United States*, 415 U.S. 336, 341 (1974).

Today, the Court departs from these time-honored rules. When it comes to "universal service" taxes, the Court concludes, an executive agency may decide for itself what rates to apply and how much to collect. In upholding that arrangement, the Court defies the Constitution's command that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.' " *Gundy v. United States*, 588 U.S. 128, 135 (2019) (plurality opinion) (quoting *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825))….

* * *

*(i) Significance of* Consumers' Research

Before the Court decided *Consumers' Research*, some people including your humble author thought the Court might revisit and revamp the nondelegation doctrine to make it more restrictive.

This view rested on *Gundy v. United States*, 588 U.S. 128 (2019). In *Gundy*, a split Court rejected a nondelegation challenge to a federal statute, the Sexual Offender Registration and Notification Act (SORNA), that delegated legislative rulemaking power to the Attorney General.

In *Gundy*, Justice Kagan wrote a plurality opinion for herself and Justices Ginsburg, Breyer, and Sotomayor, upholding SORNA's delegation. Justice Alito supplied the fifth vote. But he concurred only in the judgment, and he said, "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort." *Gundy*, 588 U.S. at 149. But because there was no such majority, Justice Alito thought "it would be freakish to single out the provision at issue here for special treatment." *Id.* Justice Gorsuch wrote a dissenting opinion for himself, Chief Justice Roberts, and Justice Thomas, arguing for a nondelegation standard that would be much more restrictive on delegations than the "intelligible principle" standard. Justice Kavanaugh did not participate in the case.

Counting heads in *Gundy*, you had four Justices supporting the longstanding intelligible principle standard, one Justice highly dubious of that standard, and three others who argued for a much more stringent nondelegation standard: 4–1–3. All eyes were on Justice Kavanaugh, whom some predicted would side with the dissent, which, with Justice Alito's presumed opposition to the current doctrine, would produce a majority in favor of adopting a more restrictive approach to delegations.

In *Consumer's Research,* though, Justice Kagan—who, remember, wrote for the 4-Justice plurality in *Gundy*—got the votes of *Gundy* dissenter Chief Justice Roberts and Justice Kavanaugh. *Consumers' Research* is thus a 6-to-3 decision. And so, for now, the "intelligible principle" standard still rules!

## b. Other Situations Presenting Delegation Issues

*(i) Interpreting Federal Statutes Narrowly to Avoid Delegation Doctrine Problems*

Although the U.S. Supreme Court has not used the nondelegation doctrine to invalidate a federal statute since 1935, the Court has used the doctrine to justify interpreting a federal statute narrowly. Indeed, the Court did so in *Consumers' Research* when it interpreted Section 254 of the Telecommunications Act. For example, the Court interpreted Section 254 to require universal-service funding to meet four statutorily specified criteria, such as whether the funded service was "essential to education, public health, or public safety." The dissent, in contrast, interpreted Section 254 to require the FCC only to consider those factors. *Compare Consumers' Research*, 145 S. Ct. at 2505–2506 *with id.* at 2529–2530 (Gorsuch, J., dissenting). The majority, in turn, criticized the dissent for failing to interpret Section 254 narrowly to avoid delegation problems.

This is not the first time the Court has used the doctrine as a canon of statutory interpretation. *See National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) (narrowly interpreting an FCC statute to avoid nondelegation problem). The takeaway seems to be that if a broad reading of a federal statute would raise serious delegation problems, a federal court will adopt a narrower reading. Of course, the statute must be reasonably susceptible to broader and narrower readings and, to that extent, ambiguous.

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**Exercise: Interpreting Statutes to Avoid Nondelegation Doctrine Problems**

The objective of this exercise is to introduce you to a statute that would raise delegation concerns if interpreted broadly, according to a federal court of appeals.

The federal Age Discrimination in Employment Act (ADEA) generally makes it unlawful for an employer to discriminate against an employee in compensation or employment benefits because of the employee's age. *See* 29 U.S.C. §623(a)(1). The ADEA is administered by the Equal Employment Opportunity Commission (EEOC). Section 9 of

the ADEA authorizes the EEOC to issue rules creating exemptions from the ADEA. Specifically, the EEOC may under §9 "establish such reasonable exemptions ... as [the EEOC] may find necessary and proper in the public interest." 29 U.S.C. §628. Exercising its §9 exemption authority, the EEOC issued a rule allowing employers to reduce retirees' health benefits to the extent those benefits were payable under Medicare or a comparable state health benefit plan. This reduction by employers is known as "coordinating" employer benefits with governmental health benefits.

The U.S. Court of Appeals for the Third Circuit held that, even if the coordination of benefits would otherwise violate the ADEA, the EEOC had authority under §9 to create the exemption allowing the coordination. *Am. Ass'n of Retired Persons v. EEOC*, 489 F.3d 558, 562–567 (3d Cir. 2007). The court said, however, "We must narrowly interpret section 9 of the ADEA, if possible, to avoid any potential delegation problem." *Id.* at 564 n.6.

Please write a short explanation of why §9 could raise delegation concerns if construed broadly.

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*(ii) Statutes Granting an Agency the Power to Define Criminal Offenses*

Some federal statutes not only grant agencies power to make legislative rules. They also make violations of those rules punishable as federal crimes. In this situation, agencies have the power to define criminal conduct.

An example of the situation now under discussion comes from *United States v. Grimaud*, 220 U.S. 506 (1911). The federal statute challenged in that case authorized the Secretary of Agriculture to issue rules to protect public forests. The statute also said that any violations of these rules could be punished, in a court proceeding, by a fine of up to $500 and imprisonment for up to a year. Mr. Grimaud was charged with violating a rule that was issued by the Secretary and that required him to get a permit before grazing sheep in a public forest. Mr. Grimaud argued that the statute was invalid because it authorized the Secretary to define criminal conduct. The Court rejected that argument.

The Court held in *Grimaud* and later cases that Congress must satisfy two requirements to authorize a federal agency to define criminal conduct. First, Congress must expressly state in the statute that violations of the agency's rules are a crime. Second, Congress itself must prescribe the criminal penalties for violations. 220 U.S. at 518; *see also United States v. O'Hagen*, 521 U.S. 642, 666–677 (1997); *Loving v. United States*, 517 U.S. 748, 768 (1996). Thus, if a federal statute grants an agency broad power to make legislative rules, but does not explicitly make violations of the rules a crime punishable by specified criminal sanctions, the agency cannot, acting alone, prescribe criminal penalties for violations of its rules.

When Congress does explicitly empower an agency to make rules that trigger statutorily prescribed criminal punishment, Congress might have to restrict the agency's power more tightly than is usually required. In one U.S. Supreme Court case, a criminal defendant argued that "something more than an 'intelligible principle' is required when Congress authorizes [the executive branch] to promulgate regulations that contemplate criminal sanctions." *Touby v. United States*, 500 U.S. 160, 165–166 (1991). In response to that argument, the Court admitted, "Our cases are not entirely clear as to whether more specific guidance is in fact required" in this situation. *Id.* at 166. The Court did not resolve the issue in that case, because the Court concluded that the challenged statute would be valid "even if greater congressional specificity is required in the

criminal context." *Id*. The issue remains open.

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**Exercise: Agency Power to Make Rules Identifying Conduct Subject to Criminal Punishment**

Why might the Court demand more specificity from Congress when it empowers a federal agency to make rules identifying conduct that is subject to statutorily prescribed criminal punishment?

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**Exercise: Making Sense of Federal Constitutional Limits on Delegations**

The material in this section has addressed these situations:

1. use of the federal nondelegation doctrine to challenge the validity of federal statutes that delegate to executive-branch agencies the power to make legislative rules, including rules the violation of which carries criminal penalties; and
2. use of the federal nondelegation doctrine as a basis for interpreting ambiguous federal statutes

Please explain in your own words the principles that apply in each situation.

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## 3. Modern Nondelegation Doctrine in the States

This section emphasizes that States are not bound by U.S. Supreme Court and lower federal court precedent on the nondelegation doctrine that applies to federal statutes. It also briefly discusses the nondelegation doctrine in the States.

### a. The Federal Nondelegation Doctrine Does Not Apply to the States

The federal nondelegation doctrine is a facet of the separation of powers doctrine established by the U.S. Constitution. The separation of powers doctrine concerns the relationship among the three branches of the federal government. It does not apply to the relationship among branches of state government. Thus, "the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957); *see also Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). In particular, the federal nondelegation doctrine does not restrict the ability of state legislatures to give state agencies power to make legislative rules.

### b. The Sources and Prevalence of the Nondelegation Doctrine in the States

According to one scholar, 78% of state constitutions adopted since 1776 have provisions expressly requiring separation of powers. Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. 545, 599 (2023). Here, for example, is the one in Georgia's Constitution:

**Georgia Constitution, Art. 1, §2, para. III**

The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.

Furthermore, even state constitutions that do not expressly require the separation of legislative,

executive, and judicial powers may be interpreted—just as the U.S. Constitution is interpreted—to require a separation of powers and, more specifically, to limit the ability of state legislatures to delegate legislative rulemaking power to state agencies. In any event, the source of the nondelegation doctrine in a State will be that State's constitution. And because state constitutions differ, the nondelegation doctrine may differ in each State. In particular, States are free to interpret their constitutions to put greater restrictions on their state legislatures than the federal nondelegation doctrine puts on Congress.

