Administrative Law Theory and Fundamentals:
An Integrated Approach (Foundation Press)

Summer Update – 2023

The past two years have justified the casebook's emphasis on formalism, functionalism, and "exclusive" and "nonexclusive" powers and functions. This year's summer update includes only one new case, *Biden v. Nebraska*, and it reorganizes the major questions cases into a dedicated section. It also includes some sampling of the relevant scholarly literature in a "debating major questions" section, which in the second edition will be included among the other "debating" sections.

This summer update combines with the last one to form a supplement the instructor can use with the first edition casebook. The following cases and materials, which are excerpted with notes and questions, are included: (1) A July 21, 2021 memorandum from the White House Counsel to White House Staff regarding contacts with agencies, which should be inserted under ex parte contact in Chapter 2.C.6; (2) FCC v. Prometheus Radio Project, which should be inserted under arbitrary and capricious review in Chapter 4.A; (3) NFIB v. OSHA, West Virginia v. EPA, and Biden v. Nebraska, which now form a dedicated section (Chapter 4.C.4) on the major questions doctrine; (4) excerpts from the scholarly literature on the major questions doctrine; (5) United States v. Arthrex, which should be inserted under the appointment power in Chapter 6.A.2; (6) Collins v. Yellen, which should be inserted under the removal power in Chapter 6.B.3; and (7) Maloney v. Murphy, a D.C. Circuit opinion about whether individual members of the US House of Representatives have standing to sue to obtain information from agencies, which should be inserted under constitutional standing in Chapter 8.C.

This update also includes a shortened case excerpt for *Myers v. United States*, after some professors suggested that the existing excerpt is too long.

Chapter Two: Rulemaking

C. Informal Rulemaking

6. Ex Parte Communications

To be inserted after Sierra Club v. Costle:

In the following memorandum, the White House Counsel for the Biden Administration sought to articulate permissible and impermissible White House contacts with agencies. Does the memorandum reflect the law after *Costle* and *Action for Children's Television*? Do you find persuasive the distinction drawn between independent agencies and other agencies? Do you think there should be even *less*

White House communication with independent agencies than permitted by this memorandum?

THE WHITE HOUSE
Washington
July 21, 2021
MEMORANDUM FOR ALL WHITE HOUSE STAFF
FROM: DANA REMUS
COUNSEL TO THE PRESIDENT

SUBJECT: PROHIBITED CONTACTS WITH AGENCIES AND DEPARTMENTS

SUMMARY

The White House plays an important role in coordinating the activities of departments and agencies, particularly with respect to policy development. But it is also important to ensure the integrity of government decision making and public confidence that decisions by government officials are made based on appropriate considerations. Balancing these interests and the President's constitutional obligation to take care that the laws be faithfully executed, the White House has adopted a policy of imposing and abiding by certain important restrictions on communications between White House staff and departments and agencies.

This memorandum sets forth the restrictions that apply to your contact with Executive Branch departments and agencies outside of the Executive Office of the President ("EOP"). . . .

To summarize the most important points:

Matters Involving Specific Parties: You should not contact any department or agency about a specific adjudication (including a licensing, permitting or approval proceeding, or similar regulatory action), benefit determination, investigation, or litigation, enforcement, procurement, or funding matter involving specific parties. . . . The restrictions concerning contact with agencies and departments about specific adjudications and other particularized decisions affecting specific parties apply with special force to the independent agencies. . . .

Policy, Administrative and Communications Matters: Communications with agencies or departments other than DOJ relating to pure policy, administrative, communications, or presidential appointment matters generally are permissible without prior consultation with or approval from the Counsel's Office.

Special considerations apply to independent agencies. Communication with independent boards and commissions about purely policy matters, including policy formation and development, as well as administrative, communications, or presidential appointment matters, is appropriate and permissible. But many

independent agencies have their own rules about *ex parte* contacts, and it is important to understand when communications even by the White House will become part of an agency's official administrative record. Furthermore, because such communication can be misconstrued, you should consult with Counsel's Office before initiating communication with the independent agencies. . . .

Chapter Four: Judicial Review of Agency Action

A. Judicial Review of Agency Reasoning

To be inserted after DHS v. Regents of the University of California:

The following case presents a rare unanimous Supreme Court decision in an arbitrary and capricious analysis. What does the following opinion tell us about how agencies sometimes have to make decisions in the absence of information? Under what circumstances should agencies be required to collect more data? Does the following case represent yet another situation in which a change of administration affected agency policy, even for an independent agency?

Federal Communications Commission v. Prometheus Radio Project
141 S. Ct. 1150 (2021)

Justice KAVANAUGH delivered the opinion of the Court.

Under the Communications Act of 1934, the Federal Communications Commission possesses broad authority to regulate broadcast media in the public interest. Exercising that statutory authority, the FCC has long maintained strict ownership rules. The rules limit the number of radio stations, television stations, and newspapers that a single entity may own in a given market. Under Section 202(h) of the Telecommunications Act of 1996, the FCC must review the ownership rules every four years, and must repeal or modify any ownership rules that the agency determines are no longer in the public interest.

In a 2017 order, the FCC concluded that three of its ownership rules no longer served the public interest. The FCC therefore repealed two of those rules—the Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule. And the Commission modified the third—the Local Television Ownership Rule. In conducting its public interest analysis under Section 202(h), the FCC considered the effects of the rules on competition, localism, viewpoint diversity, and minority and female ownership of broadcast media outlets. The FCC concluded that the three rules were no longer necessary to promote competition, localism, and viewpoint diversity, and that changing the rules was not likely to harm minority and female ownership.

A non-profit advocacy group known as Prometheus Radio Project, along with several other public interest and consumer advocacy groups, petitioned for review, arguing that the FCC's decision was arbitrary and capricious under the Administrative Procedure Act. In particular, Prometheus contended that the record evidence did not support the FCC's predictive judgment regarding minority and female ownership. Over Judge Scirica's dissent, the U. S. Court of Appeals for the Third Circuit agreed with Prometheus and vacated the FCC's 2017 order.

On this record, we conclude that the FCC's 2017 order was reasonable and reasonably explained for purposes of the APA's deferential arbitrary-and-capricious standard. We therefore reverse the judgment of the Third Circuit.

I

The Federal Communications Commission possesses broad statutory authority to regulate broadcast media "as public convenience, interest, or necessity requires." 47 U.S.C. § 303; see also § 309(a). Exercising that authority, the FCC has historically maintained several strict ownership rules. The rules limit the number of radio stations, television stations, and newspapers that a single entity may own in a given market. The FCC has long explained that the ownership rules seek to promote competition, localism, and viewpoint diversity by ensuring that a small number of entities do not dominate a particular media market.

This case concerns three of the FCC's current ownership rules. The first is the Newspaper/Broadcast Cross-Ownership Rule. Initially adopted in 1975, that rule prohibits a single entity from owning a radio or television broadcast station and a daily print newspaper in the same media market. The second is the Radio/Television Cross-Ownership Rule. Initially adopted in 1970, that rule limits the number of combined radio stations and television stations that an entity may own in a single market. And the third is the Local Television Ownership Rule. Initially adopted in 1964, that rule restricts the number of local television stations that an entity may own in a single market.

The FCC adopted those rules in an early-cable and pre-Internet age when media sources were more limited. By the 1990s, however, the market for news and entertainment had changed dramatically. Technological advances led to a massive increase in alternative media options, such as cable television and the Internet. Those technological advances challenged the traditional dominance of daily print newspapers, local radio stations, and local television stations.

In 1996, Congress passed and President Clinton signed the Telecommunications Act. To ensure that the FCC's ownership rules do not remain in place simply through inertia, Section 202(h) of the Act directs the FCC to review its ownership rules every four years to determine whether those rules remain "necessary in the public interest as the result of competition." § 202(h). After conducting each quadrennial Section 202(h) review, the FCC "shall repeal or modify" any rules that it determines are "no longer in the public interest." Section 202(h)

establishes an iterative process that requires the FCC to keep pace with industry developments and to regularly reassess how its rules function in the marketplace.

Soon after Section 202(h) was enacted, the FCC stated that the agency's traditional public interest goals of promoting competition, localism, and viewpoint diversity would inform its Section 202(h) analyses. The FCC has also said that, as part of its public interest analysis under Section 202(h), it would assess the effects of the ownership rules on minority and female ownership.

Since 2002, the Commission has repeatedly sought to change several of its ownership rules—including the three rules at issue here—as part of its Section 202(h) reviews. But for the last 17 years, the Third Circuit has rejected the FCC's efforts as unlawful under the APA. As a result, those three ownership rules exist in substantially the same form today as they did in 2002.

The current dispute arises out of the FCC's most recent attempt to change its ownership rules. In its quadrennial Section 202(h) order issued in 2016, the FCC concluded that the Newspaper/Broadcast Cross-Ownership, Radio/Television Cross-Ownership, and Local Television Ownership Rules remained necessary to serve the agency's public interest goals of promoting "competition and a diversity of viewpoints in local markets." The FCC therefore chose to retain the existing rules with only "minor modifications."

A number of groups sought reconsideration of the 2016 Order. In 2017, the Commission (with a new Chair) granted reconsideration. On reconsideration, the FCC performed a new public interest analysis. The agency explained that rapidly evolving technology and the rise of new media outlets—particularly cable and Internet—had transformed how Americans obtain news and entertainment, rendering some of the ownership rules obsolete. As a result of those market changes, the FCC concluded that the three ownership rules no longer served the agency's public interest goals of fostering competition, localism, and viewpoint diversity. The FCC explained that permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers.

The Commission also considered the likely impact of any changes to its ownership rules on minority and female ownership. The FCC concluded that repealing or modifying the three ownership rules was not likely to harm minority and female ownership.

Based on its analysis of the relevant factors, the FCC decided to repeal the Newspaper/Broadcast and Radio/Television Cross-Ownership Rules, and to modify the Local Television Ownership Rule.

Prometheus and several other public interest and consumer advocacy groups petitioned for review, arguing that the FCC's decision to repeal or modify those three rules was arbitrary and capricious under the APA.

The Third Circuit vacated the 2017 Reconsideration Order. The court did not dispute the FCC's conclusion that those three ownership rules no longer promoted the agency's public interest goals of competition, localism, and viewpoint diversity. But the court held that the record did not support the FCC's conclusion that the rule

changes would "have minimal effect" on minority and female ownership. The court directed the Commission, on remand, to "ascertain on record evidence" the effect that any rule changes were likely to have on minority and female ownership, "whether through new empirical research or an in-depth theoretical analysis."

Judge Scirica dissented in relevant part. In his view, the FCC reasonably analyzed the record evidence and made a reasonable predictive judgment that the rule changes were not likely to harm minority and female ownership. . . .

II

. . . . The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–514 (2009); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). . . .

The Commission explained that it had sought public comment on the issue of minority and female ownership during multiple Section 202(h) reviews, but "no arguments were made" that would lead the FCC to conclude that the existing rules were "necessary to protect or promote minority and female ownership." Indeed, the FCC stated that it had received several comments suggesting the opposite—namely, comments suggesting that eliminating the Newspaper/ Broadcast Cross-Ownership Rule "potentially could *increase* minority ownership of newspapers and broadcast stations." Based on the record, the Commission concluded that repealing or modifying the three rules was not likely to harm minority and female ownership. . . .

Prometheus asserts that the FCC relied on flawed data in assessing the likely impact of changing the rules on minority and female ownership. Prometheus further argues that the FCC ignored superior data available in the record.

Prometheus initially points to two data sets on which the FCC relied in the 2016 Order and the 2017 Reconsideration Order. Those data sets measured the number of minority-owned media outlets before and after the Local Television Ownership Rule and the Local Radio Ownership Rule were relaxed in the 1990s. Together, the data sets showed a slight decrease in the number of minority-owned media outlets immediately after the rules were relaxed, followed by an eventual increase in later years. The 2016 Order cited those data sets and explained that the number of minority-owned media outlets had increased over time. But the FCC added that there was no record evidence suggesting that past changes to the ownership rules had caused minority ownership levels to increase.

In the 2017 Reconsideration Order, the FCC referred to the 2016 Order's analysis of those data sets. The FCC stated that data in the record suggested that the previous relaxations of the Local Television Ownership and Local Radio Ownership

Rules "have not resulted in reduced levels of minority and female ownership." The FCC further explained that "no party" had "presented contrary evidence or a compelling argument demonstrating why" altering the rules would have a different impact today. The FCC therefore concluded that "the record provides no information to suggest" that eliminating or modifying the existing rules would harm minority and female ownership.

Prometheus insists that the FCC's numerical comparison was overly simplistic and that the data sets were materially incomplete. But the FCC acknowledged the gaps in the data. And despite repeatedly asking for data on the issue, the Commission received no other data on minority ownership and no data at all on female ownership levels. The FCC therefore relied on the data it had (and the absence of any countervailing evidence) to predict that changing the rules was not likely to harm minority and female ownership.

Prometheus also asserts that countervailing—and superior—evidence was in fact in the record, and that the FCC ignored that evidence. Prometheus identifies two studies submitted to the FCC by Free Press, a media reform group. Those studies purported to show that past relaxations of the ownership rules and increases in media market concentration had led to decreases in minority and female ownership levels. According to Prometheus, the Free Press studies undercut the FCC's prediction that its rule changes were unlikely to harm minority and female ownership.

The FCC did not ignore the Free Press studies. The FCC simply interpreted them differently. In particular, in the 2016 Order, the Commission explained that its data sets and the Free Press studies showed the same long-term increase in minority ownership after the Local Television Ownership and Local Radio Ownership Rules were relaxed. Moreover, as counsel for Prometheus forthrightly acknowledged at oral argument, the Free Press studies were purely backward-looking, and offered no statistical analysis of the likely future effects of the FCC's proposed rule changes on minority and female ownership.

In short, the FCC's analysis was reasonable and reasonably explained for purposes of the APA's deferential arbitrary-and-capricious standard. The FCC considered the record evidence on competition, localism, viewpoint diversity, and minority and female ownership, and reasonably concluded that the three ownership rules no longer serve the public interest. The FCC reasoned that the historical justifications for those ownership rules no longer apply in today's media market, and that permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers. The Commission further explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue here was not likely to harm minority and female ownership. The APA requires no more.

To be sure, in assessing the effects on minority and female ownership, the FCC did not have perfect empirical or statistical data. Far from it. But that is not unusual in day-to-day agency decisionmaking within the Executive Branch. The APA

imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies. Cf. *Fox Television*, 556 U.S., at 518–520; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). And nothing in the Telecommunications Act (or any other statute) requires the FCC to conduct its own empirical or statistical studies before exercising its discretion under Section 202(h). Here, the FCC repeatedly asked commenters to submit empirical or statistical studies on the relationship between the ownership rules and minority and female ownership. Despite those requests, no commenter produced such evidence indicating that changing the rules was likely to harm minority and female ownership. In the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had. See *State Farm*, 463 U.S. at 52.

In light of the sparse record on minority and female ownership and the FCC's findings with respect to competition, localism, and viewpoint diversity, we cannot say that the agency's decision to repeal or modify the ownership rules fell outside the zone of reasonableness for purposes of the APA.

Justice THOMAS, concurring.

. . . . I write separately to note another, independent reason why reversal is warranted: The Third Circuit improperly imposed nonstatutory procedural requirements on the FCC by forcing it to consider ownership diversity in the first place.

The FCC had no obligation to consider minority and female ownership. Nothing in § 202(h) of the Telecommunications Act of 1996 directs the FCC to consider rates of minority and female ownership. See note following 47 U.S.C. § 303 (requiring the FCC simply to consider "'the public interest as the result of competition'"). Nor could any court force the FCC to consider ownership diversity: Courts have no authority to impose "judge-made procedur[es]" on agencies. . . .

Disregarding these limits, the Third Circuit imposed on the FCC a nonstatutory requirement to consider minority and female ownership. The court first did so in 2004 when it vacated the FCC's modification of its Local Television Ownership Rule, faulting the FCC for "failing to mention anything about the effect this change would have on potential minority station owners." It then directed the FCC on remand to "consider . . . proposals for enhancing ownership opportunities for women and minorities." Repeating this error in 2016, the Third Circuit mandated that the FCC, "in addition to § 202(h)'s requirement . . . , include a determination about 'the effect of the rules on minority and female ownership.'" . . .

To be sure, the FCC has sometimes considered minority and female ownership of broadcast media when discussing ownership rules. Time after time, however, it has viewed those forms of diversity not "as policy goals in and of themselves, but as proxies for viewpoint diversity." The FCC has also said that ownership diversity "promote[s] competition." . . .

Here, as in 2003, once the FCC determined that none of its policy objectives for ownership rules—viewpoint diversity, competition, and localism—justified retaining its rules, the FCC was free to modify or repeal them without considering ownership diversity. . . .

C. Judicial Review of Legal Questions

2. The Chevron Two-Step

To be inserted after the last note following *City of Arlington v. FCC*:

We have now seen a version of "major questions" appear at *Chevron*'s first step (*Brown & Williamson*), second step (*UARG*), and at step zero (*Burwell*). What is the best way to make sense of these cases? Over the past two years, the Supreme Court has for the first time formally labeled what it calls the "Major Questions Doctrine." The next two sections describe and then "debate" this doctrine. Are the Court's more recent cases consistent with these older cases, or do they do something new?

4. The (New?) Major Questions Doctrine

As noted above, over the past two years, the Supreme Court has for the first time formally labeled what it calls the "Major Questions Doctrine." The following three cases provide a sampling of the doctrine, and the debate surrounding it.

The first case involved the Occupational Safety and Health Administration's "vaccine or test mandate," which would have imposed a requirement on employers with more than 100 employees to demand their employees be either vaccinated against or regularly tested for COVID-19. As you read, note that *Chevron* is not mentioned a single time in this opinion. Consider also the majority and concurrence's different uses of the "major questions" doctrine at Step One, and constitutional avoidance as a canon of statutory interpretation.

National Federation of Independent Business v.
Department of Labor, Occupational Safety and Health Administration
142 S. Ct. 661 (2022)

Per Curiam.

The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires

that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here.

Many States, businesses, and nonprofit organizations challenged OSHA's rule in Courts of Appeals across the country. The Fifth Circuit initially entered a stay. But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA's rule to take effect. Applicants now seek emergency relief from this Court, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.