Georgia is one State that has recently done so. Illustrating Georgia's more stringent approach is *Republican National Committee v. Eternal Vigilance Action, Inc.*, ___ S.E.2d ___ (Ga. 2025) (*"RNC"*). There, the Court struck down four rules issued by the State Election Board on the ground that the statute authorizing their issuance violated Georgia's nondelegation doctrine. The court held that the statute did not "provide meaningful, objective guidelines to cabin [the] agency's exercise of discretion." *Id.* at ___. In so holding, the Court overruled its prior decision in *Department of Transportation v. City of Atlanta*, 398 S.E.2d 567 (Ga. 1990) (*"DOT"*). In *DOT* the Court had upheld a statute authorizing the Georgia Department of Transportation to exercise eminent domain when "reasonable, necessary, and in the public interest." *Id*. at 700 (quoting statute). The Court in *RNC* would have none of it, stating that the statute upheld in *DOT* unconstitutionally "delegate[ed] unbridled discretion to an executive branch agency." *RNC*, ___ S.E.2d at ___.

The lesson to take from this discussion is that state court decisions with "nondelegation doctrines" don't necessarily have the same "nondelegation doctrine" as the U.S. Supreme Court has adopted.

## 4. Delegations of Power to Private Entities

Federal and state statutes that delegate governmental power to private entities are subject to restrictions under the Due Process Clauses of the Fifth and Fourteenth Amendments. Besides the Due Process Clauses, a particular State may have laws—including in its constitution—putting additional restrictions on state statutes authorizing private entities to exercise governmental power.

In *Consumers' Research*, which was excerpted above, the U.S. Supreme Court rejected a "private nondelegation doctrine" challenge to a federal statute. In doing so, the Court discussed its leading cases: namely, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). Of potential future significance, Justice Jackson concurred separately in *Consumers' Research* to express "skepticism that the private nondelegation doctrine … is a viable and independent doctrine in the first place." *Consumers' Research*, 145 S. Ct. at 2518 (Jackson, J., concurring).

The due process limit on private delegations that the Court in *Carter Coal* found in the Due Process Clause of the Fifth Amendment also exists under the Due Process Clause of the Fourteenth Amendment. The latter limits state and local laws that delegate governmental authority to private entities. The U.S. Supreme Court cases addressing state laws have allowed private participation in regulatory decisions, when the private parties did not compete with the regulated parties and had a legitimate stake in the matter. *Cusack v. City of Chicago*, for example, upheld a Chicago ordinance that allowed billboards on residential streets only with the consent of the residents who owned the majority of frontage on the affected street. 242 U.S. 526, 529–531 (1917). The Court observed that it was common to let a neighborhood assess "the propriety of having carried on within it trades or occupations which are properly the subject of regulation in the exercise of the police power, ... such as the right to maintain saloons." *Id*. at 530. *See also Philly's v. Byrne*, 732

F.2d 87 (7th Cir. 1984) (rejecting due process challenge to state law that allowed voters in a precinct to ban all liquor stores in the precinct by majority vote).

Like the U.S. Supreme Court, state courts are particularly suspicious of statutes delegating legislative rulemaking power to private entities. An example is *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997). A Texas statute created an "Official Cotton Growers' Boll Weevil Eradication Foundation." *Id.* at 457 (quoting statute). The Foundation had statutory authority to impose fees on cotton growers to fund a boll weevil eradication program. The Foundation was a private, nonprofit organization, made up of growers. The Court held that the statute violated the special, stringent sets of standards required under Texas law for a private delegation. *Id*. at 472–475.

The takeaway from this discussion is that the Due Process Clauses of the Fifth and Fourteenth Amendments restrict delegations of governmental power to private entities. The restriction reflects concern that private entities will not use that power impartially. The restriction does not, however, prohibit all private participation in government decision making. State law, too, may restrict delegations of power to state agencies.

# Chapter 9

# 9. Limits on Agency Rulemaking Power

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## 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*, 600 U.S. 477 (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*, 600

U.S. at 494. 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 carryover paragraph at the top of page 185, 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 10

# 10. The APA as a Source of Procedural Requirements for Agency Rulemaking

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

### 1. Federal APA Rulemaking Exemptions

#### c. Subject-Matter Exemptions in Section 553(a)

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

## p. 211:

At the very bottom of p. 211, please ignore the very last two sentences on the page and substitute these instead:

Besides these statutes, rules or policy statements have been issued by some federal agencies that make their rules subject to the APA's rulemaking requirements even though the rules would otherwise be exempt under §553(a)(2)'s proprietary functions exemption. See Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 63 n.71 (6th ed. 2018). The U.S. Department of Health and Human Services used to be one of those agencies, but it has now rescinded the policy statement that, in effect, "waived" the proprietary functions exemption. 90 Fed. Reg. 11,029 (Mar. 3, 2025).

#### d. Exemptions for Interpretative Rules, Policy Statements, and Procedural Rules

*(ii) "[G]eneral [S]tatements of [P]olicy*

## p. 215:

Please ignore the paragraph in the middle of page 215 that begins "The problem is …", and also ignore the entire description of *Regents of the Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, as that case has been effectively overruled. Read these paragraphs instead:

The problem is that the exemption for policy statements, like other exemptions in

§553(b)(A), creates an opportunity for agencies to try to "pass off" non-exempt legislative rules as exempt rules. This way, the agency can "make law" (by issuing what are really legislative rules) without having to follow the notice-and-comment procedures normally required for legislative rules. Thus, the federal courts must often decide if an agency pronouncement is really a legislative rule or, instead, just an exempt policy statement. That can be tough.

In general, though, most courts analyze how the agency pronouncement under analysis affects the agency's exercise of discretion and whether it changes the substantive legal rights or duties of those outside the agency. *See*, *e.g.*, *Gonella v. SEC*, 954 F.3d 536, 547 (2d Cir. 2020) (holding that SEC-issued guidance for entering into cooperation agreements with witnesses in SEC administrative proceedings was a policy statement because it was "highly discretionary, non-binding, and does not impose any legal requirements on cooperating parties or the Commission").

# Chapter 12

# 12. Informal Rulemaking

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## A. 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 these new paragraphs:

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). Yet 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 sum, 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

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## 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:

Please replace the existing fourth paragraph on page 381—which begins "An agency also may have to go initially to court . . ."—with this rewritten one:

An agency also may have to go initially to court—even if it has some adjudicatory power—if it wants a remedy that the agency cannot itself order in an in-house adjudication. For example, the SEC has power to adjudicate in-house many different kinds of violations of the securities laws and, in its adjudications, to impose sanctions like cease-and-desist orders. The SEC must go to court, however, if the SEC wants to bar someone who has violated the securities laws from serving as an officer of a public company. *See* 15 U.S.C. §78u(d)(2); *SEC v. Patell*, 61 F.3d 137 (2nd Cir. 1995). By statute, that particular remedy is available only from a court. In addition, the Seventh Amendment to the Constitution bars federal agencies from imposing punitive civil fines in their in-house adjudications. *See SEC v. Jarkesy*, 603 U.S. 109, 119 (2024); *see also AMG Capital Mg'mt v. FTC*, 593 U.S. 67, 71–82 (2021) (holding that provision in Federal Trade Commission Act did not authorize FTC to go directly to court for equitable monetary relief).

# Chapter 18

# 18. Agency Adjudicatory Power

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## 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 seems to like 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 exception.

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 to disputes between private parties.

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 distinction between public and private rights, the Court in *Schor* understood its public rights precedent to require consideration of multiple factors to decide if a statute granting adjudicatory power to federal agencies satisfies Article III:

> 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.

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**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*, 603 U.S. 109 (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.

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**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 choose between the two terms, 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.)

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**Securities and Exchange Commission v. Jarkesy**

603 U.S. 109 (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 and can thus be adjudicated by federal agencies in-house. *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 public rights matters, including through in-house adjudications to impose civil penalties that are designed to punish and deter.

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, unless they involve public rights as the Court has restrictively defined them?

The answer is no, not if *Atlas Roofing* remains good law. *Atlas Roofing* upheld the use of agency adjudication to impose punitive or deterrent 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 to impose punitive or deterrent civil penalties of regulations 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.

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**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?

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**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.

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# Chapter 19

# 19. Limits on Agency Adjudicatory Power

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## A. Internal Limits on Agency Adjudicatory Power

### 1. 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) (*Sackett II*)

Stick with us here: The Court in this case reversed (1) an agency adjudicatory decision that rested on a (2) legislative rule that conflicted with (3) the agency legislation. So, the adjudicatory decision exceeded limits imposed, ultimately, by the agency legislation. Let's flesh that out:

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) (*Sackett I*), 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" and was thus beyond EPA's authority to regulate under the CWA.

The Court's opinion invalidated not only the EPA compliance order against the Sacketts but also the legislative rule on which the order rested. This forced the EPA back into the murky "waters of the United States" phrase in the CWA, and it issued a new legislative rule defining that phrase several months later. 88 Fed. Reg. 61,964 (Sept. 9, 2023) (revised definition issued jointly by EPA and U.S. Army Corps of Engineers).

# Chapter 20

# 20. The Due Process Clauses as Sources 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

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## 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

### Pp. 633–643:

Please ignore all of section C in the coursebook and read this re-written version of it:

The federal doctrine of standing restricts who can sue in federal court. You have probably studied the standing doctrine before if you've taken a law school course on constitutional law or on the federal courts. If so, you may recall that the standing doctrine

(1) comes from the U.S. Constitution, being an essential element of the "cases" and "controversies" over which Article III authorizes the exercise of "judicial power";

(2) applies in all federal courts established under Article III, including the U.S. Supreme Court; and

(3) requires dismissal of a suit for lack of *subject matter jurisdiction* if the federal court determines at any point that the plaintiff lacks standing.

The third point explains why we examine standing as one of the requirements for a federal court to have *jurisdiction* to review agency action. Recognizing that you may have encountered the standing doctrine before, we will discuss the standing doctrine from the administrative law

perspective.

Administrative lawyers know that, when it comes to standing, the world is divided into easy standing cases and hard standing cases. The easy standing cases are the majority. In these cases, the plaintiff's standing is so clear that it is a non-issue. In other cases, however, standing is not clear. It helps to begin by distinguishing the easy standing cases from the hard ones.