I

A

Congress enacted the Occupational Safety and Health Act in 1970. 84 Stat. 1590, 29 U.S.C. § 651 *et seq.* The Act created the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor and under the supervision of its Secretary. As its name suggests, OSHA is tasked with ensuring *occupational* safety—that is, "safe and healthful working conditions." § 651(b). It does so by enforcing occupational safety and health standards promulgated by the Secretary. § 655(b). Such standards must be "reasonably necessary or appropriate to provide safe or healthful *employment*." § 652(8) (emphasis added). They must also be developed using a rigorous process that includes notice, comment, and an opportunity for a public hearing. § 655(b).

The Act contains an exception to those ordinary notice-and-comment procedures for "emergency temporary standards." § 655(c)(1). Such standards may "take immediate effect upon publication in the Federal Register." They are permissible, however, only in the narrowest of circumstances: the Secretary must show (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) that the "emergency standard is necessary to protect employees from such danger." Prior to the emergence of COVID–19, the Secretary had used this power just nine times before (and never to issue a rule as broad as this one). Of those nine emergency rules, six were challenged in court, and only one of those was upheld in full.

B

On September 9, 2021, President Biden announced "a new plan to require more Americans to be vaccinated." Remarks on the COVID–19 Response and National Vaccination Efforts, 2021 Daily Comp. of Pres. Doc. 775, p. 2. As part of that

plan, the President said that the Department of Labor would issue an emergency rule requiring all employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week." The purpose of the rule was to increase vaccination rates at "businesses all across America." In tandem with other planned regulations, the administration's goal was to impose "vaccine requirements" on "about 100 million Americans, two-thirds of all workers."

After a 2-month delay, the Secretary of Labor issued the promised emergency standard. 86 Fed. Reg. 61402 (2021). Consistent with President Biden's announcement, the rule applies to all who work for employers with 100 or more employees. There are narrow exemptions for employees who work remotely "100 percent of the time" or who "work exclusively outdoors," but those exemptions are largely illusory. The Secretary has estimated, for example, that only nine percent of landscapers and groundskeepers qualify as working exclusively outside. The regulation otherwise operates as a blunt instrument. It draws no distinctions based on industry or risk of exposure to COVID–19. Thus, most lifeguards and linemen face the same regulations as do medics and meatpackers. OSHA estimates that 84.2 million employees are subject to its mandate.

Covered employers must "develop, implement, and enforce a mandatory COVID–19 vaccination policy." *Id.*, at 61402. The employer must verify the vaccination status of each employee and maintain proof of it. The mandate does contain an "exception" for employers that require unvaccinated workers to "undergo [weekly] COVID–19 testing and wear a face covering at work in lieu of vaccination." But employers are not required to offer this option, and the emergency regulation purports to pre-empt state laws to the contrary. Unvaccinated employees who do not comply with OSHA's rule must be "removed from the workplace." And employers who commit violations face hefty fines: up to $13,653 for a standard violation, and up to $136,532 for a willful one. 29 C.F.R. § 1903.15(d) (2021). . . .

II

The Sixth Circuit concluded that a stay of the rule was not justified. We disagree.

A

Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." It is instead a significant encroachment into the lives—and health—of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political

significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U.S. ___, ___, 141 S.Ct. 2485, 2489 (2021) (*per curiam*) (internal quotation marks omitted). There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.

The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures. Confirming the point, the Act's provisions typically speak to hazards that employees face at work. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

The dissent protests that we are imposing "a limit found no place in the governing statute." Not so. It is the text of the agency's Organic Act that repeatedly makes clear that OSHA is charged with regulating "occupational" hazards and the safety and health of "employees." See, *e.g.,* 29 U.S.C. §§ 652(8), 654(a)(2), 655(b)–(c).

The Solicitor General does not dispute that OSHA is limited to regulating "work-related dangers." She instead argues that the risk of contracting COVID–19 qualifies as such a danger. We cannot agree. Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.

The dissent contends that OSHA's mandate is comparable to a fire or sanitation regulation imposed by the agency. But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, "cannot be undone at the end of the workday." Contrary to the dissent's contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not "part of what the agency was built for."

That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "*occupational* safety or health standard." 29 U.S.C. § 655(b) (emphasis added). . . .

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This "lack of historical precedent," coupled with the breadth of authority that the Secretary now claims, is a "telling indication" that the mandate extends beyond the agency's legitimate reach. *Fee Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010). [This case on the removal power is presented in Chapter 6.—Ed.] . . .

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, concurring.

The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.

I start with this Court's precedents. . . . [T]his Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U.S. ___, ___, 141 S.Ct. 2485, 2489 (2021). We sometimes call this the major questions doctrine.

OSHA's mandate fails that doctrine's test. The agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA. Approximately two years have passed since this pandemic began; vaccines have been available for more than a year. Over that span, Congress has adopted several major pieces of legislation aimed at combating COVID–19. But Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. . . .

[OSHA] directs us to 29 U.S.C. § 655(c)(1). In that statutory subsection, Congress authorized OSHA to issue "emergency" regulations upon determining that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful" and "that such emergency standard[s] [are] necessary to protect employees from such danger[s]." According to the agency, this provision supplies it with "almost unlimited discretion " to mandate new nationwide rules in response to the pandemic so long as those rules are "reasonably related" to workplace safety. 86 Fed. Reg. 61402, 61405 (2021).

The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate. Section

655(c)(1) was not adopted in response to the pandemic, but some 50 years ago at the time of OSHA's creation. Since then, OSHA has relied on it to issue only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals. As the agency itself explained to a federal court less than two years ago, the statute does "not authorize OSHA to issue sweeping health standards" that affect workers' lives outside the workplace. Brief for Department of Labor, *In re: AFL–CIO*, No. 20–1158, pp. 3, 33 (CADC 2020). Yet that is precisely what the agency seeks to do now—regulate not just what happens inside the workplace but induce individuals to undertake a medical procedure that affects their lives outside the workplace. Historically, such matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers. Meanwhile, at the federal level, OSHA arguably is not even the agency most associated with public health regulation. And in the rare instances when Congress has sought to mandate vaccinations, it has done so expressly. *E.g.*, 8 U.S.C. § 1182(a)(1)(A)(ii). We have nothing like that here.

Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. *E.g.*, *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980) (plurality opinion). [This case is presented in Chapter 5.—Ed.] Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. . . . If Congress could hand off all its legislative powers to unelected agency officials, it "would dash the whole scheme" of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives. *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 61 (2015) (ALITO, J., concurring); see also M. McConnell, The President Who Would Not Be King 326–335 (2020); I. Wurman, Nondelegation at the Founding, 130 Yale L. J. 1490, 1502 (2021).

The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. *E.g.*, *King v. Burwell*, 576 U.S. 473, 485–486 (2015). Later, the agency

may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes." *Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457, 468 (2001). . . .

Whichever the doctrine, the point is the same. . . . [B]oth hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion—and certainly impose no "specific restrictions" that "meaningfully constrai[n]" the agency. . . .

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.

Every day, COVID–19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID–19, in short, is a menace in work settings. The proof is all around us: Since the disease's onset, most Americans have seen their workplaces transformed.

So the administrative agency charged with ensuring health and safety in workplaces did what Congress commanded it to: It took action to address COVID–19's continuing threat in those spaces. The Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (Standard), requiring *either* vaccination *or* masking and testing, to protect American workers. The Standard falls within the core of the agency's mission: to "protect employees" from "grave danger" that comes from "new hazards" or exposure to harmful agents. 29 U.S.C. § 655(c)(1). OSHA estimates—and there is no ground for disputing—that the Standard will save over 6,500 lives and prevent over 250,000 hospitalizations in six months' time. 86 Fed. Reg. 61408 (2021).

Yet today the Court issues a stay that prevents the Standard from taking effect. In our view, the Court's order seriously misapplies the applicable legal standards. And in so doing, it stymies the Federal Government's ability to counter the unparalleled threat that COVID–19 poses to our Nation's workers. Acting outside of its competence and without legal basis, the Court displaces the judgments of the Government officials given the responsibility to respond to workplace health emergencies. We respectfully dissent.

* * *

The applicants are not "likely to prevail" under any proper view of the law. OSHA's rule perfectly fits the language of the applicable statutory provision. Once again, that provision commands—not just enables, but commands—OSHA to issue an emergency temporary standard whenever it determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). Each and every part of that provision demands that, in the circumstances here, OSHA act to prevent workplace harm.

The virus that causes COVID–19 is a "new hazard" as well as a "physically harmful" "agent." [Citing dictionary.—Ed.] The virus also poses a "grave danger" to millions of employees. As of the time OSHA promulgated its rule, more than 725,000 Americans had died of COVID–19 and millions more had been hospitalized. . . . And because the disease spreads in shared indoor spaces, it presents heightened dangers in most workplaces.

Finally, the Standard is "necessary" to address the danger of COVID–19. OSHA based its rule, requiring either testing and masking or vaccination, on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID–19 in most workplaces. The agency showed, in meticulous detail, that close contact between infected and uninfected individuals spreads the disease; that "[t]he science of transmission does not vary by industry or by type of workplace"; that testing, mask wearing, and vaccination are highly effective—indeed, essential—tools for reducing the risk of transmission, hospitalization, and death; and that unvaccinated employees of all ages face a substantially increased risk from COVID–19 as compared to their vaccinated peers. In short, OSHA showed that no lesser policy would prevent as much death and injury from COVID–19 as the Standard would.

OSHA's determinations are "conclusive if supported by substantial evidence." 29 U.S.C. § 655(f). Judicial review under that test is deferential, as it should be. OSHA employs, in both its enforcement and health divisions, numerous scientists, doctors, and other experts in public health, especially as it relates to work environments. Their decisions, we have explained, should stand so long as they are supported by "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" [citation omitted] (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). Given the extensive evidence in the record supporting OSHA's determinations about the risk of COVID–19 and the efficacy of masking, testing, and vaccination, a court could not conclude that the Standard fails substantial-evidence review.

The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. . . . Instead, the majority claims that the Act does not "plainly authorize[ ]" the Standard because it gives OSHA the power to "set *workplace* safety standards" and COVID–19 exists both inside and outside the

workplace. In other words, the Court argues that OSHA cannot keep workplaces safe from COVID–19 because the agency (as it readily acknowledges) has no power to address the disease outside the work setting.

But nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority. . . . Contra the majority, it is indifferent to whether a hazard in the workplace is also found elsewhere. The statute generally charges OSHA with "assur[ing] so far as possible . . . safe and healthful working conditions." 29 U.S.C. § 651(b). That provision authorizes regulation to protect employees from all hazards present in the workplace—or, at least, all hazards in part created by conditions there. It does not matter whether those hazards also exist beyond the workplace walls. . . .

Consistent with Congress's directives, OSHA has long regulated risks that arise both inside and outside of the workplace. For example, OSHA has issued, and applied to nearly all workplaces, rules combating risks of fire, faulty electrical installations, and inadequate emergency exits—even though the dangers prevented by those rules arise not only in workplaces but in many physical facilities. Similarly, OSHA has regulated to reduce risks from excessive noise and unsafe drinking water—again, risks hardly confined to the workplace. A biological hazard—here, the virus causing COVID–19—is no different. . . .

That is especially so because—as OSHA amply established—COVID–19 poses special risks in most workplaces, across the country and across industries. See 86 Fed. Reg. 61424 ("The likelihood of transmission can be exacerbated by common characteristics of many workplaces"). The majority ignores these findings, but they provide more-than-ample support for the Standard. OSHA determined that the virus causing COVID–19 is "readily transmissible in workplaces because they are areas where multiple people come into contact with one another, often for extended periods of time." In other words, COVID–19 spreads more widely in workplaces than in other venues because more people spend more time together there. And critically, employees usually have little or no control in those settings. "[D]uring the workday," OSHA explained, "workers may have little ability to limit contact with coworkers, clients, members of the public, patients, and others, any one of whom could represent a source of exposure to" the virus. The agency backed up its conclusions with hundreds of reports of workplace COVID–19 outbreaks—not just in cheek-by-jowl settings like factory assembly lines, but in retail stores, restaurants, medical facilities, construction areas, and standard offices. But still, OSHA took care to tailor the Standard. Where it could exempt work settings without exposing employees to grave danger, it did so. In sum, the agency did just what the Act told it to: It protected employees from a grave danger posed by a new virus as and where needed, and went no further. The majority, in overturning that action, substitutes judicial diktat for reasoned policymaking.

* * *

Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes? . . .

The Standard also has the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public.

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we "lack[] the background, competence, and expertise to assess" workplace health and safety issues. When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.

NOTES AND QUESTIONS

1. *Does* Chevron *still matter?* Do you agree that OSHA's statutory mandate is unambiguous as to OSHA's authority? In another recent case, *American Hospital Ass'n v. Becerra*, 596 U.S. ___ (2022), the Court unanimously resolved a statutory interpretation question without reference to *Chevron* deference at all. The Court held that "after employing the traditional tools of statutory, interpretation, we do not agree with HHS's interpretation of the statute." But *Chevron* traditionally requires the Court to decide whether the agency's contrary interpretation is *reasonable*, even if the Court does not "agree" that it is the best reading. Yet the Court also refused to overturn *Chevron*. Does *Chevron* remain viable in the lower courts, even if not in the Supreme Court? Has *Chevron* deference ever really mattered in the Supreme Court anyway? *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017) (concluding that "whereas the choice to apply *Chevron* deference may not matter that much at the Supreme Court, it seems to matter in the circuit courts").

2. *Major questions and nondelegation.* The Court deploys the "major questions doctrine" in this case as a Step One canon of interpretation (albeit without mentioning any of *Chevron's* steps). Thus the majority stacks the deck against the agency: even if its regulation seems consistent with the statute, the question rather is whether the statute *clearly* or *plainly* authorizes the regulation. Justice Gorsuch, in

concurrence, argues that the major questions doctrine advances nondelegation values. We will encounter the nondelegation doctrine in more detail in Chapter 5—it is the doctrine that maintains Congress cannot delegate its legislative power to an agency. Recall from the introductory chapter that the standard test today is the "intelligible principle" test, which provides that Congress must supply agencies an "intelligible principle" to guide their actions, otherwise the statute would violate the nondelegation doctrine by turning agencies effectively into lawmakers.

Is Justice Gorsuch right that the major questions doctrine is a kind of "substantive" canon that advances the substantive values of the nondelegation doctrine? The major questions canon might alternatively be a purely *linguistic* canon: we simply *expect* that Congress would have spoken clearly about certain issues. This appears to be how the majority uses the canon, and that appears consistent with the Court's other rulings in *MCI* and *Brown & Williamson*.

On the other hand, major questions is a poor fit to be a substantive canon, that is, it's a poor fit to be a traditional clear statement rule. Recall that ordinarily the Court will demand a clear statement when some constitutional value is at stake—for example, the presumption against preemption demands a clear statement before the Court will conclude that Congress has preempted state law. In *Franklin v. Massachusetts*, the Court held that separation of powers values warrant a clear statement before the APA's abuse of discretion standard will be held to apply to the President. But at least in the former case, Congress *could* preempt state law if it wanted to. Here, could Congress in fact delegate this authority to the agency? We don't know. If doing so violated the nondelegation doctrine, then major questions cannot be a clear statement rule: it does not matter how clearly Congress speaks, it still cannot make the delegation. And if Congress is allowed to delegate this authority to the agency, then it is hard to see why the canon advances nondelegation values.

However one thinks of the "major questions" doctrine, it is quickly becoming a staple of both statutory interpretation and nondelegation discourse. The last case presented in the nondelegation chapter, *West Virginia v. EPA*, 597 U.S. __ (2022), synthesizes several purportedly "major questions" cases. The student may wish to glance at that case now; it is, however, presented in the nondelegation chapter to emphasize the potential connection of this important new line of cases to that doctrine.

West Virginia v. EPA
597 U.S. ___ (2022)

Chief Justice ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air. 84 Stat. 1683, 42 U. S. C. §7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the "best

system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. §§7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders. Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources. The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

I

A

The Clean Air Act establishes three main regulatory programs to control air pollution from stationary sources such as power plants. One program is the New Source Performance Standards program of Section 111, at issue here. The other two are the National Ambient Air Quality Standards (NAAQS) program, . . . and the Hazardous Air Pollutants (HAP) program . . . . To understand the place and function of Section 111 in the statutory scheme, some background on the other two programs is in order.

The NAAQS program addresses air pollutants that "may reasonably be anticipated to endanger public health or welfare," and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." §7408(a)(1). After identifying such pollutants, EPA establishes a NAAQS for each. The NAAQS represents "the maximum airborne concentration of [the] pollutant that the public health can tolerate." EPA, though, does not choose which sources must reduce their pollution and by how much to meet the ambient pollution target. Instead, Section 110 of the Act leaves that task in the first instance to the States, requiring each "to submit to [EPA] a plan designed to implement and maintain such standards within its boundaries."

The second major program governing stationary sources is the HAP program. The HAP program primarily targets pollutants, other than those already covered by a NAAQS, that present "a threat of adverse human health effects," including substances known or anticipated to be "carcinogenic, mutagenic, teratogenic, neurotoxic," or otherwise "acutely or chronically toxic." §7412(b)(2).

EPA's regulatory role with respect to these toxic pollutants is different in kind from its role in administering the NAAQS program. There, EPA is generally limited to determining the maximum safe amount of covered pollutants in the air. As to each hazardous pollutant, by contrast, the Agency must promulgate emissions standards for both new and existing major sources. §7412(d)(1). Those standards must

"require the maximum degree of reduction in emissions . . . that the [EPA] Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . . through application of measures, processes, methods, systems or techniques" of emission reduction. §7412(d)(2). In other words, EPA must directly require all covered sources to reduce their emissions to a certain level. And it chooses that level by determining the "maximum degree of reduction" it considers "achievable" in practice by using the best existing technologies and methods. §7412(d)(3). . . .

This . . . " . . . requires the agency to . . . ensur[e] that regulated firms adopt the appropriate cleanup technology."

The third air pollution control scheme is the New Source Performance Standards program of Section 111. §7411. That section directs EPA to list "categories of stationary sources" that it determines "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." §7411(b)(1)(A). Under Section 111(b), the Agency must then promulgate for each category "Federal standards of performance for new sources," §7411(b)(1)(B). A "standard of performance" is one that

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

Thus, the statute directs EPA to (1) "determine[]," taking into account various factors, the "best system of emission reduction which . . . has been adequately demonstrated," (2) ascertain the "degree of emission limitation achievable through the application" of that system, and (3) impose an emissions limit on new stationary sources that "reflects" that amount. Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount "achievable through the application of the best system of emission reduction . . . adequately demonstrated," or the BSER. EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category.