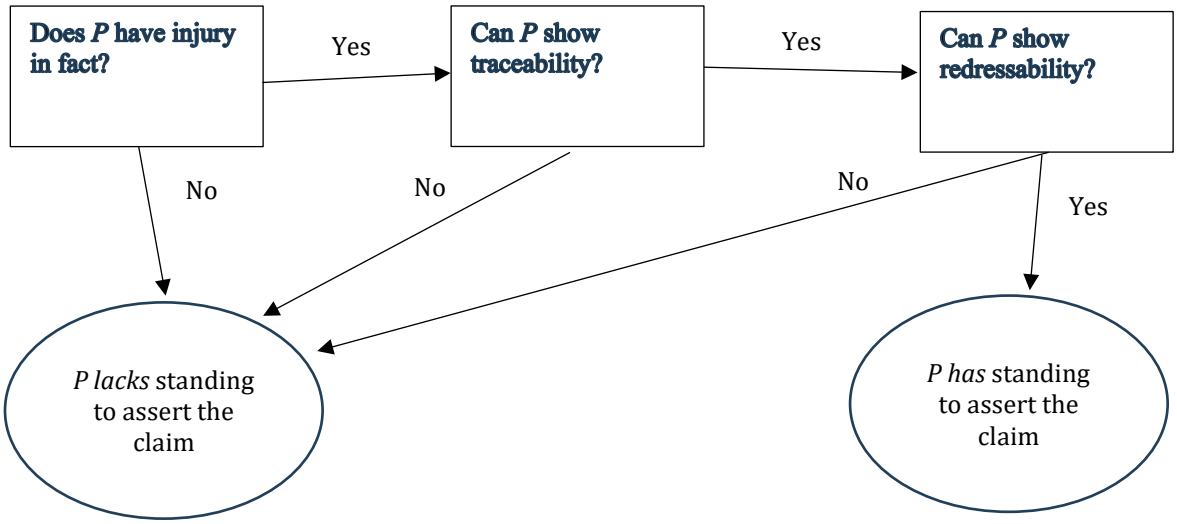
Easy standing cases involve plaintiffs who can plead and prove traditionally recognized injuries that result directly from challenged government actions that obviously affect the plaintiff. Thus, standing is obvious when agency action denies, restricts, or terminates the plaintiff's governmentally required license or government benefits; imposes a fine on, or issues a cease-and-desist order against, the plaintiff; or issues a rule that regulates the plaintiff by requiring the plaintiff to do or refrain from doing certain things. Similarly, many other kinds of agency action, like agency demands for information, have direct targets and cause clear injury. These targets of agency action have an easy time showing standing.

Hard standing cases arise when the person challenging agency action is not directly affected by the agency action or is claiming an interest that tends toward the abstract or diffuse. Specifically, many hard standing cases arise when the plaintiff claims that an agency has failed to enforce—or failed to enforce stringently enough—a law that targets someone other than the plaintiff. Thus, the U.S. Supreme Court has said that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded but it is ordinarily substantially more difficult to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–562 (1992) (internal quotation marks omitted). The plaintiff may also have trouble showing standing when the plaintiff's real stake in the lawsuit seems to consist simply of ideological opposition to a government action or policy.

In a hard standing case, you will often have trouble predicting whether or not a court will uphold standing unless you find binding precedent closely resembling your case. Rather than learning to predict the outcome of these hard cases, your present objective should be simply to learn the framework that courts use to analyze them. The framework focuses on the particular plaintiff, the particular claim being asserted by the plaintiff, and the particular relief that the plaintiff is seeking. On the issue of relief, hard standing cases almost always involve suits for prospective relief like declaratory or injunctive relief against ongoing or future harm, as distinguished from money damages for past injury.

We devote this section mostly to what's called "constitutional" or "Article III" standing. We mention two other concepts with the word "standing" in their name: "prudential standing"—a concept conceived by the U.S. Supreme Court but which the Court now seems close to abandoning; and "statutory standing"—an annoying misnomer. We hope that you can "stand" the discussion, as well as *under*stand it. A flow chart illustrating constitutional standing is depicted in Diagram 28-1.

Diagram 28-1. Constitutional ("Article III") Standing Requirements



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**Exercise: Identifying Easy and Hard Standing Cases**

Please identify the following cases as easy or hard standing cases:

1. The Nuclear Regulatory Commission denies a license that would allow Vermont Yankee Nuclear Power Corporation to build a nuclear power plant. Vermont Yankee seeks judicial review of the denial.
2. The Nuclear Regulatory Commission grants a license that would allow Vermont Yankee Nuclear Power Corporation to build a nuclear power plant. Groups opposed to nuclear power seek judicial review of the grant.
3. The U.S. EPA establishes restrictions on emissions of carbon dioxide and other greenhouse gas from new cars made in the United States. The Ford Motor Company seeks judicial review of the restrictions, which will cost the company billions of dollars to comply with.
4. The U.S. EPA relaxes existing restrictions on emissions of carbon dioxide and other greenhouse gases from new cars made in the United States. The American Lung Association seeks judicial review of the restrictions on behalf of members claiming EPA's action could make their respiratory illnesses worse.
5. The Department of Interior issues new safety rules for companies that hold leases from the federal government to explore for oil and gas on the Outer Continental Shelf (OCS). The rules are designed to lower the risk of massive oil spills by requiring costly new technology and safety procedures. Oil and gas companies that hold OCS leases and will have to spend money to comply with the new rules seek judicial review.
6. The Department of Interior issues new safety rules for companies who hold leases from the federal government to explore for oil and gas on the Outer Continental Shelf (OCS). The rules are designed to lower the risk of massive oil spills. Organizations that oppose increased production of fossil fuels on the ground that they increase global warming seek judicial review of the rules, arguing that they are not stringent enough.

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***1. Constitutional (Article III) Standing Requirements***

To have constitutional (Article III) standing the plaintiff bears the burden of pleading and proving three things:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (internal quotation marks, citations,

brackets, and ellipses omitted). These Article III requirements are known as (a) injury in fact; (b) traceability; and (c) redressability. If it is not self-evident that the plaintiff meets each requirement, the plaintiff must put on evidence proving each one, if necessary, including at the trial stage. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012); *see also Gill v. Whitford*, 585 U.S. 48, 69–72 (2018).

Before exploring these three Article III requirements, we briefly describe the rules for a membership association to have standing to sue for its members. The rules for "associational standing"—also known as "organizational" or "representative" standing—are important because so many administrative law cases are brought by associations under these rules. As the Court has described the rules:

> [A]n organization must demonstrate that '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'

*Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023) (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). The rules typically allow, for example, an environmental group to challenge an agency action that would allow development of pristine public land that the group's members use for recreation. Likewise, labor unions and trade associations can challenge agency actions that hurt their members. The theory behind allowing associations to sue for their members is that the associations have the resources, expertise, and organizational interest needed to represent its members adequately.

### a. Injury in Fact

To show injury in fact for prospective relief—like a declaratory judgment or an injunction or an order vacating agency action—the plaintiff must show either an actual, ongoing injury or an imminent threat of future injury; proof of past injury isn't enough. *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). In addition to being actual or imminent, the injury must be "particularized," meaning it must be individual and personal. *Spokeo v. Robins*, 578 U.S. 330, 339 (2016). Of relevance to administrative lawyers, for example, the Court has often held that a plaintiff's interest in government officials' and agencies' obeying the law is not particularized enough. *E.g.*, *Valley Forge Christian Coll. v. Ams. United for Sep'n of Church & State*, 454 U.S. 464, 483 (1982). The Court has held that injury must also be "concrete." *Id.* at 1549. And the Court has held that this concrete-harm requirement can't be satisfied merely by showing that the 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." *TransUnion v. Ramirez*, 594 U.S. 413, 424 (2021).

We will discuss five types of harm that count—or, to use legal terminology, are "cognizable"—as injury in fact. Then we discuss a type of harm, "procedural injury" that is not, standing alone, cognizable as injury in fact. Finally, we discuss a type of harm, emotional injury, that is sometimes cognizable and sometimes not.

We start with five types of harm (including a threat of harm) that are cognizable:

*(i) Physical Injury*

Adolph Lyons was hurt when Los Angeles police officers put him in a chokehold after stopping him for a traffic violation. The Court held that the physical injury constituted injury in

fact that gave him standing to seek damages. It did not give him standing to seek injunctive or declaratory relief, however, because he couldn't show a reasonable risk that the police would put him in a chokehold again in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–113 (1983).

*(ii) Economic Injury*

Alfalfa-seed farmers sued a federal agency, the Animal and Plant Health Inspection Service, to challenge its decision to deregulate a variety of genetically engineered alfalfa. The farms showed that they had to spend money to prevent the genetically modified alfalfa seed from infecting their non-genetically-modified alfalfa seed and that these preventive measures were necessary to provide the kind of seed their customers wanted. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 144, 153–154 (2010).

*(iii) Impairment of "Aesthetic" or "Recreational" Use of Specific Land, Including Governmentally Owned Land*

An environmental group sued a company for violating the Clean Water Act by polluting a river. The group's members showed injury in fact by alleging that their fear of pollution prevented them from recreating in and near the river. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181–182 (2000); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (holding that individuals who asserted only " 'some day' intentions" to visit areas threatened with environmental degradation by the government's challenged action did not show "imminent" threat of injury required for proof of injury in fact); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (holding that environmental group's members didn't show injury in fact merely by alleging use of "unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the [challenged] governmental action").

*(iv) Deprivation of Information to Which the Law Gives People a Personal, Legal Right*

A group of voters asked the Federal Election Commission to classify an organization—the American Israel Public Affairs Committee (AIPAC)—as a "political committee" under the Federal Election Campaign Act of 1971 (FECA). That classification would have triggered FECA provisions requiring AIPAC to disclose its contributions to political candidates. The voters claimed they wanted this information so they could figure out which candidates to vote for (and against). The Court held that the voters had standing to challenge the Commission's refusal to classify AIPAC as a political committee. The denial caused them injury in fact by depriving them of information to which they had a statutory right and that they needed to cast informed votes. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *cf. United States v. Richardson*, 416 U.S. 166, 176 (1974) (plaintiffs had only a non-cognizable "generalized grievance" in arguing that CIA's non-disclosure of its expenditures violated constitutional provision requiring publication of "[e]xpenditures of all public Money," U.S. Const., art. I, §9, cl. 7).

*(v) Violation of Personal Constitutional Rights*

A "pro-life advocacy organization" called Susan B. Anthony List (SBA) issued a press-release about then-Congressman Steve Driehaus. SBA's press release asserted that while in Congress Driehaus had voted in favor of taxpayer-funded abortions. Driehaus filed an administrative complaint charging SBA with violating an Ohio law prohibiting false statements during political campaigns. The U.S. Supreme Court held that SBA showed injury in fact by establishing the threatened enforcement against SBA of a law that, it claimed, violated its First Amendment right of free speech. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–167 (2014). *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).

*(vi) Procedural Injury*

Unlike the five types of harm discussed above, the Court has held that a "procedural injury," standing alone, isn't injury in fact. The holding came in a lawsuit by Defenders of Wildlife challenging a federal rule that interpreted the Endangered Species Act (ESA) as not applicable overseas. Defenders sued under the ESA's "citizen suit" provision, which authorized "any person" to sue the federal government for violations of the ESA. Defenders argued that the challenged rule caused a "procedural injury" by preventing the Secretary of Interior from following the procedural requirements of the ESA at overseas projects involving federal agencies.

The Court held that the ESA's citizen suit provision couldn't constitutionally be interpreted to allow a suit by a plaintiff for a procedural injury that caused no concrete injury (or threat of concrete injury) to the plaintiff. The Court explained that that interpretation would violate Article III by allowing suits for "generalized grievances," which do not constitute injury in fact. It would also violate Article II by enabling the federal courts to carry out the President's exclusive constitutional duty to "take Care that the laws be faithfully executed" (U.S. Const., art. II, §3). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–577 (1992).

In dicta, the Court said that a violation of a plaintiff's "procedural rights" does affect standing analysis. The Court explained that "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7. The Court gave as an example a person who lives next to the site of a proposed federally licensed dam. That person can complain if the agency responsible for building the dam has failed to prepare the environmental impact statement (EIS) required by federal law. The person has standing to challenge that procedural default because of the threat that it will decrease his home's value. That is true even though the person "cannot establish with any certainty that the EIS will cause the license to be withheld or altered, and even though the dam will not be completed for many years." *Id*. To use standing terminology, standing exists even though the person seeking a remedy (preparation of an EIS) might not be able to show that the remedy will surely redress the threatened injury (to the value of his property) or that the injury is imminent.

*(vii) Emotional Injury*

The last type of harm that we will discuss is emotional injury. The Court has not clarified when emotional injury is cognizable injury in fact. *See generally* Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 Brooklyn L. Rev. 1555, 1570 (2016). On the one hand, the Court held that Adolph Lyons' fear of being put into a chokehold by Los Angeles police did not constitute the injury in fact necessary to claim injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983). On the other hand, the Court has, without even discussing standing, allowed suits by plaintiffs whose only injury appears to consist of being offended by governmental displays of religious objects or ceremonies. *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989); *see also Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 80 (2019) (Gorsuch, J., concurring in the judgment) ("This 'offended observer' theory of standing has no basis in law."). Because of the Court's lack of clarity, lower courts have struggled in cases like ones in which the plaintiff claims injury from witnessing the mistreatment of animals. *E.g.*, *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 431–438 (D.C. Cir. 1998)

(en banc) (holding that member of animal rights group established aesthetic injury to his desire to see zoo animals in humane settings).

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**Exercise: Identifying Cognizable Injury**

Phillip drives through a national park every day on his way to work. He particularly enjoys seeing a particular dogwood tree on the side of the road. One day he learns from a news article that the road through the park is going to be widened, and tree clearing will begin soon. Assume Phillip can prove that his cherished dogwood is one of the trees marked for removal. Does he have a cognizable interest to support a federal lawsuit challenging the tree's removal?

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**b. Traceability**

Under Supreme Court precedent, in addition to injury in fact, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' " *Defenders of Wildlife*, 504 U.S. at 560–561 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Many hard traceability cases involve suits in which "a plaintiff challenges the government's unlawful regulation (or lack of regulation) of *someone else*." *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 382 (2024) (internal quotation marks omitted). In this situation, "standing is not precluded, but it is ordinarily substantially more difficult to establish." *Id*. (internal quotation marks omitted). Below we summarize one case finding a lack of traceability in this situation and another case holding that the plaintiffs did establish traceability.

- *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024)

Medical associations and doctors opposed to abortion sued the FDA for relaxing the restrictions on doctors prescribing, and pregnant women getting, the abortion drug mifepristone. They sought reinstatement of the restrictions. They advanced "several complicated causation theories to connect FDA's actions [relaxing the restrictions] to [their] alleged injuries in fact," *id.* at 386:

> The first set of causation theories contends that FDA's relaxed regulation of mifepristone may cause downstream conscience injuries to the individual doctor plaintiffs and the specified members of the plaintiff medical associations, who are also doctors. (We will refer to them collectively as "the doctors.") The second set of causation theories asserts that FDA's relaxed regulation of mifepristone may cause downstream economic injuries to the doctors. The third set of causation theories maintains that FDA's relaxed regulation of mifepristone causes injuries to the medical associations themselves, who assert their own organizational standing.

The Court rejected these theories. The Court held that the doctors did allege cognizable "conscience" injuries in asserting a risk that they'd be forced to facilitate emergency-room care of women who took mifepristone and had an adverse reaction. But this risk wasn't realistic because federal law protected them from being forced to participate in that situation. Nor was the danger that the doctors would suffer any economic injuries related to treating patients with mifepristone complications. Finally, the medical associations could not establish injury to themselves "simply by expending money to gather information and advocate against" the FDA's actions. *Id.* at 394.

The Court explained, "An organization cannot manufacture its own standing in that way." *Id.*

- *Diamond Alternative Energy, LLC v. EPA*, 145 S. Ct. 2121 (2025)

The plaintiffs in this case produce gasoline. They brought this suit to challenge California state regulations that required automakers to make fewer gasoline-powered vehicles and more electric and hybrid vehicles. The plaintiffs argued that the California regulations violated the federal Clean Air Act. As producers of gasoline, the plaintiffs were not directly regulated by the regulations they challenge. They based their standing on economic injury that they alleged they would suffer from the regulations causing a decrease in the sale of cars that use the gasoline they produce. Thus, they were challenging California's allegedly "unlawful regulation … of *someone else*." *Alliance for Hippocratic Med.*, 602 U.S. at 382.

The Court upheld the producers' standing. The Court found it unnecessary to address their argument that they had standing because they were, indirectly at least, the target of the regulations. The Court relied instead on "commonsense economic principles":

> The California regulations force automakers to manufacture more electric vehicles and fewer gasoline-powered vehicles. The standards force automakers to produce a fleet of vehicles that, as a whole, uses significantly less gasoline and other liquid fuels. California's regulation of automakers' vehicle fleets in turn will likely 'cause downstream or upstream economic injuries to others in the chain,' such as producers of gasoline and other liquid fuels.

*Diamond Alternative Energy*, 145 S. Ct. at 2136–2137 (quoting *Alliance for Hippocratic Med*., 602 U.S. at 384)).

### c. Redressability

This discussion of redressability makes three points.

First, the traceability and redressability requirements are "usually flip sides of the same coin." *Diamond Alternative Energy*, 145 S. Ct. at 2133 (internal quotation marks omitted). "If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." *Id.* (internal quotation marks omitted).

Second—and however—sometimes the plaintiff *cannot* show redressability even though the plaintiff *might be able* to show injury and traceability. In *United States v. Texas*, the State of Texas and other plaintiffs (Texas) sued federal officials for failing to enforce federal statutes that, Texas argued, required the federal government to arrest and detain aliens in Texas and elsewhere who were in the United States without authorization. 599 U.S. 670, 674 (2023). Texas argued that this failure required it to "continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government." *Id*.

The Court held that this financial injury was cognizable, and it did not doubt that the injury was traceable to the federal government's failure to arrest and detain aliens as assertedly required by federal law. Instead, the Court held that Texas's suit was not of the kind "traditionally redressable in federal court." *Id*. at 676. The Court noted the lack of "precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions." *Id.* at 677. To the contrary, the Court determined that the Court's precedent weighed against finding redressability in Texas's

suit. *Id*. at 677–681 (discussing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)). *See also Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020) ("climate kids" lawsuit in which court held that plaintiffs lacked standing because of the lack of redressability for the climate injuries they attributed to the federal government; any effective remedy would "necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches").

Third, don't confuse the redressability requirement with the merits of a plaintiff's lawsuit. To show redressability, the plaintiff must show that, *if* the plaintiff establishes a right to relief—i.e., *if* the plaintiff wins on the merits—the judicial relief that the plaintiff requests is likely to redress the plaintiff's injury. But the plaintiff need not show that the plaintiff is likely to *win* on the merits of his or her claim. The issue of the merits of the plaintiff's lawsuit is separate from the question of standing, including the issue of redressability.