Although the thrust of Section 111 focuses on emissions limits for new and modified sources—as its title indicates— the statute also authorizes regulation of certain pollutants from existing sources. Under Section 111(d), once EPA "has set new source standards addressing emissions of a particular pollutant under . . . section 111(b)," 80 Fed. Reg. 64711, it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or HAP programs. §7411(d)(1). Existing power plants, for example, emit

many pollutants covered by a NAAQS or HAP standard. Section 111(d) thus "operates as a gap-filler," empowering EPA to regulate harmful emissions not already controlled under the Agency's other authorities. . . .

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. For instance, the Agency has established emissions limits on acid mist from sulfuric acid production; sulfide gases released by kraft pulp mills; and emissions of various harmful gases from municipal landfills. It was thus only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an "obscure, never-used section of the law." [Citing legislative history].

B

Things changed in October 2015, when EPA promulgated two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). Both were premised on the Agency's earlier finding that carbon dioxide is an "air pollutant" that "may reasonably be anticipated to endanger public health or welfare" by causing climate change. Carbon dioxide is not subject to a NAAQS and has not been listed as a toxic pollutant.

The first rule announced by EPA established federal carbon emissions limits for new power plants of two varieties: fossil-fuel-fired electric steam generating units (mostly coal fired) and natural-gas-fired stationary combustion turbines. Following the statutory process set out above, the Agency determined the BSER for the two categories of sources. For steam generating units, for instance, EPA determined that the BSER was a combination of high-efficiency production processes and carbon capture technology. EPA then set the emissions limit based on the amount of carbon dioxide that a plant would emit with these technologies in place.

The second rule was triggered by the first: Because EPA was now regulating carbon dioxide from new coal and gas plants, Section 111(d) required EPA to also address carbon emissions from existing coal and gas plants. It did so through what it called the Clean Power Plan rule.

In that rule, EPA established "final emission guidelines for states to follow in developing plans" to regulate existing power plants within their borders. To arrive at the guideline limits, EPA did the same thing it does when imposing federal regulations on new sources: It identified the BSER.

The BSER that the Agency selected for existing coal-fired power plants, however, was quite different from the BSER it had chosen for new sources. The BSER for existing plants included three types of measures, which the Agency called "building blocks." The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal more efficiently. But such improvements, EPA stated, would "lead to only small emission reductions," because coal-fired power plants were already operating near optimum

efficiency. On the Agency's view, "much larger emission reductions [were] needed from [coalfired plants] to address climate change."

So the Agency included two additional building blocks in its BSER, both of which involve what it called "generation shifting from higher-emitting to lower-emitting" producers of electricity. Building block two was a shift in electricity production from existing coal-fired power plants to natural-gas-fired plants. Ibid. Because natural gas plants produce "typically less than half as much" carbon dioxide per unit of electricity created as coal-fired plants, the Agency explained, "this generation shift [would] reduce[] CO2 emissions." Building block three worked the same way, except that the shift was from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," mainly wind and solar. "Most of the CO2 controls" in the rule came from the application of building blocks two and three.

The Agency identified three ways in which a regulated plant operator could implement a shift in generation to cleaner sources. First, an operator could simply reduce the regulated plant's own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there. Finally, operators could purchase emission allowances or credits as part of a cap-and-trade regime. Under such a scheme, sources that achieve a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps.

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. Given the integrated nature of the power grid, "adding electricity to the grid from one generator will result in the instantaneous reduction in generation from other generators," and "reductions in generation from one generator lead to the instantaneous increase in generation" by others. So coal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas.

Having decided that the "best system of emission reduction . . . adequately demonstrated" was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. 42 U. S. C. §7411(a)(1). The Agency recognized that—given the nature of generation shifting—it could choose from "a wide range of potential stringencies for the BSER." 80 Fed. Reg. 64730. Put differently, in translating the BSER into an operational emissions limit, EPA could choose whether to require anything from a little generation shifting to a great deal. The Agency settled on what it regarded as a "reasonable" amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014.

From these significant projected reductions in generation, EPA developed a series of complex equations to "determine the emission performance rates" that States would be required to implement. The calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation described above. Indeed, the emissions limit the Clean Power Plan established for existing power plants was actually stricter than the cap imposed by the simultaneously published standards for new plants.

The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar. The White House stated that the Clean Power Plan would "drive a[n] . . . aggressive transformation in the domestic energy industry." EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3–22, 3–30, 3–33, 6– 24, 6–25 (2015). The Energy Information Administration reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040. Dept. of Energy, Analysis of the Impacts of the Clean Power Plan 21, 63–64 (May 2015).

C

These projections were never tested, because the Clean Power Plan never went into effect. . . . [B]efore [the D.C. Circuit] could issue a decision [on the plan's lawfulness], there was a change in Presidential administrations. . . .

EPA eventually repealed the rule in 2019, concluding that the Clean Power Plan had been "in excess of its statutory authority" under Section 111(d). Specifically, the Agency concluded that generation shifting should not have been considered as part of the BSER. The Agency interpreted Section 111 as "limit[ing] the BSER to those systems that can be put into operation at a building, structure, facility, or installation," such as "add-on controls" and "inherently lower-emitting processes/practices/designs." It then explained that the Clean Power Plan, rather than setting the standard "based on the application of equipment and practices at the level of an individual facility," had instead based it on "a shift in the energy generation mix at the grid level"—not the sort of measure that has "a potential for application to an individual source." . . .

EPA argued that under the major questions doctrine, a clear statement was necessary to conclude that Congress intended to delegate authority "of this breadth to regulate a fundamental sector of the economy." It found none. . . .

A number of States and private parties immediately filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the Clean Power Plan . . . . [T]he [D.C. Circuit] concluded[that] the statute could reasonably be read to encompass

generation shifting. As part of that analysis, the Court of Appeals concluded that the major questions doctrine did not apply, and thus rejected the need for a clear statement of congressional intent to delegate such power to EPA. Having found that EPA misunderstood the scope of its authority under the Clean Air Act, the Court vacated the Agency's repeal of the Clean Power Plan and remanded to the Agency for further consideration. . . .

[Because there was a third presidential administration by this time, which had asked to stay the D.C. Circuit's ruling so that it could assess for itself what Section 111(d) standard it wanted to adopt, the Court proceeded to address whether the case had become moot and concluded that it had not and therefore the Court could proceed to the merits.—Ed.]

III

A

. . . 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." In Alabama Assn. of Realtors v. Department of Health and Human Servs., 594 U. S. ___, ___ (2021), 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* 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. [UARG v. EPA, 573 U.S. 302, 310 (2014)]. 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." 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." We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable." 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. ___, ___ (2022). 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.

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 . . . . We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."

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." But in what the dissent calls the "key case" in this area, *Brown & Williamson*, the Court could not have been clearer: "In extraordinary cases . . . there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. . . . 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.

As for the major questions doctrine "label[]," it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have

granted. Scholars and jurists have recognized the common threads between those decisions. So have we.

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." It located that newfound power in the vague language of an "ancillary provision[]" of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d).

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." And as Justice Frankfurter has noted, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." FTC v. Bunte Brothers, Inc., 312 U. S. 349, 352 (1941). . . .

Indeed, EPA nodded to this history in the Clean Power Plan itself, describing the sort of "systems of emission reduction" it had always before selected—"efficiency improvements, fuel-switching," and "add-on controls"—as "more traditional air pollution control measures." . . .

This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. *MCI*, 512 U.S. at 231. Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under that paradigm, if a source was already operating at that level, there was nothing more for EPA to do. Under its newly "discover[ed]" authority, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to "shift" away virtually all of their generation—i.e., to cease making power altogether. . . .

EPA [argues that it] must limit the magnitude of generation shift it demands to a level that will not be "exorbitantly costly" or "threaten the reliability of the grid."

But this argument does not so much *limit* the breadth of the Government's claimed authority as *reveal* it. On EPA's view of Section 111(d), Congress implicitly

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

There is little reason to think Congress assigned such decisions to the Agency. . . . The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d). . . .

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. *Brown & Williamson*, 529 U.S. at 144. At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. . . .

C

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

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." As a matter of "definitional possibilities," generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction"—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents. . . .

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

. . . . I join the Court's opinion and write to offer some additional observations about the doctrine on which it rests.

One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. . . .

The Constitution prohibits Congress from passing laws imposing various types of retroactive liability. Consistent with this rule, Chief Justice Marshall long ago advised that "a court . . . ought to struggle hard against a [statutory] construction which will, by a retrospective operation, affect the rights of parties." . . .

The Constitution also incorporates the doctrine of sovereign immunity. To enforce that doctrine, courts have consistently held that "nothing but express words, or an insurmountable implication" would justify the conclusion that lawmakers intended to abrogate the States' sovereign immunity. . . .

The major questions doctrine works in much the same way to protect the Constitution's separation of powers. In Article I, "the People" vested "[a]ll" federal "legislative powers . . . in Congress." As Chief Justice Marshall put it, this means that "important subjects . . . must be entirely regulated by the legislature itself," even if Congress may leave the Executive "to act under such general provisions to fill up the details." *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825). . . .

Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine. . . . [T]he Court [has] routinely enforced "the nondelegation doctrine" through "the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States*, 488 U.S. 361, 373, n. 7 (1989). . . .

Turning from the doctrine's function to its application, it seems to me that our cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required.

First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great "political significance," or end an "earnest and profound debate across the country" . . . .

Second, this Court has said that an agency must point to clear congressional authorization when it seeks to regulate "'a significant portion of the American economy,'" or require "billions of dollars in spending" by private persons or entities. . . .

Third, this Court has said that the major questions doctrine may apply when an agency seeks to "intrud[e] into an area that is the particular domain of state law." . . .

The EPA claims the power to force coal and gas-fired power plants "to cease [operating] altogether." Whether these plants should be allowed to operate is a

question on which people today may disagree, but it is a question everyone can agree is vitally important. Congress has debated the matter frequently. . . .

Other suggestive factors are present too. "The electric power sector is among the largest in the U. S. economy, with links to every other sector." . . . Finally, the CPP unquestionably has an impact on federalism, as "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." . . .

At this point, the question becomes what qualifies as a clear congressional statement authorizing an agency's action. Courts have long experience applying clear-statement rules throughout the law, and our cases have identified several telling clues in this context too.

First, courts must look to the legislative provisions on which the agency seeks to rely "'with a view to their place in the overall statutory scheme.'" *Brown & Williamson*, 529 U. S. at 133. "[O]blique or elliptical language" will not supply a clear statement. . . .

Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. . . . [A]n agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority.

Third, courts may examine the agency's past interpretations of the relevant statute. A "contemporaneous" and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency. . . .

Fourth, skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise. . . .

Asking these questions again yields a clear answer in our case. As the Court details, the agency before us cites no specific statutory authority allowing it to transform the Nation's electrical power supply. Instead, the agency relies on a rarely invoked statutory provision that was passed with little debate and has been characterized as an "obscure, never-used section of the law." Nor has the agency previously interpreted the relevant provision to confer on it such vast authority; there is no original, longstanding, and consistent interpretation meriting judicial respect. Finally, there is a "mismatch" between the EPA's expertise over environmental matters and the agency's claim that "Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy." Such a claimed power "requires technical and policy expertise not traditionally needed in [the] EPA's regulatory development." . . .

In places, the dissent seems to suggest that we should not be unduly "'concerned'" with the Constitution's assignment of the legislative power to Congress. . . .[1] . . . .

When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives. In our Republic, "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society." *Fletcher v. Peck*, 6 Cranch 87, 136 (1810). Because today's decision helps safeguard that foundational constitutional promise, I am pleased to concur.

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

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

Climate change's causes and dangers are no longer subject to serious doubt. Modern science is "unequivocal that human influence"—in particular, the emission of greenhouse gases like carbon dioxide—"has warmed the atmosphere, ocean and land." Intergovernmental Panel on Climate Change, Sixth Assessment Report, The Physical Science Basis: Headline Statements 1 (2021). The Earth is now warmer than at any time "in the history of modern civilization," with the six warmest years on record all occurring in the last decade. U. S. Global Change Research Program, Fourth National Climate Assessment, Vol. I, p. 10 (2017); Brief for Climate Scientists as Amici Curiae 8. The rise in temperatures brings with it "increases in heat-related deaths," "coastal inundation and erosion," "more frequent and intense hurricanes, floods, and other extreme weather events," "drought," "destruction of ecosystems," and "potentially significant disruptions of food production." *American Elec. Power Co. v. Connecticut*, 564 U. S. 410, 417 (2011). If the current rate of emissions continues,

[1] [fn. 6] In the course of its argument, the dissent leans heavily on two recent academic articles. But if a battle of law reviews were the order of the day, it might be worth adding to the reading list. See, e.g., I. Wurman, Nondelegation at the Founding, 130 Yale L. J. 1490, 14931494 (2021); D. Candeub, Preference and Administrative Law, 72 Admin. L. Rev. 607, 614–628 (2020); P. Hamburger, Delegation or Divesting?, 115 Nw. L. Rev. Online 88, 91–110 (2020); M. McConnell, The President Who Would Not Be King 326–335 (2020); A. Gordon, Nondelegation, 12 N. Y. U. J. L. & Liberty 718, 719 (2019); R. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. & Pub. Pol'y 147, 155–161 (2017); G. Lawson & G. Seidman, "A Great Power of Attorney:" Understanding the Fiduciary Constitution 104–129 (2017); P. Hamburger, Is Administrative Law Unlawful? 377– 402 (2014); L. Alexander & S. Prakash, Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1298–1299 (2003); G. Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 335–343 (2002); D. Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance? 83 Mich. L. Rev. 1223, 1252–1255, 1260–1261 (1985); see generally P. Wallison & J. Yoo, The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine (2022).

children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. See Brief for Climate Scientists as Amici Curiae 6. Rising waters, scorching heat, and other severe weather conditions could force "mass migration events[,] political crises, civil unrest," and "even state failure." Dept. of Defense, Climate Risk Analysis 8 (2021). And by the end of this century, climate change could be the cause of "4.6 million excess yearly deaths." See R. Bressler, The Mortality Cost of Carbon, 12 Nature Communications 4467, p. 5 (2021).

Congress charged EPA with addressing those potentially catastrophic harms, including through regulation of fossilfuel-fired power plants. Section 111 of the Clean Air Act directs EPA to regulate stationary sources of any substance that "causes, or contributes significantly to, air pollution" and that "may reasonably be anticipated to endanger public health or welfare." 42 U. S. C. §7411(b)(1)(A). Carbon dioxide and other greenhouse gases fit that description. See *American Elec. Power*, 564 U.S. at 416–417; *Massachusetts*, 549 U.S. at 528–532. EPA thus serves as the Nation's "primary regulator of greenhouse gas emissions." *American Elec. Power*, 564 U. S., at 428. And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are responsible for about one quarter of the Nation's greenhouse gas emissions. Curbing that output is a necessary part of any effective approach for addressing climate change.

To carry out its Section 111 responsibility, EPA issued the Clean Power Plan in 2015. The premise of the Plan—which no one really disputes—was that operational improvements at the individual-plant level would either "lead to only small emission reductions" or would cost far more than a readily available regulatory alternative. That alternative—which fossil-fuel-fired plants were "already using to reduce their [carbon dioxide] emissions" in "a cost effective manner"—is called generation shifting. As the Court explains, the term refers to ways of shifting electricity generation from higher emitting sources to lower emitting ones—more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind. A power company (like the many supporting EPA here) might divert its own resources to a cleaner source, or might participate in a cap-and-trade system with other companies to achieve the same emissions-reduction goals.

This Court has obstructed EPA's effort from the beginning. Right after the Obama administration issued the Clean Power Plan, the Court stayed its implementation. That action was unprecedented: Never before had the Court stayed a regulation then under review in the lower courts. . . . [T]he Biden administration announced that, instead of putting the Plan into effect, it would commence a new rulemaking. Yet this Court determined to pronounce on the legality of the old rule anyway. . . .

The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select

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

I

The Clean Air Act was major legislation, designed to deal with a major public policy issue. As Congress explained, its goal was to "speed up, expand, and intensify the war against air pollution" in all its forms. . . .

Section 111(d) . . . ensures that EPA regulates existing power plants' emissions of all pollutants. When the pollutant at issue falls within the NAAQS or HAP programs, EPA need do no more. But when the pollutant falls outside those programs, Section 111(d) requires EPA to set an emissions level for currently operating power plants (and other stationary sources). That means no pollutant from such a source can go unregulated . . . . That something is a backstop does not make it a backwater. Even if they are needed only infrequently, backstops can perform a critical function—and this one surely does. Again, Section 111(d) tells EPA that when a pollutant—like carbon dioxide—is not regulated through other programs, EPA must undertake a further regulatory effort to control that substance's emission from existing stationary sources. In that way, Section 111(d) operates to ensure that the Act achieves comprehensive pollution control.

Section 111 describes the prescribed regulatory effort in expansive terms. EPA must set . . .

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

To take that language apart a bit, the provision instructs EPA to decide upon the "best system of emission reduction which . . . has been adequately demonstrated." The provision tells EPA, in making that determination, to take account of both costs and varied "nonair" impacts (on health, the environment, and the supply of energy). And the provision finally directs EPA to set the particular emissions limit achievable through use of the demonstrated "best system." Taken as a whole, the section provides regulatory flexibility and discretion. It imposes, to be sure, meaningful constraints: Take into account costs and nonair impacts, and make sure the best system has a proven track record. But the core command—go find the best system of emission reduction—gives broad authority to EPA.

If that flexibility is not apparent on the provision's face, consider some dictionary definitions—supposedly a staple of this Court's supposedly textualist method of reading statutes. A "system" is "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." Webster's Third New International Dictionary 2322 (1971). Or again: a "system" is "[a]n organized and coordinated method; a procedure." American Heritage Dictionary 1768 (5th ed. 2018). . . . [C]ontra the majority, a broad term is not the same thing as a "vague" one. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. . . .

[G]eneration shifting fits comfortably within the conventional meaning of a "system of emission reduction." Consider one of the most common mechanisms of generation shifting: the use of a cap-and-trade scheme. Here is how the majority describes cap and trade: "Under such a scheme, sources that receive a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps." Does that sound like a "system" to you? It does to me too. . . .

Other statutory provisions confirm the point. The Clean Air Act's acid rain provision, for example, describes a cap-and-trade program as an "emission allocation and transfer *system*." §7651(b) (emphasis added). . . .

There is also a flipside point: Congress declined to include in Section 111 the restrictions on EPA's authority contained in other Clean Air Act provisions. Most relevant here, quite a number of statutory sections confine EPA's emissions-reduction efforts to technological controls—essentially, equipment or processes that can be put into place at a particular facility. So, for example, one provision tells EPA to set standards "reflect[ing] the greatest degree of emission reduction achievable through the application of technology." §7521(a)(3)(A)(i). Others direct the use of the "best available retrofit technology," or the "best available control technology," or the "maximum achievable control technology." §§7491(b)(2)(A), (g)(2), 7475(a)(4), 7479(3), 7412(g)(2). There are still more. None of those provisions would allow EPA to set emissions limits based on generation shifting, as the Agency acknowledges. But nothing like the language of those provisions is included in Section 111. That matters under normal rules of statutory interpretation. As Justice Scalia once wrote

for the Court: "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration and Customs Enforcement*, 543 U. S. 335, 341 (2005).

Statutory history serves only to pile on: It shows that Congress has specifically declined to restrict EPA to technology-based controls in its regulation of existing stationary sources. The key moment came in 1977, when Congress amended Section 111 to distinguish between new sources and existing ones. For new sources, EPA could select only the "best technological system of continuous emission reduction." Clean Air Act Amendments, §109(c)(1)(A), 91 Stat. 700 (emphasis added). But for existing sources, the word "technological" was struck out: EPA could select the "best system of continuous emission reduction." Ibid. The House Report emphasized Congress's deliberate choice: Whereas the standards set for new sources were to be based on "the best technological" controls, the "standards adopted for existing sources" were "to be based on available means of emission control (not necessarily technological)." H. R. Rep. No. 95–564, p. 129 (1977). . . .

"Congress," this Court has said, "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Arlington v. FCC*, 569 U. S. 290, 296 (2013). In Section 111, Congress spoke in capacious terms. . . . And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

II

A

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

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

The majority claims it is just following precedent, but that is not so. The Court has never even used the term "major questions doctrine" before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has . . . considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design.

The key case here is *FDA v. Brown & Williamson*. There, the Food and Drug Administration (FDA) asserted that its power to regulate "drugs" and "devices" extended to tobacco products. The claim had something to it: FDA has broad authority over "drugs" and drug-delivery "devices," and the definitions of those terms could be read to encompass nicotine and cigarettes. But the asserted authority "simply [did] not fit" the overall statutory scheme. FDA's governing statute required the agency to ensure that regulated products were "safe" to be marketed—but there was no making tobacco products safe in the usual sense. So FDA would have had to reinterpret what it meant to be "safe," or else ban tobacco products altogether. Both options, the Court thought, were preposterous. . . . [T]here was "simply" a lack of "fit" between the regulation at issue, the agency in question, and the broader statutory scheme. . . .

For anyone familiar with this Court's *Chevron* doctrine, that language [in *Brown & Williamson*] will ring a bell. The Court was saying only—and it was elsewhere explicit on this point—that there was reason to hesitate before giving FDA's position *Chevron* deference. . . . In reaching that conclusion, the Court relied (as I've just explained) not on any special "clear authorization" demand, but on normal principles of statutory interpretation: look at the text, view it in context, and use what the Court called some "common sense" about how Congress delegates. . . .

In *Gonzales v. Oregon*, 546 U. S. 243 (2006), we . . . doubted Congress would have delegated such a "quintessentially medical judgment[]" to "an executive official who lacks medical expertise." . . . Later, in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), the Court relied on similar reasoning to reject EPA's efforts to regulate "millions of small" and previously unregulated sources of emissions . . . . Key to that decision was the Court's view that reading the delegation so expansively would be "inconsistent with" the statute's broader "structure and design." The Court explained

that allowing the agency action to proceed would necessitate the "rewriting" of other "unambiguous statutory terms"—indeed, of "precise numerical thresholds."

And last Term, the Court concluded that the Centers for Disease Control and Prevention (CDC) lacked the power to impose a nationwide eviction moratorium. The Court . . . raised an eyebrow at the thought of the CDC "intrud[ing]" into "the landlord-tenant relationship"—a matter outside the CDC's usual "domain." . . .

In each case, the Court thought, the agency had strayed out of its lane, to an area where it had neither expertise nor experience. . . .

B

The Court today faces no such singular assertion of agency power. . . . It claims EPA has no "comparative expertise" in "balancing the many vital considerations of national policy" implicated in regulating electricity sources. But that is wrong. . . .

As the Plan noted, generation shifting has a well-established pedigree as a tool for reducing pollution; even putting aside other federal regulation, both state regulators and power plants themselves have long used it to attain environmental goals. The technique is, so to speak, a tool in the pollution-control toolbox. And that toolbox is the one EPA uses. So that Agency, more than any other, has the desired "comparative expertise." . . . [T]he majority protests that Congress would not have wanted EPA to "dictat[e]," through generation shifting, the "mix of energy sources nationwide." But that statement reflects a misunderstanding of how the electricity market works. Every regulation of power plants—even the most conventional, facility-specific controls—"dictat[es]" the national energy mix to one or another degree. . . .

The Clean Power Plan was not so big. It was not so new. And to the extent it was either, that should not matter.

As to bigness—well, events have proved the opposite: The Clean Power Plan, we now know, would have had little or no impact. The Trump administration's repeal of the Plan created a kind of controlled experiment: The Plan's "magnitude" could be measured by seeing how far short the industry fell of the Plan's nationwide emissions target. Except that turned out to be the wrong question, because the industry didn't fall short of the Plan's goal; rather, the industry exceeded that target, all on its own. And it did so mainly through the generation-shifting techniques that the Plan called for. . . .

The majority's claim about the Clean Power Plan's novelty—the most fleshed-out part of today's opinion—is also exaggerated. As EPA explained when it issued the Clean Power Plan, an earlier Section 111(d) regulation had determined that a cap-and-trade program was the "best system of emission reduction" for mercury. . . . A decade earlier, EPA had determined that States could comply with a Section 111(d) regulation for municipal waste combustors by establishing cap-and-trade programs. . . .

In any event, newness might be perfectly legitimate— even required—from Congress's point of view. I do not dispute that an agency's longstanding practice may inform a court's interpretation of a statute delegating the agency power. But it is equally true, as *Brown & Williamson* recognized, that agency practices are "not carved in stone." . . . In selecting [its] words, Congress understood—it had to—that the "best system" would change over time. Congress wanted and instructed EPA to keep up. . . .

And contra the majority, it is that Congress's choice which counts, not any later one's. The majority says it "cannot ignore" that Congress in recent years has "considered and rejected" cap-and-trade schemes. But under normal principles of statutory construction, the majority *should* ignore that fact . . . .

III

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

The kind of agency delegations at issue here go all the way back to this Nation's founding. "[T]he founding era," scholars have shown, "wasn't concerned about delegation." E. Posner & A. Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1734 (2002) (Posner & Vermeule). The records of the Constitutional Convention, the ratification debates, the Federalist—none of them suggests any significant limit on Congress's capacity to delegate policymaking authority to the Executive Branch. And neither does any early practice. The very first Congress gave sweeping authority to the Executive Branch to resolve some of the day's most pressing problems, including questions of "territorial administration," "Indian affairs," "foreign and domestic debt," "military service," and "the federal courts." J. Mortenson & N. Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 349 (2021) (Mortenson & Bagley). That Congress, to use a few examples, gave the Executive power to devise a licensing scheme for trading with Indians; to craft appropriate laws for the Territories; and to decide how to pay down the (potentially ruinous) national debt. See id., at 334–338, 340–342, 344–345; C. Chabot, The Lost History of Delegation at the Founding, 56 Ga. L. Rev. 81, 113–134 (2021) (Chabot). Barely anyone objected on delegation grounds. . . .

In all times, but ever more in "our increasingly complex society," the Legislature "simply cannot do its job absent an ability to delegate power under broad

general directives." *Mistretta v. United States*, 488 U. S. 361, 372 (1989). Consider just two reasons why.

First, Members of Congress often don't know enough— and know they don't know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. Congress looks to them to make specific judgments about how to achieve its more general objectives. And it does so especially, though by no means exclusively, when an issue has a scientific or technical dimension. Why wouldn't Congress instruct EPA to select "the best system of emission reduction," rather than try to choose that system itself? . . .

Second and relatedly, Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. Once again, that is most obviously true when it comes to scientific and technical matters. The "best system of emission reduction" is not today what it was yesterday, and will surely be something different tomorrow. . . .

Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines.

This Court has historically known enough not to get in the way. Maybe the best explanation of why comes from Justice Scalia. See *Mistretta*, 488 U.S. at 415–416 (dissenting opinion). The context was somewhat different. He was responding to an argument that Congress could not constitutionally delegate broad policymaking authority; here, the Court reads a delegation with unwarranted skepticism, and thereby artificially constrains its scope. But Justice Scalia's reasoning remains on point. He started with the inevitability of delegations: "[S]ome judgments involving policy considerations," he stated, "must be left to [administrative] officers." Then he explained why courts should not try to seriously police those delegations, barring—or, I'll add, narrowing—some on the ground that they went too far. The scope of delegations, he said,

> "must be fixed according to common sense and the inherent necessities of the governmental co-ordination. Since Congress is no

> less endowed with common sense than we are, and better equipped to inform itself of the necessities of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."

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

In rewriting [the] text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. . . .

Whatever else this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

NOTES AND QUESTIONS

1. Has major questions evolved? Having read both the OSHA vaccine-or-test case and this one, what do you think—is major questions a straightforward doctrine of statutory interpretation, or is it intended to enforce the nondelegation doctrine? Do you agree with how Justice Kagan distinguished the other so-called major questions cases—that in those cases the delegation of authority was not necessarily too big or important, but rather simply did not fit with the statutory scheme or involved matters outside of the agency's lane? Should "major questions" be taught along *Chevron* deference (at Step One), as this casebook does with the *OSHA* case, or along with *Gundy* and other nondelegation cases, as this casebook does with *West Virginia v. EPA*? In *West Virginia*, as in *Gundy*, is the majority—albeit different majorities—narrowing the statute to avoid constitutional concerns? Is there any other plausible interpretation of what the majority is doing? On the other hand, Chief Justice Roberts says in conclusion that "[a] decision of such magnitude and consequence rests with Congress itself, *or an agency acting pursuant to a clear delegation from that representative body*." Is Chief Justice Roberts explicitly rejecting the nondelegation argument?

Biden v. Nebraska

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

. . . . Outstanding federal student loans now total $1.6 trillion extended to 43 million borrowers. Last year, the Secretary of Education established the first comprehensive student loan forgiveness program, invoking the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) for authority to do so. The Secretary's plan canceled roughly $430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by the other 23 million from $29,400 to $13,600. Six States sued, arguing that the HEROES Act does not authorize the loan cancellation plan. We agree.

I

A

. . . . The Education Act specifies in detail the terms and conditions attached to federal loans, including applicable interest rates, loan fees, repayment plans, and consequences of default. See §§ 1077, 1080, 1087e, 1087dd. It also authorizes the Secretary to cancel or reduce loans, but only in certain limited circumstances and to a particular extent. Specifically, the Secretary can cancel a set amount of loans held by some public servants—including teachers, members of the Armed Forces, Peace Corps volunteers, law enforcement and corrections officers, firefighters, nurses, and librarians—who work in their professions for a minimum number of years. §§ 1078–10, 1087j, 1087ee. The Secretary can also forgive the loans of borrowers who have died or been "permanently and totally disabled," such that they cannot "engage in any substantial gainful activity." § 1087(a)(1). Bankrupt borrowers may have their loans forgiven. § 1087(b). And the Secretary is directed to discharge loans for borrowers falsely certified by their schools, borrowers whose schools close down, and borrowers whose schools fail to pay loan proceeds they owe to lenders. § 1087(c).

Shortly after the September 11 terrorist attacks, Congress became concerned that borrowers affected by the crisis—particularly those who served in the military—would need additional assistance. As a result, it enacted the Higher Education Relief Opportunities for Students Act of 2001. That law provided the Secretary of Education, for a limited period of time, with "specific waiver authority to respond to conditions in the national emergency" caused by the September 11 attacks. 115 Stat. 2386. Rather than allow this grant of authority to expire by its terms at the end of September 2003, Congress passed the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). 117 Stat. 904. That Act extended the coverage of the 2001 statute to include any war or national emergency—not just the September 11 attacks. By its terms, the Secretary "may waive or modify any statutory or regulatory provision applicable to the student

financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1).

The Secretary may issue waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." § 1098bb(a)(2)(A). An "affected individual" is defined, in relevant part, as someone who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." §§ 1098ee(2)(C)–(D). And a "national emergency" for the purposes of the Act is "a national emergency declared by the President of the United States." § 1098ee(4).

Immediately following the passage of the Act in 2003, the Secretary issued two dozen waivers and modifications addressing a handful of specific issues. Among other changes, the Secretary waived the requirement that "affected individuals" must "return or repay an overpayment" of certain grant funds erroneously disbursed by the Government, and the requirement that public service work must be uninterrupted to qualify an "affected individual" for loan cancellation. Additional adjustments were made in 2012, with similar limited effects.

But the Secretary took more significant action in response to the COVID–19 pandemic. On March 13, 2020, the President declared the pandemic a national emergency. One week later, then-Secretary of Education Betsy DeVos announced that she was suspending loan repayments and interest accrual for all federally held student loans. The following week, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, which required the Secretary to extend the suspensions through the end of September 2020. Before that extension expired, the President directed the Secretary, "[i]n light of the national emergency," to "effectuate appropriate waivers of and modifications to" the Education Act to keep the suspensions in effect through the end of the year. And a few months later, the Secretary further extended the suspensions, broadened eligibility for federal financial assistance, and waived certain administrative requirements (to allow, for example, virtual rather than on-site accreditation visits and to extend deadlines for filing reports).

Over a year and a half passed with no further action beyond keeping the repayment and interest suspensions in place. But in August 2022, a few weeks before President Biden stated that "the pandemic is over," the Department of Education announced that it was once again issuing "waivers and modifications" under the Act—this time to reduce and eliminate student debts directly. During the first year of the pandemic, the Department's Office of General Counsel had issued a memorandum concluding that "the Secretary does not have statutory authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of

student loan principal balances." After a change in Presidential administrations and shortly before adoption of the challenged policy, however, the Office of General Counsel "formally rescinded" its earlier legal memorandum and issued a replacement reaching the opposite conclusion. . . .

The terms of the debt cancellation plan are straightforward: For borrowers with an adjusted gross income below $125,000 in either 2020 or 2021 who have eligible federal loans, the Department of Education will discharge the balance of those loans in an amount up to $10,000 per borrower. . . . The Department of Education estimates that about 43 million borrowers qualify for relief, and the Congressional Budget Office estimates that the plan will cancel about $430 billion in debt principal. . . .

II

[The Court first found that the Missouri Higher Education Loan Authority, a government-created nonprofit that serviced student loans pursuant to a contract with the U.S. Department of Education, had a concrete injury as a result in the reduction in fees it would receive as a result of the loan discharges. The majority found that the Authority was effectively an arm of the state such that Missouri itself had standing.–Ed.]

III

The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not. We hold today that the Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up.

A

The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U. S. C. § 1098bb(a)(1). That power has limits. To begin with, statutory permission to "modify" does not authorize "basic and fundamental changes in the scheme" designed by Congress. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 225 (1994). Instead, that term carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." *Ibid.* That is how the word is ordinarily used. . . . The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them.

The Secretary's previous invocations of the HEROES Act illustrate this point. Prior to the COVID–19 pandemic, "modifications" issued under the Act implemented only minor changes, most of which were procedural. Examples include reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain actions, and allowing oral rather than written authorizations.

Here, the Secretary purported to "modif[y] the provisions of" two statutory sections and three related regulations governing student loans. The affected statutory provisions granted the Secretary the power to "discharge [a] borrower's liability," or pay the remaining principal on a loan, under certain narrowly prescribed circumstances. 20 U. S. C. §§ 1087, 1087dd(g)(1). Those circumstances were limited to a borrower's death, disability, or bankruptcy; a school's false certification of a borrower or failure to refund loan proceeds as required by law; and a borrower's inability to complete an educational program due to closure of the school. See §§ 1087(a)–(d), 1087dd(g). The corresponding regulatory provisions detailed rules and procedures for such discharges. They also defined the terms of the Government's public service loan forgiveness program and provided for discharges when schools commit malfeasance. See 34 CFR §§ 682.402, 685.212; 34 CFR pt. 674, subpt. D.

The Secretary's new "modifications" of these provisions were not "moderate" or "minor." Instead, they created a novel and fundamentally different loan forgiveness program. The new program vests authority in the Department of Education to discharge up to $10,000 for every borrower with income below $125,000 . . . . No prior limitation on loan forgiveness is left standing. Instead, every borrower within the specified income cap automatically qualifies for debt cancellation, no matter their circumstances. The Department of Education estimates that the program will cover 98.5% of all borrowers. From a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country.

The Secretary's plan has "modified" the cited provisions only in the same sense that "the French Revolution 'modified' the status of the French nobility"—it has abolished them and supplanted them with a new regime entirely. Congress opted to make debt forgiveness available only in a few particular exigent circumstances; the power to modify does not permit the Secretary to "convert that approach into its opposite" by creating a new program affecting 43 million Americans and $430 billion in federal debt. Labeling the Secretary's plan a mere "modification" does not lessen its effect, which is in essence to allow the Secretary unfettered discretion to cancel student loans. It is "highly unlikely that Congress" authorized such a sweeping loan cancellation program "through such a subtle device as permission to 'modify.'" *MCI*, 512 U.S. at 231.

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them—and that this additional term "grant[s] broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions.

Previously, waiver under the HEROES Act was straightforward: the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary. For instance, on one occasion the Secretary waived the requirement that a student provide a written request for a leave of absence. On another, he waived the regulatory provisions requiring schools and guaranty agencies to attempt collection of defaulted loans for the time period in which students were affected individuals.

Here, the Secretary does not identify any provision that he is actually waiving. No specific provision of the Education Act establishes an obligation on the part of student borrowers to pay back the Government. . . .

Yet even [the] expansive conception of waiver [according to which the Secretary is waiving the elements of the discharge and cancellation—Ed.] cannot justify the Secretary's plan, which does far more than relax existing legal requirements. The plan specifies particular sums to be forgiven and income-based eligibility requirements. The addition of these new and substantially different provisions cannot be said to be a "waiver" of the old in any meaningful sense. Recognizing this, the Secretary acknowledges that waiver alone is not enough; after waiving whatever "inapplicable" law would bar his debt cancellation plan, he says, he then "modif[ied] the provisions to bring [them] in line with this program." So in the end, the Secretary's plan relies on modifications all the way down. And as we have explained, the word "modify" simply cannot bear that load.