## 2. Prudential Standing Requirements

Over time, the Court developed "prudential" standing rules that supplement the constitutional standing requirements. The Court said these prudential standing rules were "self-imposed limits on the exercise of federal jurisdiction." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The three prudential standing rules were [1] the general rule against third-party standing; [2] the rule against generalized grievances; and [3] the zone of interests requirement. *Id*. at 751.

Today only one prudential standing rule survives, and its future is uncertain. You still must know all three, as well as their fate, because you'll find references to them in many administrative law cases and because they will continue to exist in different form.

The Court discussed the three rules in *Lexmark International, Inc. v. Static Control Components, Inc*., 572 U.S. 118 (2014). The Court also clarified that the second rule, the rule against generalized grievances, stems directly from Article III; it isn't merely prudential. The third rule, the zone of interests requirement, relates to the existence of a cause of action. (As such, we discuss it in Chapter 29.) The first prudential rule, the general rule against third-party standing, is "hard[] to classify," the Court said in *Lexmark*, and added that its "proper place in the standing firmament can await another day." *Id.* at 127 n.3.

So, the only prudential standing rule that is left (well …) standing is the general rule against third-party standing rule.

## 3. Statutory "Standing" Requirements

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

*Corp. v. City of Miami, Fla.*, 581 U.S. 189, 196 (2017).

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

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

All of this is to say that we should not even be discussing statutory "standing" requirements in this chapter, which is about jurisdiction, not about causes of action! But we're forced to do it because people, including judges, so often confuse the two. Because statutory standing restrictions actually relate to the cause of action requirement, we take it up in Chapter 29, where we also discuss one of the prudential standing rules related to causes of action: namely, the zone of interest requirement. See Chapter 29 *infra*.

# Chapter 29

# 29. Cause of Action

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## 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

***(i) 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 judicial 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 through the special review statute to assign exclusively to the federal courts of appeals.

***

## 3. Preclusion in Enforcement Proceedings

## p. 671

Please ignore the version of this subsection in the course book and read this rewritten version instead:

Sometimes a person is minding his or her own business when an agency begins a judicial enforcement proceeding against the person. For example, the agency may sue the person to collect civil fines for the person's violation of an agency rule. In that judicial enforcement proceeding, can the person challenge the validity of the agency rule that the person has supposedly violated? The question, more generally, is as follows: In a civil or criminal proceeding to enforce an agency rule or other prior agency action, can the target of the enforcement proceeding challenge the agency rule or the other agency action that the agency has gone to court to enforce?

The answer in the federal courts is generally "yes," under the last sentence of §703 of the federal APA:

> **§703. Form and venue of proceeding**
>
> **... Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, *agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.***

(Emphasis added.) This last sentence recognizes that, to quote §703's title, one **"[f]orm"** of judicial-review proceeding is a civil or criminal enforcement proceeding brought in a court by the agency against some target. The target of the enforcement proceeding generally can seek judicial review of the federal agency rule or other agency action to be enforced. The 2010 Model State APA has a provision nearly identical to the last sentence of §703, including its exception. *See* 2010 Model State APA §502(b). Section 703's last sentence thus "codifie[s]" the "basic presumption of judicial review of agency action … [in] th[e] enforcement-proceeding context." *McLaughlin Chiropractic Assocs. v. McKesson Corp.*, 145 S. Ct. 2006, 2015 (2025) (internal quotation marks omitted; brackets added).

But the last sentence starts with an exception, which applies when "**prior, adequate, and exclusive opportunity for judicial review is provided by law."** Some federal statutes do **"by law"** provide for exclusive, *pre*-enforcement judicial review of agency action. For example, the Clean Water Act has a provision authorizing pre-enforcement judicial review of certain rules and other actions taken by the EPA Administrator; the provision is 33 U.S.C. §1369(b)(*1*). Section 1369(b)*(2)* then says, "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. §1369(b)(2). Thus, suppose ABC Inc. is regulated by an EPA rule that is subject to a pre-enforcement challenge under §1369(b)(1), but that ABC foregoes such a challenge. Can ABC seek judicial review of that EPA rule later, when EPA sues ABC in a court to enforce that rule? No, because ABC had a **"prior adequate, and exclusive opportunity for judicial review."** 5 U.S.C. §703.

Section 1369(b)(1) of the Clean Water Act provision clearly and expressly provides the **"exclusive opportunity for judicial review."** But federal statutes authorizing pre-enforcement judicial challenges are not always so clear about their exclusivity. An example is the Hobbs Act, 28 U.S.C. §§2341–2351. The Hobbs Act authorizes pre-enforcement review of several federal agencies' rules and other actions. It confers jurisdiction to review these agencies' actions upon the federal courts of appeals. *Id.* §2342. The agency actions subject to pre-enforcement review under the Hobbs Act include those of the FCC. The Act gives a court of appeals in the specified circuit "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain FCC actions. *Id.* §2342(1).

The Court held in *McLaughlin Chiropractic Associates v. McKesson Corp.*, 145 S. Ct. 2006 (2025), that this exclusive jurisdiction is not as exclusive as it might seem. The Court interpreted the Hobbs Act not to preclude judicial review of an FCC declaratory ruling by a federal *district* court in an enforcement action. The enforcement action at issue was actually brought by a private plaintiff, McLaughlin Chiropractic Associates, against McKesson Corporation. The action alleged violations of a federal statute that the FCC was responsible for administering, the Telephone Consumer Protection Act (TCPA). The defendant in the action, McKesson, resisted liability based on an FCC declaratory ruling that interpreted the TCPA narrowly to exclude certain telemarketing practices that the plaintiff, McLaughlin Chiropractic, contended *were* covered by the Act. The Court held that the federal district court in this private enforcement action could review the FCC's declaratory ruling despite the federal court of appeals' "exclusive jurisdiction" to review it under

the Hobbs Act. *See McLaughlin Chiropractic*, 145 S. Ct. at 2017–2019. The Court concluded that the Hobbs Act does not "override[]" the "default rule" established by federal APA §703's last sentence, which generally permits challenges to agency actions in enforcement proceedings. *Id*. at 2018.

The Court in *McLaughlin Chiropractic* limited its holding to situations where the target of the enforcement proceeding challenges an agency's statutory interpretation. 145 S. Ct. at 2015 n.2. The Court thus did not address situations in which the target of an enforcement proceeding makes a *procedural* challenge to the agency action to be enforced, such as a failure to follow APA procedures. Some lower federal courts have held procedural challenges *are* precluded in enforcement proceedings when a statute authorizes pre-enforcement review and expressly forecloses review in enforcement proceedings. *See*, *e.g.*, *JEM Broadcasting v. FCC*, 22 F.3d 320, 324–326 (D.C. Cir. 1994). *See generally* Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 Cardozo L. Rev. 2203, 2218 (2011). Those lower-court decisions probably remain good law, even after *McLaughlin Chiropractic*.

* * *

The bottom line is that judicial review of agency action generally *is* available in enforcement proceedings, but (1) Congress can change that default rule and (2) some lower federal courts limit the scope of judicial review in that setting.

# Chapter 30

# 30. Timing

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## 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" or "statutes of repose." These two types of time-restricting statutes differ in the way they start the 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 a particular 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*, 603 U.S. 799 (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 particular plaintiff was injured, rather than when the defendant engaged in the assertedly wrongful conduct. *Corner Post*, 603 U.S. at 812–813.

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). These operate as statutes of repose.

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 . . .**

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As discussed above in Section C.1 of this chapter, this sentence of §704 means that you generally don't have to seek any form of reconsideration to exhaust administrative remedies. Of present importance, 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.

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**Exercise: Time Restrictions on 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

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## 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*, 603 U.S. 279 (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

## Pp. 754, 769–786:

The first paragraph of section C refers to "three leading" cases on the A&C standard. In the course book, the third case is *Department of Commerce v. New York*, 588 U.S. 752 (2019). Below, we have switched out that case in favor of *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1 (2020). We have also rewritten the course book's discussion of the significance of the *State Farm* case.

Accordingly, please replace the material in the course book that currently goes from page 769, starting with "b. The Significance of *State Farm*," up to the Section D heading ("Chapter 33 Wrap Up …") on p. 787. Read this instead:

### b. The Significance of *State Farm*

Events after the Court's decision in *State Farm* remind us that winning a court case against an agency, even in the U.S. Supreme Court, may not mean immediate victory. State Farm sued NHTSA because State Farm wanted NHTSA to require airbags in cars. After State Farm won its case before the Court in 1983 and the case was remanded to the agency, it took fifteen more years before airbags in all new cars were federally mandated. *See* History, This Day in History:

September 1, 1998, https://www.history.com/this-day-in-history/federal-legislation-makes-airbags-mandatory. *See generally* Jerry L. Mashaw, *The Story of* Motor Vehicles Mfrs. Ass'n of the US v. State Farm Mutual Automobile Ins. Co.: *Law, Science and Politics in the Administrative State* in Administrative Law Stories 381–385 (Peter L. Strauss ed. 2009). Even so, *State Farm* played an important, though delayed, role in causing airbags to be a standard safety feature. But let's focus on *State Farm*'s legal importance.

*State Farm*, like *Overton Park*, is famous for its discussion of the arbitrary and capricious (A&C) standard. Although *State Farm* involved an agency's rescission of a rule, its description of the A&C standard has been applied in later cases involving other types of agency action. *See*, *e.g.*, *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 265, 291–292 (2016) (reviewing legislative rule); *Judulang v. Holder*, 566 U.S. 42, 49–51, 53, 55 (2011) (reviewing statutory-analysis method developed in agency adjudicatory decisions); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 649, 658 (2007) (reviewing agency's transferal of permitting authority to a State).