The Secretary and the dissent go on to argue that the power to "waive or modify" is greater than the sum of its parts. Because waiver allows the Secretary "to eliminate legal obligations in their entirety," the argument runs, the combination of "waive or modify" allows him "to reduce them to any extent short of waiver"—even if the power to "modify" ordinarily does not stretch that far. But the Secretary's program cannot be justified by such sleight of hand. The Secretary has not truly waived or modified the provisions in the Education Act authorizing specific and limited forgiveness of student loans. Those provisions remain safely intact in the U.S. Code, where they continue to operate in full force. What the Secretary has actually done is draft a new section of the Education Act from scratch by "waiving" provisions root and branch and then filling the empty space with radically new text.

Lastly, the Secretary points to a procedural provision in the HEROES Act. The Act directs the Secretary to publish a notice in the Federal Register "includ[ing] *the terms and conditions to be applied in lieu of* such statutory and regulatory provisions" as the Secretary has waived or modified. 20 U.S.C. § 1098bb(b)(2) (emphasis added). In the Secretary's view, that language authorizes "both deleting and then adding back in, waiving and then putting his own requirements in"—a sort of "red penciling" of the existing law.

Section 1098bb(b)(2) is, however, "a wafer-thin reed on which to rest such sweeping power." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs*. The provision is no more than it appears to be: a humdrum reporting requirement. Rather than implicitly granting the Secretary authority to draft new substantive statutory provisions at will, it simply imposes the obligation to report

any waivers and modifications he has made. Section 1098bb(b)(2) suggests that "waivers and modifications" includes additions. . . . But the Secretary's ability to add new terms "in lieu of" the old is limited to his authority to "modify" existing law. As with any other modification issued under the Act, no new term or condition reported pursuant to § 1098bb(b)(2) may distort the fundamental nature of the provision it alters.

The Secretary's comprehensive debt cancellation plan cannot fairly be called a waiver—it not only nullifies existing provisions, but augments and expands them dramatically. It cannot be mere modification, because it constitutes "effectively the introduction of a whole new regime." *MCI*, 512 U. S., at 234. And it cannot be some combination of the two, because when the Secretary seeks to *add* to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.

B

In a final bid to elide the statutory text, the Secretary appeals to congressional purpose. "The whole point of" the HEROES Act, the Government contends, "is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something." And that "something" was left deliberately vague because Congress intended "to grant substantial discretion to the Secretary to respond to unforeseen emergencies." . . .

The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia* v. *EPA* involved similar concerns over the exercise of administrative power. That case involved the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide emissions. Given "the 'history and the breadth of the authority that [the agency] ha[d] asserted,' and the 'economic and political significance' of that assertion," we found that there was "'reason to hesitate before concluding that Congress' meant to confer such authority."

So too here, where the Secretary of Education claims the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans. The Secretary has never previously claimed powers of this magnitude under the HEROES Act. . . .

Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind," *West Virginia*—one in which the Secretary may unilaterally define every aspect of federal student financial aid, provided he determines that recipients have "suffered direct economic hardship as a direct result of a . . . national emergency." 20 U. S. C. § 1098ee(2)(D).

The "'economic and political significance'" of the Secretary's action is staggering by any measure. Practically every student borrower benefits, regardless of circumstances. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers "between $469 billion and $519 billion," depending on the total number of borrowers ultimately covered. That is ten times the "economic impact" that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine. It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending. There is no serious dispute that the Secretary claims the authority to exercise control over "a significant portion of the American economy." *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U. S., at 159).

The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature. . . . Congress is not unaware of the challenges facing student borrowers. "More than 80 student loan forgiveness bills and other student loan legislation" were considered by Congress during its 116th session alone. And the discussion is not confined to the halls of Congress. Student loan cancellation "raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy." J. Stein, Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers, Washington Post, Aug. 31, 2022.

The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act. . . . "A decision of such magnitude and consequence" on a matter of "'earnest and profound debate across the country'" must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *West Virginia*. As then-Speaker of the House Nancy Pelosi explained:

"People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress." Press Conference, Office of the Speaker of the House (July 28, 2021).

. . . . The dissent insists that "[s]tudent loans are in the Secretary's wheelhouse." But in light of the sweeping and unprecedented impact of the Secretary's loan forgiveness program, it would seem more accurate to describe the program as being in the "wheelhouse" of the House and Senate Committees on Appropriations. Rather than dispute the extent of that impact, the dissent chooses to mount a frontal assault on what it styles "the Court's made-up major questions doctrine." But its attempt to relitigate *West Virginia* is misplaced. As we explained in that case, while the major questions "label" may be relatively recent, it refers to "an identifiable body of law that has developed over a series of significant cases" spanning decades. . . .

The Secretary, for his part, acknowledges that *West Virginia* is the law. But he objects that its principles apply only in cases concerning "agency action[s] involv[ing] the power to regulate, not the provision of government benefits." In the Government's view, "there are fewer reasons to be concerned" in cases involving benefits, which do not impose "profound burdens" on individual rights or cause "regulatory effects that might prompt a note of caution in other contexts involving exercises of emergency powers."

This Court has never drawn the line the Secretary suggests—and for good reason. Among Congress's most important authorities is its control of the purse. U. S. Const., Art. I, § 9, cl. 7. It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations. . . . In *King* v. *Burwell*, 576 U. S. 473 (2015), we declined to defer to the Internal Revenue Service's interpretation of a healthcare statute, explaining that the provision at issue affected "billions of dollars of spending each year and . . . the price of health insurance for millions of people." . . . That the statute at issue involved government benefits made no difference in *King*, and it makes no difference here.

All this leads us to conclude that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." *West Virginia*. In such circumstances, we have required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program. And as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone "clear congressional authorization" for such a program. . . .

JUSTICE BARRETT, concurring.

I join the Court's opinion in full. I write separately to address the States' argument that, under the "major questions doctrine," we can uphold the Secretary of Education's loan cancellation program only if he points to "'clear congressional authorization'" for it. In this case, the Court applies the ordinary tools of statutory interpretation to conclude that the HEROES Act does not authorize the Secretary's plan. The major questions doctrine reinforces that conclusion but is not necessary to it.

Still, the parties have devoted significant attention to the major questions doctrine, and there is an ongoing debate about its source and status. I take seriously the charge that the doctrine is inconsistent with textualism. And I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.

Yet for the reasons that follow, I do not see the major questions doctrine that way. Rather, I understand it to emphasize the importance of *context* when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation.

I

A

Substantive canons are rules of construction that advance values external to a statute. A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 117 (2010) (Barrett). Some substantive canons, like the rule of lenity, play the modest role of breaking a tie between equally plausible interpretations of a statute. Others are more aggressive—think of them as strong-form substantive canons. Unlike a tie-breaking rule, a strong-form canon counsels a court to *strain* statutory text to advance a particular value. There are many such canons on the books, including constitutional avoidance, the clear-statement federalism rules, and the presumption against retroactivity. Such rules effectively impose a "clarity tax" on Congress by demanding that it speak unequivocally if it wants to accomplish certain ends. J. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 403 (2010). This "clear statement" requirement means that the better interpretation of a statute will not necessarily prevail. Instead, if the better reading leads to a disfavored result (like provoking a serious constitutional question), the court will adopt an inferior-but-tenable reading to avoid it. So to achieve an end protected by a strong-form canon, Congress must close all plausible off ramps.

While many strong-form canons have a long historical pedigree, they are "in significant tension with textualism" insofar as they instruct a court to adopt something other than the statute's most natural meaning. Barrett 123–124. . . .

B

Some have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause. On this view, the Court overprotects the nondelegation principle by increasing the cost of delegating authority to agencies—namely, by requiring Congress to speak unequivocally in order to grant them significant rulemaking power. This "clarity tax" might prevent Congress from getting too close to the nondelegation line, especially since the "intelligible principle" test largely leaves Congress to self-police. (So the doctrine would function like constitutional avoidance.) In addition or instead, the doctrine might reflect the judgment that it is so important for Congress to exercise "[a]ll legislative Powers," Art. I, § 1, that it should be forced to think twice before delegating substantial discretion to agencies—even if the delegation is well within Congress's power to make. (So the doctrine would function like the rule that Congress must speak clearly to abrogate state sovereign immunity.) No matter which rationale justifies it, this "clear statement" version of the major questions doctrine "loads the dice" so that a plausible antidelegation interpretation wins even if the agency's interpretation is better.

While one could walk away from our major questions cases with this impression, I do not read them this way. No doubt, many of our cases express an expectation of "clear congressional authorization" to support sweeping agency action. But none requires "an 'unequivocal declaration'" from Congress authorizing the *precise* agency action under review, as our clear-statement cases do in their respective domains. And none purports to depart from the best interpretation of the text—the hallmark of a true clear-statement rule.

So what work is the major questions doctrine doing in these cases? I will give you the long answer, but here is the short one: The doctrine serves as an interpretive tool reflecting "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000).

II

The major questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at hand. After all, the meaning of a word depends on the circumstances in which it is used. To strip a word from its context is to strip that word of its meaning.

Context is not found exclusively "'within the four corners' of a statute." Background legal conventions, for instance, are part of the statute's context. Thus, courts apply a presumption of *mens rea* to criminal statutes, and a presumption of equitable tolling to statutes of limitations. . . .

Context also includes common sense, which is another thing that "goes without saying." Case reporters and casebooks brim with illustrations of why literalism—the antithesis of context-driven interpretation—falls short. Consider the classic example of a statute imposing criminal penalties on "'whoever drew blood in the streets.'" *United States* v. *Kirby*, 7 Wall. 482, 487 (1869). Read literally, the statute would cover a surgeon accessing a vein of a person in the street. But "common sense" counsels otherwise, because in the context of the criminal code, a reasonable observer would "expect the term 'drew blood' to describe a violent act," Manning 2461. Common sense similarly bears on judgments like whether a floating home is a "vessel," *Lozman* v. *Riviera Beach*, 568 U. S. 115, 120–121 (2013), whether tomatoes are "vegetables," *Nix* v. *Hedden*, 149 U. S. 304, 306–307 (1893), and whether a skin irritant is a "chemical weapon," *Bond*, 572 U. S., at 860–862.

Why is any of this relevant to the major questions doctrine? Because context is also relevant to interpreting the scope of a delegation. Think about agency law, which is all about delegations. . . . [I]magine that a grocer instructs a clerk to "go to the orchard and buy apples for the store." Though this grant of apple-purchasing authority sounds unqualified, a reasonable clerk would know that there are limits. For example, if the grocer usually keeps 200 apples on hand, the clerk does not have actual authority to buy 1,000—the grocer would have spoken more directly if she

meant to authorize such an out-of-the-ordinary purchase. A clerk who disregards context and stretches the words to their fullest will not have a job for long.

This is consistent with how we communicate conversationally. Consider a parent who hires a babysitter to watch her young children over the weekend. As she walks out the door, the parent hands the babysitter her credit card and says: "Make sure the kids have fun." Emboldened, the babysitter takes the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel. Was the babysitter's trip consistent with the parent's instruction? Maybe in a literal sense, because the instruction was open-ended. But was the trip consistent with a *reasonable* understanding of the parent's instruction? Highly doubtful. In the normal course, permission to spend money on fun authorizes a babysitter to take children to the local ice cream parlor or movie theater, not on a multiday excursion to an out-of-town amusement park. If a parent were willing to greenlight a trip that big, we would expect much more clarity than a general instruction to "make sure the kids have fun." . . .

In my view, the major questions doctrine grows out of these same commonsense principles of communication. Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" That clarity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency. . . .

This expectation of clarity is rooted in the basic premise that Congress normally "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 reh'g en banc). Or, as Justice Breyer once observed, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration." S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986); see also A. Gluck & L. Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 1003–1006 (2013). That makes eminent sense in light of our constitutional structure, which is itself part of the legal context framing any delegation. Because the Constitution vests Congress with "[a]ll legislative Powers," Art. I, § 1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch.

Crucially, treating the Constitution's structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to overenforce Article I's nondelegation principle (which, again, is the rationale behind the substantive-canon view of the major questions doctrine). My point is simply that in a system of separated powers, a reasonably informed interpreter would expect

Congress to legislate on "important subjects" while delegating away only "the details." *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825). . . .

Given these baseline assumptions, an interpreter should "typically greet" an agency's claim to "extravagant statutory power" with at least some "measure of skepticism." . . . Still, this skepticism does not mean that courts have an obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency's authority—and that marks a key difference between my view and the "clear statement" view of the major questions doctrine. . . .

Just as an instruction to "pick up dessert" is not permission to buy a four-tier wedding cake, Congress's use of a "subtle device" is not authorization for agency action of "enormous importance." . . . Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse. . . . The shared intuition behind these cases is that a reasonable speaker would not understand Congress to confer an unusual form of authority without saying more.

We have also pumped the brakes when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Utility Air*, 573 U. S., at 324. Of course, an agency's post-enactment conduct does not control the meaning of a statute, but "this Court has long said that courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court." *Bittner* v. *United States*, 598 U. S. 85, 97 (2023) (citing *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)). The agency's track record can be particularly probative in this context: A longstanding "want of assertion of power by those who presumably would be alert to exercise it" may provide some clue that the power was never conferred. . . .

[B]y my lights, the Court arrived at the most plausible reading of the statute in these cases. . . . With the full picture in view, it became evident in each case that the agency's assertion of "highly consequential power" went "beyond what Congress could reasonably be understood to have granted." *West Virginia*.

III

As for today's case: The Court surely could have "hi[t] the send button," after the routine statutory analysis set out in Part III–A. But it is nothing new for a court to punctuate its conclusion with an additional point, and the major questions doctrine is a good one here. It is obviously true that the Secretary's loan cancellation program has "vast 'economic and political significance.'" That matters not because agencies are incapable of making highly consequential decisions, but rather because an initiative of this scope, cost, and political salience is not the type that Congress lightly delegates to an agency. . . .

Granted, some context clues from past major questions cases are absent here—for example, this is not a case where the agency is operating entirely outside its usual domain. But the doctrine is not an on-off switch that flips when a critical mass of factors is present . . . .

Here, enough of those indicators are present to demonstrate that the Secretary has gone far "beyond what Congress could reasonably be understood to have granted" in the HEROES Act. Our decision today does not "trump" the statutory text, nor does it make this Court the "arbiter" of "national policy." Instead, it gives Congress's words their best reading.

The major questions doctrine has an important role to play when courts review agency action of "vast 'economic and political significance.'" But the doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way.

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

. . . . Some 20 years ago, Congress enacted legislation, called the HEROES Act, authorizing the Secretary of Education to provide relief to student-loan borrowers when a national emergency struck. The Secretary's authority was bounded: He could do only what was "necessary" to alleviate the emergency's impact on affected borrowers' ability to repay their student loans. 20 U.S.C. § 1098bb(a)(2). But within that bounded area, Congress gave discretion to the Secretary. He could "waive or modify any statutory or regulatory provision" applying to federal student-loan programs, including provisions relating to loan repayment and forgiveness. And in so doing, he could replace the old provisions with new "terms and conditions." §§ 1098bb(a)(1), (b)(2). The Secretary, that is, could give the relief that was needed, in the form he deemed most appropriate, to counteract the effects of a national emergency on borrowers' capacity to repay. That may have been a good idea, or it may have been a bad idea. Either way, it was what Congress said.

When COVID hit, two Secretaries serving two different Presidents decided to use their HEROES Act authority. The first suspended loan repayments and interest accrual for all federally held student loans. The second continued that policy for a time, and then replaced it with the loan forgiveness plan at issue here, granting most low- and middle-income borrowers up to $10,000 in debt relief. Both relied on the HEROES Act language cited above. In establishing the loan forgiveness plan, the current Secretary scratched the pre-existing conditions for loan discharge, and specified different conditions, opening loan forgiveness to more borrowers. So he "waive[d]" and "modif[ied]" statutory and regulatory provisions and applied other "terms and conditions" in their stead. That may have been a good idea, or it may have been a bad idea. Either way, the Secretary did only what Congress had told him he could. . . .

The HEROES Act's text settles the legality of the Secretary's loan forgiveness plan. The statute provides the Secretary with broad authority to give emergency relief to student-loan borrowers, including by altering usual discharge rules. What the Secretary did fits comfortably within that delegation. But the Court forbids him to proceed. As in other recent cases, the rules of the game change when Congress

enacts broad delegations allowing agencies to take substantial regulatory measures. See, *e.g.*, *West Virginia* v. *EPA*. Then, as in this case, the Court reads statutes unnaturally, seeking to cabin their evident scope. And the Court applies heightened-specificity requirements, thwarting Congress's efforts to ensure adequate responses to unforeseen events. The result here is that the Court substitutes itself for Congress and the Executive Branch in making national policy about student-loan forgiveness. . . .

[The dissent's discussion of standing is omitted.—Ed.]

II

. . . . The majority picks the statute apart piece by piece in an attempt to escape the meaning of the whole. But the whole—the expansive delegation—is so apparent that the majority has no choice but to justify its holding on extra-statutory grounds. So the majority resorts, as is becoming the norm, to its so-called major-questions doctrine. And the majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts. Thus the Court once again substitutes itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation's most important, as well as most contested, policy decisions.

A

. . . . Instead of specifying a particular crisis, that [HEROES Act] enables the Secretary to act "as [he] deems necessary" in connection with any military operation or "national emergency." § 1098bb(a)(1). But the statute's greater coverage came with no sacrifice of potency. When the law's emergency conditions are satisfied, the Secretary again has the power to "waive or modify any statutory or regulatory provision" relating to federal student-loan programs.

Before turning to the scope of that power, note the stringency of the triggering conditions. Putting aside military applications, the Secretary can act only when the President has declared a national emergency. See § 1098ee(4). Further, the Secretary may provide benefits only to "affected individuals"—defined as anyone who "resides or is employed in an area that is declared a disaster area . . . in connection with a national emergency" or who has "suffered direct economic hardship as a direct result of a . . . national emergency." §§ 1098ee(2)(C)–(D). And the Secretary can do only what he determines to be "necessary" to ensure that those individuals "are not placed in a worse position financially in relation to" their loans "because of" the emergency. § 1098bb(a)(2). That last condition, said more simply, requires the Secretary to show that the relief he awards does not go beyond

alleviating the economic effects of an emergency on affected borrowers' ability to repay their loans.