The Court in *State Farm* discussed and applied the A&C standard in its role as imposing a requirement of "reasoned decisionmaking." (The A&C standard did not supply the standard of review specifically for the factual basis of the agency's decision in *State Farm*, because a special review statute instead prescribed the "substantial evidence" standard of review for that aspect of the agency's decision. *State Farm*, 463 U.S. at 44.) As described in *State Farm*, the reasoned decisionmaking requirement does not allow the reviewing court "to substitute its judgment for that of the agency." *Id.* at 43. But it does allow the court to invalidate agency action if the court concludes that the agency did not exercise its considered judgment.

*State Farm* proves the point. The Court held that NHTSA's decision to rescind Modified Standard 208—which required car makers to install either airbags or automatic seat belts—failed the A&C standard because it did not meet the reasoned decisionmaking requirement. Let us explore that holding to highlight three aspects of reasoned decisionmaking.

(1) Agency action must be reasonable and reasonably explained.

The Court concluded in *State Farm* that the agency "failed to supply the requisite reasoned analysis." That conclusion could be read to mean that the underlying decision—namely, the NHTSA's decision to rescind Modified Standard 208—was unreasonable. But it could also mean that the agency's written analysis—the explanation that it "supplied"—was inadequate. In reality, these potential problems are linked. The agency's failure to adequately *explain* its analysis might reflect errors or omissions in the agency's *analysis* itself. Reflecting this linkage, in cases after *State Farm*, the Court has often said that the A&C standard requires the agency's action to be both "reasonable and reasonably explained." *E.g.*, *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497 (2025); *Ohio v. EPA*, 603 U.S. 279, 292 (2024).

You can see the linkage in *State Farm*'s discussion of why the rescission of the Standard was arbitrary and capricious. The first flaw was that "NHTSA *apparently* gave no consideration … to modifying the Standard to require that airbag technology be utilized." (Emphasis added.) The Court likely used the term "apparently" because, although NHTSA might have actually considered the airbags-only option, "[n]ot one sentence of its rulemaking statement discusse[d] the airbags-only option." Ultimately, it doesn't matter whether NHTSA *considered* the option because NHTSA's written decision didn't *explain* why that option was a no-go. The deficient explanation alone rendered the agency decision arbitrary and capricious.

The second flaw identified by the Court in *State Farm* was that "the agency was too quick to dismiss the safety benefits of automatic seatbelts." As with the first flaw, the Court's description of this second flaw could indicate either that the agency didn't adequately *consider* the issue, or that the agency didn't adequately *explain* its conclusion that automatic seatbelts didn't have significant safety benefits. The Court elaborated that NHTSA "apparently" took "no account of the critical difference between detachable automatic belts and current manual belts": namely, that the latter, once reattached, remain attached until the driver overcomes natural "inertia" and detaches them again. Thus, the Court faulted NHTSA for not explaining (not considering?) the inertia factor. In addition, NHTSA "failed to articulate a basis for not requiring nondetachable belts." In sum, NHTSA's failure to explain why it found that automatic seatbelts ineffective rendered its decision arbitrary and capricious; the decision was arbitrary and capricious even if NHTSA did adequately consider this issue but just didn't "show its work."

(2) The agency must consider relevant factors and must not consider irrelevant factors.

The Court said in *State Farm* that a court must determine whether the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (Quoting *Overton Park*). The relevant factors include "the relevant data." So the question is: What is relevant?

We discussed this question in discussing the agency's duty in informal rulemaking to consider **"the relevant matter presented."** 5 U.S.C. § 553(c). *See* Chapter 12.C.1. The issue of relevance is also illuminated by our discussion in Chapter 12.D.2 of what things the agency should discuss in the concise general statement that accompanies a final rule. Those prior discussions apply equally to what the Court in *State Farm* (and *Overton* Park) meant by "relevant factors."

As discussed, the main determinants of what is relevant are the agency legislation and applicable cross-cutting statutes. In *State Farm*, the National Traffic and Motor Vehicle Safety Act of 1966 specified relevant factors the Secretary was supposed to consider when establishing safety standards. They included, for example, "relevant motor vehicle safety data"; whether the proposed standard "is reasonable, practicable, and appropriate" for the particular type of motor vehicle; and the "extent to which such standards will contribute to carrying out the purposes" of the Act. *See State Farm* (quoting statute). It is not unusual for the agency legislation to specify what factors an agency must consider when exercising its power under the statute. *See*, *e.g.*, 49 U.S.C. §60108(a)(2) (listing factors that agency "shall consider" when reviewing adequacy of pipeline safety and maintenance plans). Sometimes, though, the agency legislation does not clearly address what factors are relevant. *See*, *e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (addressing whether provision in the Clean Water Act allowed EPA to consider cost-benefit analysis in regulating power plants). But the point is, determining relevance typically entails interpreting statutes.

A cross-cutting statute that applies to many federal agency actions is the National Environmental Policy Act (NEPA). NEPA requires an agency to prepare an environmental impact statement (EIS) for a proposed agency action that significantly affects the environment. 42 U.S.C. §4332(C). The environmental impacts of the proposed action might very well be relevant to whether the agency should take the action. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). But that depends on the agency legislation on which the action is based. The agency legislation could conceivably prohibit consideration of environmental impacts. *Seven Cnty. Infrastructure Coalition v. Eagle Cnty.*, 145 S. Ct. 1497, 1514 n.4 (2025) (person challenging denial of permit for a project can challenge denial on ground that agency weighed environmental

impact of project "too heavily in light of the agency's governing statute . . . or perhaps that the agency erred because the governing statute did not allow the agency to weigh environmental consequences at all").

On the flip side, "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43. Determining what factors are irrelevant, like determining which factors are relevant, generally entails statutory interpretation. If an agency interprets governing statutes to permit or require consideration of factors that a reviewing court later decides Congress did not intend the agency to consider, the court can set aside the agency action under the A&C standard.

*State Farm* illustrates what an irrelevant factor could look like. Modified Standard 208 gave car makers a choice between installing airbags or automatic seatbelts. The car makers showed a clear preference for the latter; they "planned to install the automatic seatbelts in approximately 99% of new cars." *State Farm*, 463 U.S. at 38. But the background of the National Traffic and Motor Vehicle Safety Act of 1966—which reflected a failure by the car makers to adopt safety standards voluntarily—implied that their preference for automatic seatbelts over airbags should have little or no relevance to the agency's choice of standards. If NHTSA nonetheless agency *had* considered this preference in rescinding the standard rather than modifying it to mandate airbags, therefore, the rescission would have been arbitrary and capricious.

A recurring issue, also present in *State Farm*, is whether the incumbent Administration's (i.e., President's) policy preferences are relevant to agency decision making. NHTSA's rescission of Modified Standard 208 occurred in 1981, after a new President (Ronald Reagan) took office having promised voters "deregulation." The Court alluded to this when it remarked that "the forces of change do not always or necessarily point in the direction of deregulation." While this remark seems to disparage presidential influence on agency actions, the Court elsewhere has explained that an agency can consider the President's policy preferences to the extent that doing so does not conflict with the agency legislation and other applicable law:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Chevron U.S.A. Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 865–866 (1984). Thus, within statutory constraints, agencies can exercise their discretion so as to advance the incumbent administration's policies.

(3) Agencies can change course, but they must adequately explain such changes.

As presidential administrations change, executive-branch policies change. Other circumstances as well can lead an agency to change its position. The Court in *State Farm* said, "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis." Thus, agency changes in course implicate the principle discussed above: An agency action must be reasonable and reasonably explained. But agency changes in course also raise distinctive issues, necessitating this separate discussion of the subject.

The Court in *State Farm* implied that when an agency changes course, it carries an extra burden of justification. The Court said:

> A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, [Topeka & Santa Fe Ry.] Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–808 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

*State Farm*, 463 U.S. at 42.

The Court later rejected the broad implications of the passage from *State Farm* just quoted. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). *Fox Television* was about the FCC's statutory authority to punish television and radio broadcasts of "indecent ... language." 18 U.S.C. §1464. For about thirty years, the FCC followed a "fleeting expletives" policy, under which it did not punish a broadcaster for a broadcast that contained an isolated curse word or two. In 2004, the FCC changed its fleeting expletives policy in favor of a much stricter one that punished even isolated curse words. The Court held that the FCC's change in policy was not arbitrary and capricious. In so holding, the Court rejected the argument that 5 U.S.C. §706(2)(A), as interpreted in *State* Farm, requires closer judicial review when an agency changes its policy. But the Court added this qualification:

> To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position ... And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.... In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

*FCC v. Fox Television*, 556 U.S. at 515–516.

The Court relied on the passage from *Fox Television* just quoted to find an agency's change in course arbitrary and capricious in *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016). *Encino Motorcars* is summarized in Chapter 12.D.2.f. It involved an agency rule that changed the agency's "decades-old" interpretation of a federal statute. *Id.* at 218. Employers and employees in the regulated industry had relied on the old interpretation. Even so, the agency "offered barely any explanation" for the change. *Id.* at 222. The Court smote it.

More recently, the Court has said that *Encino Motorcars* and earlier cases establish the "change-in-position doctrine." *FDA v. Wages and White Lion Investments, LLC*, 145 S. Ct. 898, 916–917 (2025). "Under that doctrine," the Court explained, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change, display awareness that [they are] changing position, and consider serious reliance interests." *Id.* at 917 (internal quotation marks omitted). The Court in *Wages and White Lion* determined that the agency in that

case, the FDA, did not change its position. Rather, its regulatory actions simply reflected "the agency's "evolving understanding" of "the relevant issues." *Id*. at 914, 916. And don't we all hope that we ourselves display such an "evolving understanding"?

A case after *Encino Motorcars* further discusses this issue of reliance in the change-in-position doctrine, and is so important we devote the next subsection to it.

## *3.* Department of Homeland Security v. Regents of the University of California

### a. The DHS v. Regents Opinion

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**Exercise: *DHS v. Regents***

Please keep these questions in mind as you read the opinion below:

1. What agency action is being challenged?
2. Why does the majority hold that the agency action is invalid?
3. Please review the discussion of the change-in-position doctrine in the subsection above. How does the decision give us an evolving understanding of the A&C standard?

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**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. DACA let certain aliens who entered the United States without legal authorization while they were children 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 criteria like having refrained from serious crime, which 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 published without public notice or opportunity for comment.

In 2014, DHS issued another memo. It relaxed the eligibility requirements of DACA and created another deferred action program. This one was 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 federal district court to issue a nationwide preliminary injunction preventing implementation of the 2014 "DAPA Memorandum." The district court's order was affirmed by the Fifth Circuit in a decision that was, in turn, affirmed by an equally divided U.S. Supreme Court. *United States v. Texas*, 579 U.S. 547 (2016) (per curiam). The 2014 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 sent a letter to Acting DHS Secretary Elaine Duke advising her that DHS should rescind DACA as well. The Attorney General's letter said that

DACA had the "same legal . . . defects" as DAPA. 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 the Attorney General's letter.

DHS's rescission of DACA was challenged in three federal-court lawsuits. The suits alleged, among other claims, that DACA's rescission violated the APA. 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 alone 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 the memo's 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.]

II

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. [The Court explained that the issue was whether, in rescinding DACA, DHS satisfied the "reasoned decision making" requirement imposed by the APA's "arbitrary and capricious" standard of judicial review. Before addressing that issue, however, the Court rejected DHS's arguments that the rescission was not subject to judicial review.]

…

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 … 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 renewed the argument that prevailed in the lower courts: namely, that "the Duke Memorandum d[id] not adequately explain the conclusion that DACA [was] unlawful, and that this conclusion is, in any event, wrong." The Court declined to address the legality of DACA because that was a matter for the Attorney General, *not* the DHS Secretary, to decide, and the present cases challenged only the DHS Secretary's decision.]

. . . [W]e 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 [gradually instead of immediately rescinding DACA in its entirety]. . . .

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 with the majority that respondents failed to state a viable equal protection claim but disagreed that the rescission violated the APA. Justice Alito wrote to emphasize that the federal courts had blocked DACA's rescission for an entire presidential term without ever squarely holding that DACA could not lawfully be rescinded. Justice Kavanaugh's separate opinion argued that the majority should have considered the Nielsen memo, which gave additional reasons for winding down DACA.]

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**Exercise: *Department of Homeland Security* Revisited**

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

- *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.

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## b. The Significance of *DHS v. Regents*

*DHS v. Regents*, like *State Farm*, involved an agency's rescission of prior agency action, and in both cases the Court held that the rescission was arbitrary and capricious. When an agency rescinds its prior action, by definition it is changing course, and thus both cases involve the change-in-course doctrine. "Under that doctrine, [a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change, display awareness that [they are] changing position, and consider serious reliance interests." *FDA v. Wages and White Lion Investments, LLC*, 145 S. Ct. 898, 917 (2025) (internal quotation marks omitted). DHS's rescission of DACA violated that doctrine in two ways.

First, the Court said that DHS's "rescission memorandum contain[ed] no discussion of forbearance or the option of retaining forbearance without benefits; [DHS] entirely failed to consider [that] important aspect of the problem." In this statement, the Court is assuming that the DHS's failure to *explain* why it rejected the forbearance-only option reflects that DHS failed to *consider* that option. The Court in *State Farm* made a similar assumption in *State Farm* when it said, "NHTSA *apparently* gave no consideration whatever to modifying the Standard to require that airbag technology be utilized." (Emphasis added). More broadly, the two cases show that if there are obvious alternatives to the choice that the agency has made, the agency must adequately explain why it rejected those alternatives. Otherwise, its chosen action will be found arbitrary and

capricious. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal.").

Second, DHS "failed to address whether there was legitimate reliance on the DACA Memorandum." The people who primarily relied on DACA were the approximately 1.7 million people who got deferred action. *See DHS v. Regents*, 591 U.S. at 39 (Thomas, J., concurring in the judgment in part and dissenting in part (citing the 1.7 million figure)). Moreover, according to the respondents, "[t]he consequences of the rescission … would radiate outward to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them." *Id.* at 31. The Court recognized that DHS might "determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests." But that was for DHS to decide on remand.

As it turned out, things went a different way on remand. The Court issued its decision in June 2020. In November 2020, a new President was elected. In 2021, the new Administration issued a Notice of Proposed Rulemaking that would essentially codify DACA as a legislative rule. The final rule issued in 2022, and was challenged by Texas and other plaintiffs in a federal court lawsuit. In January 2025, the Fifth Circuit held that the rule codifying DACA violates federal statutes restricting the availability of relief for people who are in the country without legal authorization. *Texas v. United States*, 126 F.4th 392 (5th Cir. 2025). The Fifth Circuit vacated the portion of the rule that makes DACA recipients eligible for federal benefits while leaving in place the portion of the rule that gives forbearance to DACA recipients. As of this writing, DHS is allowing existing DACA recipients to renew their grants of deferred action and work authorization. It is also receiving initial requests for deferred action but not processing them. In short, for now people who've already gotten deferred action get to keep it, along with their work authorization; however, DHS is not granting deferred action to new applicants.

# Chapter 34

# 34. The *Chevron* Doctrine and State Counterparts

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## Overview

## p. 789:

Note: In the upcoming 3rd edition of this course book, this chapter is renamed "The De Novo Standard of Review and the Rise and Fall of the *Chevron* Doctrine."

Please replace the Overview with this rewrite:

This chapter discusses how courts decide questions of law that arise when they review agency action in APA-type challenges. We focus on federal court review of federal agency action, but also touch upon state court review of state agency action.

In a nutshell, the federal courts use the de novo standard to review questions of law. In other words, they independently resolve any disputed issues of law. There are two situations, however, when a federal court will give weight to a federal agency's interpretation of the law, even as the court seeks independently to resolve the disputed legal issues.

The first situation 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). The *Chevron* doctrine required a federal court to defer to——i.e., to accept as correct—an agency's interpretation of an ambiguous statutory provision as long as the interpretation was reasonable ("permissible," as the Court often put it), even if the court did not think the agency's interpretation was actually correct.

But the Court overruled the *Chevron* doctrine in 2024. Now, a federal agency's interpretation of a statute that it is responsible for administering might still get respect from—i.e., be given some weight by—the reviewing court, but it no longer gets "deference" in the sense of being binding on the court.

The second situation when a federal agency interpretation may get weight is when the agency interprets one of its own legislative rules. In this second situation, federal courts may give the agency's interpretation what's known as "*Auer* deference," or, more recently, as "*Kisor* deference," which are named after (can you guess?) the Supreme Court decisions most closely associated with them. It has been unclear whether "*Kisor* deference," similar to the now-defunct *Chevron* "deference," requires a court to accept an agency's interpretation of an ambiguous legislative rule if reasonable, even if the court doesn't agree with it. In any event, now that the *Chevron* doctrine has been overruled, *Kisor* "deference" probably means only weight or respect.

This chapter discusses the de novo standard and the rise and fall of the *Chevron* doctrine. The next chapter discusses *Kisor* deference, as well as some other specialized standards of judicial review used in APA-type challenges to agency action.

Some state courts have adopted the *Chevron* doctrine and *Kisor* deference as a matter of state law. We'll have to see if those courts change their mind now that the *Chevron* doctrine has died in the federal courts.

A. Questions of Law in General

B. Federal Agencies' Interpretation of Statutes They Administer

C. State Agencies' Interpretations of Statutes They Administer

D. Chapter 34 Wrap Up and Look Ahead

# p. 792:

## B. Federal Agencies' Interpretation of Statutes They Administer

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:

Until 2024, federal courts used the "*Chevron* doctrine" to review federal agencies' interpretation of the statutes that they administered. 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 the 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 ambiguous agency legislation if the interpretation was reasonable (permissible), even if it wasn't the interpretation that the court would have adopted itself. But the Court overruled the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (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 federal 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.

The judicial-review situation that these cases address is narrow but important. These cases address the agency's interpretation of the legislation that it administers, not the agency's interpretation of the U.S. Constitution, cross-cutting statutes like the APA, or the agency's own regulations. But remember that for an agency, administering the statutes that it's responsible for administering is job one, and it's a day-in, day-out job. In *administering* its statutes, the agency must continuously

*interpret* them, and its interpretations have great implications for individual people and businesses, and for the public.

# 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

We go from the 1944 *Skidmore* case excerpted above to the 2024 *Loper Bright* case in this subsection. In the middle of that 80-year span, 1984, the Court decided the *Chevron* case and established the *Chevron* doctrine. Forty years later, the Court in *Loper Bright* overruled 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, an approach most famously associated with *Skidmore*. What all this actually means will become clearer after you've read the *Loper Bright* excerpt in subsection 2.b below. But 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" means to accept—i.e., to treat as correct and 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 an ambiguous statute means. "Respecting" an agency interpretation means that the court still gets to decide. The Court emphasizes this difference in *Loper Bright*.

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. In contrast, 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

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**Exercise: *Loper Bright***

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

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

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**Loper Bright Enterprises v. Raimondo**

603 U.S. 369 (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), a special review provision that authorizes judicial review "in accordance with" the federal.] In relevant part, they argued that the MSA does not authorize NMFS to compel them to 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 should be overruled.]

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 (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 [(2001)] (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 *Chevron 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 dissenting opinion contains 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. . . .

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**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 APA relevant in *Chevron*? (Hint: The answer relates to what we call "an APA-type action." See course book 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 generally *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. Still, a court in this situation uses the good old de novo standard for this type of legal question—namely, the same standard the court uses for other legal questions such as whether the agency's action is constitutional.