But if those conditions are met, the Secretary's delegated authority is capacious. As in the prior statutes, the Secretary has the linked power to "waive or modify any statutory or regulatory provision" applying to the student-loan programs. § 1098bb(a)(1). . . . "Any" of the referenced provisions means, well, any of those provisions. And those provisions include several relating to student-loan cancellation—more precisely, specifying conditions in which the Secretary can discharge loan principal. Now go back to the twin verbs: "waive or modify." To "waive" means to "abandon, renounce, or surrender"—so here, to eliminate a regulatory requirement or condition. Black's Law Dictionary 1894 (11th ed. 2019). To "modify" means "[t]o make somewhat different" or "to reduce in degree or extent"—so here, to lessen rather than eliminate such a requirement. *Id.*, at 1203. Then put the words together, as they appear in the statute: To "waive or modify" a requirement means to lessen its effect, from the slightest adjustment up to eliminating it altogether. Of course, making such changes may leave gaps to fill. So the statute says what is anyway obvious: that the Secretary's waiver/modification power includes the ability to specify "the terms and conditions to be applied in lieu of such [modified or waived] statutory and regulatory provisions." § 1098bb(b)(2). Finally, attach the "waive or modify" power to all the provisions relating to loan cancellation: The Secretary may amend, all the way up to discarding, those provisions and fill the holes that action creates with new terms designed to counteract an emergency's effects on borrowers.

Before reviewing how that statutory scheme operated here, consider how it might work for a hypothetical emergency that the enacting Congress had in the front of its mind. . . . A terrorist organization sets off a dirty bomb in Chicago. Beyond causing deaths, the incident leads millions of residents (including many with student loans) to flee the city to escape the radiation. They must find new housing, probably new jobs. And still their student-loan bills are coming due every month. To prevent widespread loan delinquencies and defaults, the Secretary wants to discharge $10,000 for the class of affected borrowers. Is that legal? Of course it is; it is exactly what Congress provided for. . . .

How does the majority avoid this conclusion? By picking the statute apart, and addressing each segment of Congress's authorization as if it had nothing to do with the others. For the first several pages—really, the heart—of its analysis, the majority proceeds as though the statute contains only the word "modify." It eventually gets around to the word "waive," but similarly spends most of its time treating that word alone. Only when that discussion is over does the majority inform the reader that the statute also contemplates the Secretary's addition of new terms and conditions. . . .

The majority's cardinal error is reading "modify" as if it were the only word in the statutory delegation. . . . It is one part of a couplet: "waive or modify." The first verb, as discussed above, means eliminate—usually the most substantial kind of

change. So the question becomes: Would Congress have given the Secretary power to wholly eliminate a requirement, as well as to relax it just a little bit, but nothing in between? The majority says yes. But the answer is no, because Congress would not have written so insane a law. The phrase "waive or modify" instead says to the Secretary: "Feel free to get rid of a requirement or, short of that, to alter it to the extent you think appropriate." Otherwise said, the phrase extends from minor changes all the way up to major ones. . . .

As noted earlier, the statute refers expressly to "the terms and conditions to be applied in lieu of such [modified or waived] statutory and regulatory provisions." § 1098bb(b)(2). In other words, the statute expects the Secretary's waivers and modifications to involve replacing the usual provisions with different ones. . . . [T]he statute proceeds on the premise that the usual waiver or modification will, contra the majority, involve adding "new substantive" provisions. . . .

When COVID struck, Secretary DeVos immediately suspended loan repayments and interest accrual for all federally held student loans. The majority claims it is not deciding whether that action was lawful. Which is all well and good, except that under the majority's reasoning, how could it not be [unlawful]? The suspension too offered a significant new benefit, and to an even greater number of borrowers. (Indeed, for many borrowers, it was worth much more than the current plan's $10,000 discharge.) So the suspension could no more meet the majority's pivotal definition of "modify"—as make a "minor change[ ]"—than could the forgiveness plan. . . .

B

The tell comes in the last part of the majority's opinion. When a court is confident in its interpretation of a statute's text, it spells out its reading and hits the send button. Not this Court, not today. This Court needs a whole other chapter to explain why it is striking down the Secretary's plan. And that chapter is not about the statute Congress passed and the President signed, in their representation of many millions of citizens. It instead expresses the Court's own "concerns over the exercise of administrative power." Congress may have wanted the Secretary to have wide discretion during emergencies to offer relief to student-loan borrowers. Congress in fact drafted a statute saying as much. And the Secretary acted under that statute in a way that subjects the President he serves to political accountability—the judgment of voters. But none of that is enough. This Court objects to Congress's permitting the Secretary (and other agency officials) to answer so-called major questions. Or at least it objects when the answers given are not to the Court's satisfaction. So the Court puts its own heavyweight thumb on the scales. . . .

The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation. Here is a fact of the matter: Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and

circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things wouldn't get done. In wielding the major-questions sword, last Term and this one, this Court overrules those legislative judgments. The doctrine forces Congress to delegate in highly specific terms—respecting, say, loan forgiveness of certain amounts for borrowers of certain incomes during pandemics of certain magnitudes. Of course Congress sometimes delegates in that way. But also often not. Because if Congress authorizes loan forgiveness, then what of loan forbearance? And what of the other 10 or 20 or 50 knowable and unknowable things the Secretary could do? And should the measure taken—whether forgiveness or forbearance or anything else—always be of the same size? Or go to the same classes of people? Doesn't it depend on the nature and scope of the pandemic, and on a host of other foreseeable and unforeseeable factors? You can see the problem. It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future. So, again, Congress delegates broadly. Except that this Court now won't let it reap the benefits of that choice.

And that is a major problem not just for governance, but for democracy too. Congress is of course a democratic institution; it responds, even if imperfectly, to the preferences of American voters. And agency officials, though not themselves elected, serve a President with the broadest of all political constituencies. . . .

The majority is therefore wrong to say that the "indicators from our previous major questions cases are present here." . . . In this case, the Secretary responsible for carrying out the student-loan programs forgave student loans in a national emergency under the core provision of a recently enacted statute empowering him to provide student-loan relief in national emergencies. . . .

To justify *this* use of its heightened-specificity requirement, the majority relies largely on history: "[P]ast waivers and modifications," the majority argues, "have been extremely modest." But first, it depends what you think is "past." One prior action, nowhere counted by the majority, is the suspension of loan payments and interest accrual begun in COVID's first days. That action cost the Federal Government over $100 billion, and benefited many more borrowers than the forgiveness plan at issue. . . .

Similarly unavailing is the majority's reliance on the controversy surrounding the program. Student-loan cancellation, the majority says, "raises questions that are personal and emotionally charged," precipitating "profound debate across the country." I have no quarrel with that description. . . . [A] political controversy is resolved by political means, as our Constitution requires. . . .

Notes & Questions

1. *Justice Barrett's opinion*. What do you make of Justice Barrett's opinion? Does her opinion more accurately reflect how the major questions doctrine has been used in prior cases? Whether it is an accurate descriptive account, is it normatively

more justifiable than using the doctrine as a substantive canon? Why did no other Justice sign on to her opinion? The next section on "debating major questions" canvasses two different defenses of the major questions doctrine—one that argues the doctrine is justifiable as a substantive canon, and the other, by your casebook author, that argues it is best understood as a kind of linguistic canon. (The section then canvasses some arguments against the doctrine.) Who is right?

2. *"Necessary."* As Justice Kagan points out, the statute authorizes waivers and modification that are "necessary" to ensure that a borrower is not "placed in a worse position financially" as a result of the national emergency. Would that have been an easier ground to challenge the Biden Administration's loan forgiveness program? Could one argue that pausing interest accrual and temporarily suspending payments might be necessary to ensure that a borrower is not worse off, but that eliminating the debt principal might not be necessary because it makes the borrower better off? In footnote 6 of the majority's opinion, Chief Justice Roberts wrote, "While our decision does not rest upon that reasoning, we note that the Secretary faces a daunting task in showing that cancellation of debt principal is 'necessary to ensure' that borrowers are not placed in 'worse position[s] financially in relation to' their loans, especially given the Government's prior determination that pausing interest accrual and loan repayments would achieve that end." Is that persuasive? Why or why not?

5. Debating Major Questions

Several scholarly articles have come out in the past two years regarding the Court's new major questions doctrine. Most oppose it. What follows are excerpts from two articles that oppose the new doctrine, and two articles the support it, albeit on different grounds. As you read the following materials, consider two questions, one descriptive and the other normative. First, how would you describe the major questions doctrine? (a) Is it an avoidance canon, whereby the doctrine is deployed to avoid a potentially unconstitutional result? (b) Is it a clear statement rule that insists Congress speak clearly because some constitutional value is at stake, but Congress can nevertheless make the delegation if it wants? (c) Is it neither, but rather a type of linguistic tool for better interpreting statutes? Second, which if any of these accounts would be normatively justifiable, and on what grounds?

The Major Questions Quartet
Mila Sohoni, 136 Harvard Law Review 262 (2022)
pp. 262-67, 271-72, 276, 282-84, 300-01, 308-09

. . . . [N]o one should mistake these cases for anything but what they are: separation of powers cases in the guise of disputes over statutory interpretation. . . . To begin with, the quartet unhitched the major questions exception from *Chevron*, which has been silently ousted from its position as the starting point for evaluating

whether an agency can exert regulatory authority. Instead, the CDC case initiated, and the OSHA and EPA cases completed, a transition to a new order of operations for evaluating the legality of major regulatory action. Under the test that the quartet has now designated as the "major questions doctrine," the Court will not sustain a major regulatory action unless the statute contains a clear statement that the action is authorized. The import of this shift can be measured by the yardstick of earlier cases. If the method enunciated by the quartet is the law, *King v. Burwell* and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (among others) cannot possibly have been right, and *Massachusetts v. EPA* is standing on quicksand. Yet no Justice acknowledged, let alone defended, the disjunction between such precedents and the method charted in the quartet. . . .

The world of administrative law has recently been on tenterhooks, awaiting with bated breath the Court's revival of the nondelegation doctrine. Yet, strikingly, this did not occur, despite the obvious opening for a nondelegation renaissance that these cases supplied. . . . Rather than saying anything of substance about what the law (of nondelegation) is, the Court instead told us that it is emphatically the province of the judicial branch to say what the law must say clearly. . . .

The Court's evasion of nondelegation in these decisions may presage how the Court will — or, more precisely, will not — develop constitutional doctrine in the future. As three of these cases exemplify, a sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine. The most important work that the nondelegation doctrine would perform can be accomplished on an ad hoc, agency-by-agency, rule-by-rule basis through the mechanism of the quartet's new clear statement rule — a subconstitutional device that congenially skirts the need for the Court to specify what, if anything, the nondelegation doctrine actually prohibits. . . .

Major questions challenges will load the Court's docket for years to come. And the impact of this doctrine will extend well beyond what is observable from federal court filings. The quartet, with its inchoate theory of nondelegation in tow, will cause not just an actual but an in terrorem curtailment of regulation on an ongoing basis, while placing the onus on today's gridlocked Congress to revisit complex regulatory schemes enacted years or decades ago.

To inflict a consequence of this scale on the political branches demands a *justification* from the Court, not a rain check. Yet a rain check is all we got. In none of the three cases in which it ruled against the government did the Court say that a nondelegation doubt (let alone obstacle) would exist if Congress had delegated to the agency the authority that the agency claimed. In none of the three cases in which the government lost did the Court adequately ground its momentous and new clear statement rule with a meaningful constitutional justification. . . .

It is not clear what theory of nondelegation, *if any*, underlies and justifies the major questions quartet. And without knowing what that underlying theory is, it becomes much harder to sensibly apply a rule that ostensibly exists "in service of" that underlying doctrine. The major questions quartet may seem to be a pragmatic

type of light-touch nondelegation that pumps the brakes on the occasional instance of regulatory overreach while carefully eschewing hard constitutional limits on Congress's power to delegate. But whenever the Court — especially a supposedly textualist Court — imposes a requirement on Congress that it legislate with special clarity, the Court should articulate a concrete and specific constitutional value that justifies that rule. . . .

In . . . cases scattered over the course of twenty-two years [including *MCI* and *Brown & Williamson*—Ed.], the Court negotiated the relationship between *Chevron* deference and major questions. It did so in varying ways, to be sure. Yet the common thread connecting these cases is that if the Court regarded a major question to be implicated, the agency's interpretation of the statute would not receive *Chevron* deference. Instead, the Court reclaimed the "law-interpreting function" from the agency and itself supplied the best reading of the statute. Sometimes that inquiry wound up at the same endpoint that a search for a clear statement in the statute would reach. But the endpoints were not always the same — as *King* shows — and (more importantly) the route the Court took to get to that endpoint encompassed far more terrain than a binary inquiry into whether the statute contained a clear statement that authorized the agency to achieve the result sought. . . .

The old major questions exception was a check on executive power; in contrast, the new major questions doctrine directs how Congress must draft statutes and is therefore a check on congressional power as well. . . .

Apart from its ramifications for administrative law, the quartet raises — and leaves unanswered — challenging questions concerning whether the Court's new clear statement rule is compatible with its commitment to textualism. In each of the three cases (CDC, OSHA, and EPA) in which the government lost, strong textualist arguments existed to support the result the Court reached. In each case, the Court could have, if not without some difficulty, crafted a textualist opinion that would have grappled squarely with statutory language, and *only* grappled with that language.

The Court did not do that. Instead, over the course of these three cases, it enunciated a clear statement rule — the new major questions doctrine. . . .

One school of textualists has urged that textualism requires that courts apply the ordinary meaning of statutory text, rather than bend and inflect it in accordance with clear statement rules and substantive canons. The proliferation and the malleability of such interpretive rules erode the neutrality and judicial constraint that textualism is intended to promote. This strain of textualism views substantive canons and clear statement rules as "get-out-of-text-free cards" and accordingly treats them with suspicion.

There is another strain of textualism, however, that allows such rules, though with limits. This "flexible" strain of textualism, to borrow Professor Tara Leigh Grove's terminology, regards the application of clear statement rules and substantive canons as in keeping with the broader textualist commitments to serving as a faithful agent to Congress and to judicial constraint. Because many such canons and rules are

well known, the argument goes, one can assume that Congress knows them too and takes them into account when it drafts legislation.

But even flexible textualists acknowledge courts should treat such substantive canons gingerly because of their evident potential to encourage departures from plain text when judges discern abstract "values" in constitutional text, structure, and principles. As urged by one defender of textualists' use of substantive canons — then-Professor Amy Coney Barrett — a substantive canon or clear statement rule should seek to protect "more specific" constitutional values — "state sovereign immunity," for example, which is specific, rather than "fairness," which is vague. When a substantive canon is linked to a "reasonably specific" constitutional value, "the more even [the canon's] application will be across a range of cases," and "the more specific the value, the better Congress can anticipate its effect on a statute's subsequent interpretation." While flexible textualists need not abjure such clear statement rules and canons, then, they must use them responsibly — and they must adopt and craft *new* rules of this ilk *very* responsibly.

The real bite, then, of Justice Kagan's criticism of the Court's supposed adherence to textualism is that it attacks not simply the bare propriety of clear statement rules and substantive canons, nor simply the risk of their selective application, but also the propriety of the Court's creation of *new* clear statement rules and substantive canons that lack crisp boundaries and that are linked only vaguely to the Constitution. . . .

Under extant intelligible principle doctrine, there's *no* intelligible principle obstacle to, or dubiety in, *any* of the statutes implicated in the quartet. If, on the other hand, the silent implication of the quartet is that three of these statutes pose serious problems under the intelligible principle test, or fail to satisfy it, that would represent a sharp break with extant understandings of the intelligible principle inquiry. These decisions cannot fairly be read to work such a shift sub silentio, and therefore they do not explain why a major questions inquiry was warranted. Nor do they help us to understand whether it would be warranted in future cases in which the statute states an intelligible principle. . . .

For now, it suffices to say that whichever theory of nondelegation, assuming there is any, is driving the application of the new major questions doctrine, it would have helped if the Court told us what it was. Instead, as matters stand, agencies and Congress are meant to understand that they must beware a jabberwock of nondelegation that the Court left unidentified and undefined. But by failing to set out the contours of the nondelegation problem, the major questions quartet has created a shadow nondelegation doctrine that is more formless and discretionary, and therefore potentially more dangerous, than a precise articulation of a nondelegation problem would have been. . . .

The New Major Questions Doctrine

Daniel T. Deacon and Leah M. Litman, 109 Virginia Law Review __ (2023)

. . . . The "politically controversial" element of the Court's major question doctrine is decidedly anti-formalist despite the doctrine's purportedly formalist justifications. In particular, the doctrine seems to allow a motivated political party to functionally amend a statute through political opposition rather than through the legislative process, despite the doctrine's claimed focus on returning issues to the legislative process. . . .

Triggering the major questions doctrine by reference to the political controversy surrounding a policy allows political opponents of that policy "in both legal and practical effect," to amend an Act of Congress by essentially "repealing a portion" of an agency's authority. Take the OSHA vaccine case . . . . The political controversy around vaccines meant the Court was *not* merely asking whether a vaccination policy fell within the statute's broad grant of authority according to its term; it instead altered the inquiry to ratchet up the required statutory specificity and clarity, effectively creating a carveout from a broad statutory provision.

Yet the Court insists that the principal justification for the major questions doctrine is that it channels issues into the legislative process—forcing Congress to decide them—rather than allowing those issues to be decided elsewhere. . . . And yet the Court's willingness to designate issues as major because they are subject to political contestation seems to allow issues to be resolve outside the legislature, rather than within it.

In some respects, this element of the major questions doctrine functions like a kind of delegation to future political parties and people to amend a statute outside of the formal legislative process. The doctrine allows political parties and people, well after a statute was enacted, to create the conditions such that an agency policy is deemed "major," and therefore cannot be enacted under a broad grant of authority that otherwise would authorize it. In other words, the doctrine empowers later-in-time entities to carve out statutory exceptions by creating political controversy . . . .

The Court's major question doctrine is also politicized in the sense that invites courts to rely on politically and ideologically infused judgments. Triggering application of the doctrine based on whether a given policy is politically controversial is uniquely susceptible to the kind of reasoning that ideologically aligns Justices' articulated views with the political party that appointed them. After all, the doctrine turns on courts' assessment about whether a particular policy is politically controversial. It would not be particularly surprising for a judge's assessment about what is politically controversial or politically significant to align with their own worldview, which these days is often closely aligned with that of the political party that appointed them. . . .