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. Section 706 does so when it says, **"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . . [and] interpret constitutional and statutory provisions."** 5 U.S.C. §706. Just as the court has the final say on what the Constitution means, it has the final say on what the agency statute means. *Chevron* held otherwise—the *Loper Bright* majority concluded—without appreciating the command of the good old federal APA.

There's a twist, though: The majority's opinion in *Loper Bright* suggests that Congress can modify the *Marbury* tradition. The majority did so to explain specific precedent.

The first precedent comprises *Gray v. Powell*, 314 U.S. 402 (1941), and *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). *Gray*, as described by the *Loper Bright* Court, 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*, 603 U.S. at 388 (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.' " *Id.* (emphasis added). To say that the Court gave "deference" in *Gray* and *Hearst* 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 apparent (grudging?) 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 delegated by Congress. *See Loper Bright*, 603 U.S. at 389 ("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.").

The agency determinations in *Gray* and *Hearst* were "factbound" because both were made in formal adjudications. To start with *Hearst*, recall that we excerpted it in Chapter 31.E2.b. *Hearst* concerned whether "newsboys" were "employees" within the meaning of National Labor Relations Act. The National Labor Relations Board had interpreted the statutory term "employee" to include the newsboys in a proceeding to determine whether the Hearst publishing company had committed an unfair labor practice by refusing to bargain with a union representing the newsboys. This proceeding was a formal adjudication. A formal adjudication was also involved in *Gray*, in which the National Bituminous Coal Commission interpreted the term "producer" in the Bituminous Coal Act of 1937 as not extending to a coal-burning railroad that had arrangements with several coal mines. The agencies were thus exercising quasi-judicial authority.

In *Loper Bright*, the Court suggests that Congress can delegate interpretive authority to an agency in a formal adjudication to define a statutory term or concept, but (1) it's up to the reviewing court to determine whether such a delegation has occurred; and (2) mere ambiguity cannot be deemed to be an "implicit delegation" of such authority. When those caveats, though, the agency's interpretation can get deference, not just respect.

The Court in *Loper Bright* similarly explained another precedent, *Batterton v. Francis*, 432 U.S. 416 (1977). In *Batterton*, a provision in the Social Security Act authorized benefits for certain children who were "deprived of parental care … by reason of the unemployment" of their fathers. The statute said that the term "unemployment" was to be "determined in accordance with standards prescribed by" the Secretary of Health, Education, and Welfare. The Court in *Batterton* held that this statute "expressly delegated" interpretive authority to the Secretary. *Id.* at 425. As a result, the Court said, "The regulation … is therefore entitled to more than mere deference or weight. It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id*. at 436. In *Loper Bright*, the Court endorsed the reasoning of *Batterton*, especially including the ideas that (1) Congress can expressly delegate interpretive authority to an agency and (2) when the agency acts within that authority, its interpretation gets deference, not just respect, meaning that—as the Court said in *Batterton*—the reviewing court *cannot* reject it "simply because [the court] would have interpreted the statute in a different manner." 432 U.S. at 425.

*Batterton* concerned judicial review of an agency's exercise of quasi-legislative authority to make legislative rules. *See id.* at 425 (stating that Secretary's regulations had "legislative effect"). Importantly, that was also the situation in *Chevron* itself; there, the Administrator of EPA issued a legislative rule defining the term "stationary source" as used in the Clean Air Act. The difference seems to be that in *Chevron*, Congress had not expressly delegated to the EPA Administrator the authority to interpret that term, whereas such an express delegation had occurred

in *Batterton*. In *Chevron*, EPA was acting under a broadly worded grant of statutory authority to "prescribe such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. §7601(a)(1)(Supp. I 1977); *see* 46 Fed. Reg. 16,280, 16,282 (1981). The Court's misstep in *Chevron*—as viewed by the Court in *Loper Bright*—was treating the broad grant of rulemaking authority as an implicit delegation of authority to interpret any ambiguous term in the statute.

The takeaway from *Loper Bright* is fourfold. *First*, *Chevron* is dead; federal courts cannot treat the ambiguity of a statutory provision as an implicit delegation of authority to the agency to interpret that provision. Second, *Skidmore* lives; federal courts should respect an agency's statutory interpretation when the interpretation deserves it. Third, Congress can—within constitutional limits such as the nondelegation doctrine, of course—delegate interpretive authority to an agency, and agency interpretations made within that authority get deference, not just respect. Fourth, federal courts have the final say on whether such a delegation has occurred, just as they have the final say on other issues of statutory interpretation. When you re-read these four takeaways, you will appreciate (we hope) that *Loper Bright*'s doctrinal significance is huge!

As for *Loper Bright*'s practical significance, time will tell. The Court minimized the decision's immediate practical effect in a sentence that we didn't include in the excerpt but quote now:

> [W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology.

*Loper Bright*, 603 U.S. at 412. Thus, agency action that is still in effect today, and that the Court has upheld in the past using the *Chevron* methodology, is not subject to attack just because the Court has repudiated the methodology. And that point presumably extends to agency actions that have been upheld by the federal courts of appeals using the *Chevron* methodology. *Cf. Tennessee v. Becerra*, 131 F.4th 350, 365 (6th Cir. 2025) ("Unremarked upon [by *Loper Bright*] was whether statutory stare decisis includes Circuit court precedent."). We don't yet know whether or how *Loper Bright* will affect an agency decision making or a person who's considering a judicial challenge to an agency decision. Stay tuned!

We need to discuss one more thing related to *Loper Bright*, but it's so distinctive and important that it deserves its own subsection.

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**Exercise: Specialized Review Standards in State Courts**

Please select a State of your choice and research how courts of that State review state agencies' interpretation of the statutes that they administer.

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### d. The Major Questions Doctrine

In *Loper Bright*, the Court described an exception to the *Chevron* doctrine. The exception is called "the major questions doctrine." It is so important it's earned its own acronym: MQD. The MQD operates as a principle—also called a "canon"—of statutory interpretation. It survives *Chevron*'s overruling and has great importance in administrative law because it applies specifically to interpreting statutes that grant power to agencies.

We explore the MQD using one of the Court's leading decisions on it, *West Virginia v. EPA*, 597 U.S. 697 (2022). *West Virginia v. EPA* involved a complex regulatory scheme. To

simplify things, we separately discuss (i) the facts and holding; and (2) the Court's discussion of the MQD.

*(i) Facts and Holding of* West Virginia v. EPA

*West Virginia v. EPA* 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." 597 U.S. 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" (BSER) that has been "adequately demonstrated." *Id*. (quoting statute). Note that although the EPA Rule was called "Clean Power *Plan*," it involved power *plants*.

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." 597 U.S. at 706. 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. That was because it wasn't a "best system of emission reduction" within the meaning of the Clean Air 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 a power plant.

*(ii)* West Virginia v. EPA's *Discussion of the MQD*

EPA's authority to adopted the Clean Power Plan (no "t") Rule depended on whether it was the "best system of reduction " within the meaning of the Clean Air Act. The EPA argued that its interpretation of this statutory phrase was entitled to deference under the *Chevron* doctrine. At this time (2022), the Court had not yet overruled the *Chevron* doctrine. Even so, the Court refused to apply *Chevron*, because the issue presented a "major question." We excerpt below the Court's discussion of the major question doctrine.

**West Virginia v. EPA**

597 U.S. 697 (2022)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

…

III

A

In devising emissions limits for power plants, EPA first "determines" the "best system of emission reduction" [BSER] that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated." 42 U. S. C. § 7411(a)(1). The Agency then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. *Ibid*. The BSER, therefore, "is the central determination that the EPA must make in formulating [its emission] guidelines" under Section 111. The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the

"best system of emission reduction" within the meaning of Section 111.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159 (2000). In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *Id*., at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." *Id*., at 160. In *Alabama Assn. of Realtors v. Department of Health and Human Servs*., [594 U.S. 758 (2021) (per curiam)], we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the ... spread of " disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so.

Our decision in *Utility Air* [*Regulatory Group v. EPA*, 573 U.S. 302 (2014)], addressed another question regarding EPA's authority—namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." *Id*., at 324. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), we confronted the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them "inconsistent with the public interest," 21 U. S. C. § 823(f). We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation ... not sustainable." 546 U.S. at 267. Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration's mandate that "84 million Americans ... either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense." *National Federation of Independent Business v. Occupational Safety and Health Administration*, [595 U. S. 109, 117 (2022)] (per curiam). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure. *Id*., at [119].

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been]

likely to delegate" such power to the agency at issue, *Brown & Williamson*, 529 U.S. at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*, 531 U.S. at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co*., 512 U.S. 218, 229 (1994). Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, Controlling *Chevron*-Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

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

…

The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation," post … (opinion of KAGAN, J.)….. The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear congressional authorization," *ibid*.—confirms that the approach under the major questions doctrine is distinct….

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air*, 573 U.S. at 324. It located that newfound power in the vague language of an "ancillary provision[ ]" of the Act, *Whitman*, 531 U.S. at 468, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*, 529 U.S. at 159–160; *Gonzales*, 546 U.S. at 267–268; *Alabama Assn*., 594 U. S., at ——. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U.S. at 159–160.

* * *

The Court in *West Virginia v. EPA* found no clear congressional authorization for EPA's Clean Power Plan Rule and accordingly struck it down. And although it described the MQD as applicable only in "extraordinary" cases, it's appeared in quite a few Supreme Court cases to date. In any event, it is a canon of statutory interpretation that, coupled with the overruling of the *Chevron* doctrine, will likely make federal agencies more leery—or at least more careful—in making extravagant assertions of regulatory power.

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**Exercise: Applying the MQD**

Please review *Loper Bright* and explain in your own words why the Court didn't apply the MQD there.

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**End of Supplement**