There, the Court's reasons about the apparent significance of COVID-19 vaccines tracked conservative commentators question-ing the necessity of the COVID-19 vaccine. And there too, polling indicated that a majority of Americans and a majority of Democrats supported a vaccine mandate, whereas less than half of Republicans supported a general vaccine requirement and only 35% supported a

vaccine requirement for large companies. The same polling disparities existed with respect to the Clean Power Plan. . . .

Now consider the agency matters that the Court has *not* identified as major questions. In *Little Sisters of the Poor v. Pennsylvania*, the then five Republican-appointed Justices on the Court upheld the Trump administration's statutory authority to create exemptions from regulations that required employer health insurance policies to cover certain forms of health care. . . . The case involved an agency's effort to exempt employers from covering certain forms of contraception. That issue, and specifically the existence of exemptions from health insurance coverage for contraception, is an issue of national political significance insofar as it's politically controversial; it is also economically significant as well. Yet that concern was nowhere evident in the Court's opinion; the Court did not require the statute to speak with the degree of specificity required in the OSHA or CDC cases. Rather, it sufficed that the statute contained a "broad" grant of authority to the agency, the very kind of authority that was not sufficient in the OSHA or the CDC or the EPA cases. . . .

Or take Trump v. Hawaii, a challenge to then President Trump's policy of excluding persons from several Muslim majority countries from entering the United States. That policy was certainly politically controversial, and there were widespread protests against it and many of President Trump's immigration policies. Yet there too, the Court did not even seem to perceive that question as significant; it certainly did not allow the significance of that question to affect the Court's analysis of the statute. . . .

A . . . skepticism of regulatory novelty is now firmly part of the major questions doctrine. . . . The novelty of an agency's regulatory approach is an indication that the policy is major and therefore likely not authorized by statute. . . . [T]he novelty of an agency's regulation has increasingly featured in the Court's major question cases and . . . has now hardened into a central principle guiding the application of the doctrine. . . .

[E]videntiary-based limit supplies an important reason that might explain regulatory novelty—changes at the societal level. Relevant changes might include a subsequent regulation that requires the agency to make adjustments, or a judicial decision that altered the regulatory or statutory landscape. . . . Or there might have been some changes in markets or society more broadly that alter the field in which an agency is regulating, like when a novel pandemic shuts down entire sectors of the market. That might explain why, for example, the OSHA had never previously adopted a vaccination requirement, or why the CDC had never previously concluded that a moratorium on evictions would restrict the spread of disease. Or we might develop new knowledge about, say, the harm caused by cigarettes and their intended effects. Alternatively, an agency's priorities or its assessment of the costs and benefits or political landscape might have shifted. . . .

[T]here is no reason why regulatory novelty would be evidence about the actual meaning of a statute, particularly when a delegation is framed in unambiguously broad and capacious terms that Congress expected an agency to

apply to changing circumstances. . . . In particular, by limiting an agency's authority to familiar contexts, the Court undermines the reasons why Congress might delegate to an agency in the first place. As a result, this aspect of the major questions doctrine hobbles delegations in circumstances in which Congress is most likely to rely on a delegatory approach, and in circumstances where delegations are most likely to be an effective governance strategy. . . .

Part of what is striking about the new major questions cases is that the justifications for delegations to agencies—the reasons why Congress might rely on delegations to agencies—now overlap with the reasons the Court has identified to be skeptical of an agency's authority. As a result, the Court's major questions doctrine undermines the very bases for delegation, turning the reasons why Congress might rely on delegations to agencies into reasons to narrowly construe and limit the reach of the delegations in the circumstances in which the delegations are likely to be used and likely to be needed for effective governance.

Take the expertise rationale for delegations. The premise of the expertise rationale is that Congress is not likely to know how or when or in what context a particular goal might be achieved. When Congress operates under those conditions, the thinking goes, it may rely on a delegatory approach and delegate authority to an agency. Yet the major questions doctrine requires Congress to anticipate many of the means that an agency might use to pursue a particular goal. The fact that Congress did not anticipate and spell out a particular method of regulation is no longer a reason why Congress might use a broad delegation to an agency; it is now a reason why a delegation may not be put toward a particular use.

Or consider the flexibility rationale for delegations to agencies. The premise behind this rationale is that there may be unanticipated problems or crises or just factual developments that arise that may require adaptation along the way. Here too, when Congress legislates in a field where this might be true, it may rely on a delegatory approach. Yet here too, the major questions doctrine requires Congress to anticipate and spell out the circumstances that might precipitate an agency action, as well as the possible responses that an agency might adopt. This too inverts the reasons why Congress might rely on and might need to rely on delegations into the bases for restricting the delegations. . . .

The Past and Future of the Major Questions Doctrine

Louis J. Capozzi III, 84 Ohio State Law Journal 191 (2023)

pp. 196-203, 206-07

. . . . The major questions doctrine sits upon an uneasy throne, its legitimacy constantly questioned. Many scholars have argued that the major questions doctrine's clear-statement rule is a recent innovation invented by Justices eager to weaken the administrative state. Justice Kagan's dissent suggested the same, arguing the Court "magically" conjured the "arrival of the 'major questions doctrine'" as part

of an "anti-administrative-state" agenda. Even more sympathetic commentators have admitted "it is not entirely clear where the doctrine comes from," "rais[ing] questions about [its] justification."

But the major questions doctrine is not entirely novel. The doctrine has a history that has largely been overlooked by scholars. That history reveals a doctrinal ancestor: a clear-statement rule in the mid-to-late 1800s to limit delegations of authority to administrative agencies. In fact, courts applied a general rule against *any* implied delegations, with perhaps more stringency in cases deemed to involve major questions. The doctrine was first applied in state courts. But the Supreme Court prominently invoked the doctrine in *ICC v. Cincinnati, New Orleans & Texas Pacific Railway Co.* (*The Queen and Crescent Case*), confronting a major claim to power by the Interstate Commerce Commission. Indeed, history shows the Court has long—if inconsistently—enforced Article I's lawmaking requirements through a clear-statement rule against implied delegations and its doctrinal sibling: the nondelegation doctrine. Rather than being a modern fabrication, *West Virginia* is merely the latest chapter of an old book. . . .

Article I "vested" "all legislative Powers herein granted" in "a Congress of the United States." Believing that excess lawmaking was a threat to liberty, the framers drafted Article I to make it difficult for Congress to pass laws. Before a bill can become law, majorities of both the House of Representatives and the Senate must concur; and either the President must also agree or two thirds of both houses must override his veto. Altogether, Article I's system of bicameralism and presentment "represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Influenced by John Locke, there was also general agreement in the 1800s that Congress could not circumvent these rules by transferring its legislative power to other entities.

By contrast, the President was not given the power to make laws. . . .

The railroads were frequent targets of new administrative agencies; by 1887, around twenty states had established commissions regulating the railroads.

In the ensuing conflicts between state agencies and railroads, courts demanded clear evidence that agencies really had the power to regulate. To be more specific, courts employed a *general* presumption against implied delegations by legislatures. In cases involving both major and mundane stakes, courts demanded a clear statement that the legislature intended to delegate the power at issue. By 1891, the rule was well established enough that Sutherland's treatise on statutory interpretation recited it. And Frank Goodnow's early 1905 treatise on American administrative law also recognized that that the power of administrative agencies to issue regulations must be "expressly given."

A good example of the rule's application comes from 1888, when the Oregon Supreme Court considered whether the state legislature had given the Oregon Board of Railroad Commissioners the power to investigate and adjudicate allegations that railroads had overcharged consumers. [Bd. of R.R. Comm'rs of Or. v. Or. Ry. &

Navigation Co., 19 P. 702, 703 (Or. 1888)]. The court held that the legislature had not, applying the rule against implied delegations. The court claimed that "for a very long time" it had "been considered the safer and better rule, in determining questions of jurisdiction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act." Not only that, when "creat[ing] a commission and cloth[ing] it with important functions," the court held that the state legislature needed to "define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent." Applying that rule, the court expressed its fear that, under the agency's view, it "would be the most important tribunal in the state," making the court skeptical the "legislature would confer so important a prerogative upon a board of commissioners." The court then concluded the agency lacked a clear statement of authority. . . .

[In ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (The Queen and Crescent Case), 167 U.S. 479, 481 (1897),] [r]ather than relying on ordinary statutory interpretation, the Court applied a rule that looks similar to the major questions doctrine applied in *West Virginia*. First, the Court explained that the power at issue was both "legislative" and very important. As to the nature of the power, the Court distinguished between "prescrib[ing] rates which shall be charged in the future," which it deemed a "legislative act," and the "judicial act" of reviewing whether rates charged in the past were just and reasonable. Having established that the power at issue was legislative, the Court repeatedly emphasized the importance of the ICC's claimed power to set railroad freight rates. "The importance of the question [at stake] cannot be overestimated," the Court explained, because "[b]illions of dollars [were] invested in railroad properties" and "[m]illions of passengers, as well as millions of tons of freight, [were] moved each year by the railroad companies[.]" And the power to set rates was "so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions[.]"

Having concluded that the ICC was claiming "a power of supreme delicacy and importance," the Court imposed a heightened statutory burden for the ICC to prove Congress had granted it the power to set carriage rates. Reciting the rule previously applied in state courts, the Court insisted that "[t]he grant of such a power is never to be implied." Rather, such a delegation must be "clear and direct"—"open to no misconstruction." . . .

Why did courts develop a rule against implied delegations? Part of the motivation was likely a formalist concern rooted in the separation of powers. Disclaimers that agencies are subject to legislative control are found repeatedly in these decisions, regardless of whether the agency won or lost. For example, after the Minnesota Supreme Court found it "perfectly evident" that the legislature *had* delegated the authority to prescribe railroad rates, the court reaffirmed that "[i]t is, of course, one of the settled maxims in constitutional law, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body." . . .

Importance and Interpretive Questions

. . . . Perhaps the major questions doctrine is simply the nondelegation doctrine deployed as a canon of constitutional avoidance, or a blend of avoidance and a clear-statement requirement. Under the modern formulation, constitutional avoidance allows courts to adopt narrowing constructions of statutes when they have "serious doubts" as to the statute's constitutionality. This version of the doctrine would be hard to defend for two reasons. First, constitutional avoidance is generally indefensible: it allows courts to rewrite statutes without having actually to decide that the statute as Congress wrote it would violate the Constitution. Second, even if the canon were otherwise legitimate, we would need to know what the serious constitutional doubt is, and thus far the Court has not explained what majorness has to do with nondelegation. That's not to say there is no connection, but that the Court has not explicated it precisely because under constitutional avoidance it does not have to do so.

The fourth and most recent version, at least as most academics understand it, is that the doctrine is one among many clear statement rules, such as the demand for a clear statement to abrogate sovereign immunity, to apply the Administrative Procedure Act to the President, or to make regulatory requirements applicable to ships sailing under foreign flags. Major questions, at least as currently theorized, also seems a poor fit for this category. Ordinarily clear statement rules exist to advance some constitutional value—like federalism or state sovereignty—and apply even against otherwise unambiguous statutes. But Congress can take the relevant action so long as it speaks clearly *and* specifically. That is, neither the best reading of a statute, nor an unambiguous statute, is enough; specificity is also required. In the major questions cases there is a constitutional value (nondelegation) that may be motivating the Court, but it is not fully clear how the canon relates to or advances the doctrine, and, if it does, whether Congress's delegations would be constitutional even if it did speak clearly. The clear-statement version also contradicts the *Chevron* framework (if we care about that) and appears to allow courts to ignore even a statute's plain meaning.

There is a way to explain, if not all, then certainly some of the cases, however, that constructs a coherent and defensible version of the doctrine. In each, the statute was plausibly ambiguous. And, in each, the Court can be understood to have resolved the ambiguity by adopting the narrower reading of the statute on the ground that, as a matter of legislative intent, it was more plausible to think that Congress intended the narrower reading. Thus, the Court arrived at what it deemed the best reading of the statute, and not necessarily a clear or unambiguous reading. It is also possible that the Court is demanding unambiguous, though not necessarily specific, statutory language; and usually the best reading of an otherwise ambiguous statute is that it does not do major, controversial things without being clearer about it. That is just another way of saying that "Congress does not hide elephants in mouseholes." But sometimes a hole is elephant sized, and the best reading of the statute suggests that

it contains an elephant whether or not Congress was clear about it [as in *King v. Burwell*].

In other words, when the Court asks for a clear statement, it does not have to be understood as deploying the same concept as other clear statement rules—what some have called "super strong clear statement rules"—where both clarity and specificity are required. . . .

On this conceptualization, the importance of a purported grant of authority would operate as a kind of linguistic canon: ordinarily, lawmakers and private parties tend to speak clearly, and interpreters tend to expect clarity, when those lawmakers or parties authorize others to make important decisions on their behalf.

Although "linguistic" in the sense that it is about how speakers use and interpret language, such an "importance canon" is unlike other linguistic canons: it is about how people and lawmakers use language in a circumscribed range of substantive contexts, namely, the delegation of important authorities to other parties. But it is unlike substantive canons: it does not flow from any substantive policy encoded in the Constitution or in longstanding tradition. One might call it a "quasi" linguistic canon, although the label does not much matter. Scholars have shown that the dividing line between linguistic and substantive canons is often thinner than traditionally believed, and there may be ambiguity-resolving canons that defy either the linguistic or substantive label, such as the longstanding and contemporaneous interpretations canon.

However labeled, such a canon may be consistent with textualism . . . .

The inquiry . . . is not whether Congress likes to delegate important questions through broad language—it often does—but rather whether it is likely to do so through ambiguous language. True, scholars have noted that Congress often compromises on ambiguous, and not only broad, language. . . . And empirical research has shown that Congress does often legislate with deliberate ambiguity to achieve greater consensus.

Whether Congress is likely to delegate the resolution of important questions through ambiguous statutory language, however, is the question, and it is an open one. The only available study suggests that the major questions canon is an accurate description of how Congress legislates. Abbe Gluck and Lisa Bressman [Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 1003-04 (2013)] surveyed congressional drafters and described their findings as follows:

> Our findings offer some confirmation for the major questions doctrine—the idea that drafters intend for Congress, not agencies, to resolve these types of questions. More than 60% of our respondents corroborated this assumption. Only 28% of our respondents indicated that drafters intend for agencies to fill ambiguities or gaps relating to major policy questions; only 38% indicated that drafters intend for agencies to fill ambiguities or gaps relating to questions of

> major economic significance; and only 33% indicated that drafters intend for agencies to fill ambiguities or gaps relating to questions of major political significance (answering questions that tracked the Court's three formulations of the major questions doctrine). We also note that we did not find differences across respondents based on whether they worked for members in the majority or the minority of Congress, which suggests that, at least for our respondents, the answer did not depend on whether the respondent was a member of the same party as the President.

. . . . That analysis makes intuitive sense. Deliberate ambiguity benefits both parties when it comes to issues that are not sufficiently important as a general matter to scuttle an entire piece of legislation. But whether to tackle climate change through CO_2 regulation, or to regulate cigarettes, or to allow a public health agency to prohibit evictions, are probably not the kinds of things legislators leave to strategic ambiguity; they are the kinds of things that one side wins and the other loses. . . .

To the extent textualists are supposed to ignore legislative intent and focus on public understanding, using importance to resolve interpretive ambiguity may also be consistent with how ordinary speakers use language. At least, insights from philosophy of language help explain why courts (and people) are more likely to find statutory ambiguities in cases involving questions of major political and economic significance. Those same insights also suggest that ordinary readers are likely to resolve such ambiguities against an agency purporting to take major and consequential actions.

As Ryan Doerfler has explained [in Ryan D. Doerfler, *High-Stakes Interpretation*, 116 Mich. L. Rev. 523, 527 (2018)], "to say that the meaning of a statute is 'clear' or 'plain' is, in effect, to say that one *knows* what that statute means." And, "[a]s numerous philosophers have observed, . . . ordinary speakers attribute 'knowledge'—and, in turn, 'clarity'—more freely or less freely depending upon the practical stakes." "In low-stakes situations," Doerfler explains, "speakers are willing to concede that a person 'knows' this or that given only a moderate level of justification." If the stakes are high, in contrast, "speakers require greater justification before allowing that someone 'knows' that same thing, holding constant that person's evidence." . . .

The application to some of the major questions cases is intuitive, at least as to the threshold question of ambiguity. The meaning of an "occupational health and safety standard" may seem straightforward in an ordinary, relatively low-stakes regulation of the workplace. We might "know" that the statute permits such regulations, or find the statute is "clear" in this regard. But when dealing with a regulation that imposes a requirement on millions of individuals, that persists beyond the workplace itself, and which requirement is itself hugely controversial, it is intuitive to think that ordinary speakers would in fact demand more epistemic confidence before concluding that the statute in fact authorizes such a requirement.

In other words, ordinary readers and speakers are more likely to find the statute ambiguous in that context than in a relatively lower-stakes context.

Moreover, these same insights suggest that, because ordinary speakers demand clearer proofs when making assertions with high stakes generally, they would demand clearer proofs that the agency has the asserted power when the regulation involves high stakes. . . . In most major questions cases, the high-stakes proposition is, "the agency has authority to do *X*." It is *that* proposition that needs to be proven with great epistemic confidence . . . .

This argument does assume a certain framing of the question: whether the statute authorizes the agency. It is possible to reframe the question as whether the agency's action is contrary to law, and then Doerfler's insights suggest that the judge should demand more epistemic certainty before deciding *that* question against the agency in the context of a consequential rulemaking. Neither the major questions canon nor textualism more broadly can tell us which of these two framings is correct; it is a matter of the legal system's other features. . . .

Fortunately, the legal system already contingently addresses this question of framing differently: because agencies are creatures of statute, they must demonstrate authority for their actions. Thus, as a matter of constitutional structure, the agencies are the asserters of the legal claim and bear the burden of proof. Even if one does not buy this distribution of proof burdens, it is enough to say that the question addressed here is the meaning of the statute, which is not necessarily the same question as whether the agency has acted unlawfully; and on that former question, the insights about high-stakes interpretation militate in favor of a major questions canon of some sort. . . .

Historical research reveals that it was commonly understood in many different contexts that, ordinarily, lawmakers and ordinary people do not delegate important authorities without being more explicit than they might be in other contexts. . . .

That is what James Madison argued in opposition to the Bank of the United States. "It cannot be denied that the power proposed to be exercised is an important power. As a charter of incorporation the bill creates an artificial person previously not existing in law," he said. "It confers important civil rights and attributes which could not otherwise be claimed. It is, though not precisely similar, at least equivalent to the naturalization of an alien, by which certain new civil characters are acquired by him. Would Congress have had the power to naturalize if it had not been expressly given?" Here we see that Madison argued that incorporation of a bank is an important power, similar to the naturalization power—and we would not lightly presume that Congress had such powers without express authorization. Later in his speech, he added, "Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented or supplied by an amendment of the Constitution." Important powers are generally not delegated through cryptic language or implication. . . .

Versions of this rule persist to this day in modern agency law. The Third Restatement explains that "[e]ven if a principal's instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts." For example, "[a] reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment." An agent might still bind the principal with regard to such matters, but at least there will be a question as to whether more clarity was required. . . .

Finally, it might be suggested that the arguments here put forward about the role of importance in resolving interpretive questions might apply not only to ambiguity, but to broad language as well. That would militate in favor of a clear statement rule. To take a quotidian example, suppose a parent tells a nanny to "have fun with the kids for the day." Although broad and unambiguous, surely the parent did not mean to suggest that the nanny can go on a joyride or buy plane tickets and take the kids to Disneyland. Sometimes broad yet unambiguous statements are not enough to authorize such important activities.

Whether that context translates to congressional delegations to agencies is a matter of social facts about how Congress actually operates and how people understand Congress to operate—or, as in agency law, how Congress and agencies ordinarily interact. As noted previously, Congress often does delegate important questions to the agency through broad language, such as when it authorizes an agency to grant licenses "in the public interest." And more generally Congress does compromise on broad statutory delegations. . . . The claim throughout has been only that importance can and perhaps should play a role in resolving interpretive questions involving ambiguities. . . .

Chapter Six: The President and the Administration

A. Appointments

2. Principal of Inferior?

To be inserted after Edmond v. United States:

United States v. Arthrex
141 S. Ct. 1970 (2021)

Chief Justice ROBERTS delivered the opinion of the Court with respect to Parts I and II.

The validity of a patent previously issued by the Patent and Trademark Office can be challenged before the Patent Trial and Appeal Board, an executive tribunal within the PTO. The Board, composed largely of Administrative Patent Judges appointed by the Secretary of Commerce, has the final word within the Executive Branch on the validity of a challenged patent. Billions of dollars can turn on a Board decision.

Under the Constitution, "[t]he executive Power" is vested in the President, who has the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; § 3. The Appointments Clause provides that he may be assisted in carrying out that responsibility by officers nominated by him and confirmed by the Senate, as well as by other officers not appointed in that manner but whose work, we have held, must be directed and supervised by an officer who has been. § 2, cl. 2. The question presented is whether the authority of the Board to issue decisions on behalf of the Executive Branch is consistent with these constitutional provisions.

I

A

. . . . The present system is administered by the Patent and Trademark Office (PTO), an executive agency within the Department of Commerce "responsible for the granting and issuing of patents" in the name of the United States. Congress has vested the "powers and duties" of the PTO in a sole Director appointed by the President with the advice and consent of the Senate. As agency head, the Director "provid[es] policy direction and management supervision" for PTO officers and employees.

This suit centers on the Patent Trial and Appeal Board (PTAB), an executive adjudicatory body within the PTO . . . . The PTAB sits in panels of at least three members drawn from the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and more than 200 Administrative Patent Judges (APJs). The Secretary of Commerce appoints the members of the PTAB (except for the Director), including the APJs at issue in this dispute. Like the 1790 Patent Board, the modern Board decides whether an invention satisfies the standards for patentability on review of decisions by primary examiners.

Through a variety of procedures, the PTAB can also take a second look at patents previously issued by the PTO. One such procedure is inter partes review. Established in 2011, inter partes review is an adversarial process by which members of the PTAB reconsider whether existing patents satisfy the novelty and nonobviousness requirements for inventions. Any person—other than the patent owner himself—can file a petition to institute inter partes review of a patent. The Director can institute review only if, among other requirements, he determines that the petitioner is reasonably likely to prevail on at least one challenged patent claim. Congress has committed the decision to institute inter partes review to the Director's

unreviewable discretion. By regulation, the Director has delegated this authority to the PTAB itself.

The Director designates at least three members of the PTAB (typically three APJs) to conduct an inter partes proceeding. The PTAB then assumes control of the process, which resembles civil litigation in many respects. The PTAB must issue a final written decision on all of the challenged patent claims within 12 to 18 months of institution. A party who disagrees with a decision may request rehearing by the PTAB.

The PTAB is the last stop for review within the Executive Branch. A party dissatisfied with the final decision may seek judicial review in the Court of Appeals for the Federal Circuit. At this stage, the Director can intervene before the court to defend or disavow the Board's decision. The Federal Circuit reviews the PTAB's application of patentability standards *de novo* and its underlying factual determinations for substantial evidence. Upon expiration of the time to appeal or termination of any appeal, "the Director shall issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent by operation of the certificate any new or amended claim determined to be patentable."

B

Arthrex, Inc. develops medical devices and procedures for orthopedic surgery. In 2015, it secured a patent on a surgical device for reattaching soft tissue to bone without tying a knot, U.S. Patent No. 9,179,907 ('907 patent). Arthrex soon claimed that Smith & Nephew, Inc. and ArthroCare Corp. (collectively, Smith & Nephew) had infringed the '907 patent, and the dispute eventually made its way to inter partes review in the PTO. Three APJs formed the PTAB panel that conducted the proceeding and ultimately concluded that a prior patent application "anticipated" the invention claimed by the '907 patent, so that Arthrex's patent was invalid.

On appeal to the Federal Circuit, Arthrex raised for the first time an argument premised on the Appointments Clause of the Constitution. That Clause specifies how the President may appoint officers who assist him in carrying out his responsibilities. *Principal* officers must be appointed by the President with the advice and consent of the Senate, while *inferior* officers may be appointed by the President alone, the head of an executive department, or a court. Art. II, § 2, cl. 2. Arthrex argued that the APJs were principal officers and therefore that their appointment by the Secretary of Commerce was unconstitutional. The Government intervened to defend the appointment procedure.

The Federal Circuit agreed with Arthrex that APJs were principal officers. Neither the Secretary nor Director had the authority to review their decisions or to remove them at will. The Federal Circuit held that these restrictions meant that APJs

were themselves principal officers, not inferior officers under the direction of the Secretary or Director.

To fix this constitutional violation, the Federal Circuit invalidated the tenure protections for APJs. . . .

II

A

. . . . Today, thousands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through "a clear and effective chain of command" down from the President, on whom all the people vote. James Madison extolled this "great principle of unity and responsibility in the Executive department," which ensures that "the chain of dependence [will] be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (1789). . . .

B

Congress provided that APJs would be appointed as inferior officers, by the Secretary of Commerce as head of a department. The question presented is whether the nature of their responsibilities is consistent with their method of appointment. As an initial matter, no party disputes that APJs are officers . . . .

The starting point for each party's analysis is our opinion in *Edmond*. There we explained that "[w]hether one is an 'inferior' officer depends on whether he has a superior" other than the President. An inferior officer must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."

In *Edmond*, we applied this test to adjudicative officials within the Executive Branch—specifically, Coast Guard Court of Criminal Appeals judges appointed by the Secretary of Transportation. We held that the judges were inferior officers because they were effectively supervised by a combination of Presidentially nominated and Senate confirmed officers in the Executive Branch . . . . "What is significant," we concluded, "is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." . . .

Edmond goes a long way toward resolving this dispute. What was "significant" to the outcome there—review by a superior executive officer—is absent here: APJs have the "power to render a final decision on behalf of the United States" without any such review by their nominal superior or any other principal officer in the Executive Branch. . . . [T]he Director's "power" in that regard is limited to carrying out the ministerial duty that he "shall issue and publish a certificate"

canceling or confirming patent claims he had previously allowed, as dictated by the APJs' final decision. . . .

The Government and Smith & Nephew assemble a catalog of steps the Director might take to affect the decisionmaking process of the PTAB . . . . [T]he Director, according to the Government, could manipulate the composition of the PTAB panel that acts on the rehearing petition. For one thing, he could "stack" the original panel to rehear the case with additional APJs assumed to be more amenable to his preferences. For another, he could assemble an entirely new panel consisting of himself and two other officers . . . .

The Government proposes (and the dissents embrace) a roadmap for the Director to evade a statutory prohibition on review without having him take responsibility for the ultimate decision. Even if the Director succeeds in procuring his preferred outcome, such machinations blur the lines of accountability demanded by the Appointments Clause. The parties are left with neither an impartial decision by a panel of experts nor a transparent decision for which a politically accountable officer must take responsibility. . . .

The Government contends that the Director may respond after the fact by removing an APJ "from his judicial assignment without cause" and refusing to designate that APJ on *future* PTAB panels. Even assuming that is true, reassigning an APJ to a different task going forward gives the Director no means of countermanding the final decision already on the books. Nor are APJs "meaningfully controlled" by the threat of removal from federal service entirely because the Secretary can fire them after a decision only "for such cause as will promote the efficiency of the service." In all the ways that matter to the parties who appear before the PTAB, the buck stops with the APJs, not with the Secretary or Director. . . .

Given the insulation of PTAB decisions from any executive review, the President can neither oversee the PTAB himself nor "attribute the Board's failings to those whom he *can* oversee." *Free Enterprise Fund*, 561 U.S., at 496. APJs accordingly exercise power that conflicts with the design of the Appointments Clause "to preserve political accountability." *Edmond*, 520 U.S., at 663. . . .

C

History reinforces the conclusion that the unreviewable executive power exercised by APJs is incompatible with their status as inferior officers. Since the founding, principal officers have directed the decisions of inferior officers on matters of law as well as policy. Hamilton articulated the principle of constitutional accountability underlying such supervision in a 1792 Treasury circular. Writing as Secretary of the Treasury to the customs officials under his charge, he warned that any deviations from his instructions "would be subversive of uniformity in the execution of the laws." 3 Works of Alexander Hamilton 557 (J. Hamilton ed. 1850). "The power to superintend," he explained, "must imply a right to judge and direct,"

thereby ensuring that "the responsibility for a wrong construction rests with the head of the department, when it proceeds from him." *Id.*, at 559.

Early congressional statutes expressly empowered department heads to supervise the work of their subordinates, sometimes by providing for an appeal in adjudicatory proceedings to a Presidentially nominated and Senate confirmed officer. See, *e.g.*, 1 Stat. 66–67 (authorizing appeal of auditor decisions to Comptroller); § 4, 1 Stat. 378 (permitting supervisors of the revenue to issue liquor licenses "subject to the superintendence, control and direction of the department of the treasury"). For the most part, Congress left the structure of administrative adjudication up to agency heads, who prescribed internal procedures (and thus exercised direction and control) as they saw fit. See J. Mashaw, Creating the Administrative Constitution 254 (2012).

This Court likewise indicated in early decisions that adequate supervision entails review of decisions issued by inferior officers. For example, we held that the Commissioner of the General Land Office—the erstwhile agency that adjudicated private claims to public lands and granted land patents—could review decisions of his subordinates despite congressional silence on the matter. Our explanation, almost "too manifest to require comment," was that the authority to review flowed from the "necessity of 'supervision and control,' vested in the commissioner, acting under the direction of the President." *Barnard v. Ashley*, 18 How. 43, 45, 5 L.Ed. 285 (1856). . . .

Congress has carried the model of principal officer review into the modern administrative state. As the Government forthrightly acknowledged at oral argument, it "certainly is the norm" for principal officers to have the capacity to review decisions made by inferior adjudicative officers. The Administrative Procedure Act, from its inception, authorized agency heads to review such decisions. 5 U.S.C. § 557(b). . . .

When it comes to the patent system in particular, adjudication has followed the traditional rule that a principal officer, if not the President himself, makes the final decision on how to exercise executive power. Recall that officers in President Washington's Cabinet formed the first Patent Board in 1790. 1 Stat. 109–110. The initial determination of patentability was then relegated to the courts in 1793, but when the Executive Branch reassumed authority in 1836, it was the Commissioner of Patents—appointed by the President with the advice and consent of the Senate—who exercised control over the issuance of a patent. 5 Stat. 117, 119. . . .

We hold that the unreviewable authority wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to an inferior office. . . . Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us. . . .

III

Decisions by APJs must be subject to review by the Director. . . .

The Government defends the different approach adopted by the Federal Circuit. The Court of Appeals held unenforceable APJs' protection against removal . . . . The Government contends that APJs would then be inferior officers . . . . But regardless whether the Government is correct that at-will removal by the Secretary would cure the constitutional problem, review by the Director better reflects the structure of supervision within the PTO and the nature of APJs' duties, for the reasons we have explained. . . .

Today, we reaffirm and apply the rule from *Edmond* that the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate. The Constitution therefore forbids the enforcement of statutory restrictions on the Director that insulate the decisions of APJs from his direction and supervision. To be clear, the Director need not review every decision of the PTAB. What matters is that the Director have the discretion to review decisions rendered by APJs. In this way, the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people.

Justice GORSUCH, concurring in part and dissenting in part.
[This opinion is on the issue of remedy and severability.—Ed.]

. . . . In Part III of its opinion, the Court invokes severability doctrine. . . .

Faced with an application of a statute that violates the Constitution, a court might look to the text of the law in question to determine what Congress has said should happen in that event. Sometimes Congress includes "fallback" provisions of just this sort, and sometimes those provisions tell us to disregard this or that provision if its statutory scheme is later found to offend the Constitution.

The problem here is that Congress has said nothing of the sort. And here it is the combination of separate statutory provisions that conspire to create a constitutional violation. Through some provisions, Congress has authorized executive officers to cancel patents. Through others, it has made their exercise of that power unreviewable within the Executive Branch. It's the combination of these provisions—the exercise of executive power and unreviewability—that violates the Constitution's separation of powers.

Nor is there only one possible way out of the problem. First, one could choose as the Court does and make PTAB decisions subject to review by the Director, who is answerable to the President through a chain of dependence. Separately, one could specify that PTAB panel members should be appointed by the President and confirmed by the Senate and render their decisions directly reviewable by the President. Separately still, one could reassign the power to cancel patents to the Judiciary where it resided for nearly two centuries. Without some direction from Congress, this problem cannot be resolved as a matter of statutory interpretation. All that remains is a policy choice.

In circumstances like these, I believe traditional remedial principles should be our guide. Early American courts did not presume a power to "sever" and excise portions of statutes in response to constitutional violations. Instead, when the application of a statute violated the Constitution, courts simply declined to enforce the statute in the case or controversy at hand. I would follow that course today by identifying the constitutional violation, explaining our reasoning, and "setting aside" the PTAB decision in this case. . . .

No doubt, if Congress is dissatisfied with the choice the Court makes on its behalf today, it can always reenter the field and revise our judgment. But doesn't that just underscore the legislative nature of the Court's judgment? And doesn't deciding for ourselves which policy course to pursue today allow Congress to disclaim responsibility for our legislative handiwork much as the President might the PTAB's executive decisions under the current statutory structure? . . .

Instead of confronting these questions, the Court has justified modern "severance" doctrine on assumptions and presumptions about what Congress would have chosen to do, had it known that its statutory scheme was unconstitutional. But any claim about "congressional intent" divorced from enacted statutory text is an appeal to mysticism. . . .

Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, concurring in the judgment in part and dissenting in part.

I agree with Justice THOMAS's discussion on the merits and I join Parts I and II of his dissent. Two related considerations also persuade me that his conclusion is correct.

First, in my view, the Court should interpret the Appointments Clause as granting Congress a degree of leeway to establish and empower federal offices. Neither that Clause nor anything else in the Constitution describes the degree of control that a superior officer must exercise over the decisions of an inferior officer. . . .

Congress' scheme is consistent with our Appointments Clause precedents. . . . All told, the Director maintains control of decisions insofar as they determine policy. The Director cannot rehear and decide an individual case on his own; but Congress had good reason for seeking independent Board determinations in those cases—cases that will apply, not create, Director-controlled policy. . . .

Second, I believe the Court, when deciding cases such as these, should conduct a functional examination of the offices and duties in question rather than a formalist, judicial-rules-based approach. In advocating for a "functional approach," I mean an approach that would take account of, and place weight on, why Congress enacted a particular statutory limitation. It would also consider the practical consequences that are likely to follow from Congress' chosen scheme. . . .

In this suit, a functional approach, which considers purposes and consequences, undermines the Court's result. Most agencies (and courts for that

matter) have the power to reconsider an earlier decision, changing the initial result if appropriate. Congress believed that the PTO should have that same power and accordingly created procedures for reconsidering issued patents. Congress also believed it important to strengthen the reconsideration power with procedural safeguards that would often help those whom the PTO's initial decision had favored, such as the requirement that review be available only when there is a "reasonable likelihood" that the patent will be invalid. Given the technical nature of patents, the need for expertise, and the importance of avoiding political interference, Congress chose to grant the APJs a degree of independence. These considerations set forth a reasonable legislative objective sufficient to justify the restriction upon the Director's authority that Congress imposed. . . .

I continue to believe that a more functional approach to constitutional interpretation in this area is superior. As for this particular suit, the consequences of the majority's rule are clear. The nature of the PTAB calls for technically correct adjudicatory decisions. . . . [T]hat fact calls for greater, not less, independence from those potentially influenced by political factors. The Court's decision prevents Congress from establishing a patent scheme consistent with that idea. . . .

The Founders wrote a Constitution that they believed was flexible enough to respond to new needs as those needs developed and changed over the course of decades or centuries. At the same time, they designed a Constitution that would protect certain basic principles. A principle that prevents Congress from affording inferior level adjudicators some decisionmaking independence was not among them. . . .

Justice THOMAS, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join as to Parts I and II, dissenting.

For the very first time, this Court holds that Congress violated the Constitution by vesting the appointment of a federal officer in the head of a department. Just who are these "principal" officers that Congress unsuccessfully sought to smuggle into the Executive Branch without Senate confirmation? About 250 administrative patent judges who sit at the bottom of an organizational chart, nestled under at least two levels of authority. Neither our precedent nor the original understanding of the Appointments Clause requires Senate confirmation of officers inferior to not one, but *two* officers below the President.

I

The Executive Branch is large, and the hierarchical path from President to administrative patent judge is long. At the top sits the President, in whom the executive power is vested. U.S. Const., Art. II, § 1. Below him is the Secretary of Commerce, who oversees the Department of Commerce and its work force of about 46,000. Within that Department is the United States Patent and Trademark Office led

by a Director. In the Patent and Trademark Office is the Patent Trial and Appeal Board. Serving on this Board are administrative patent judges. . . .

[T]he [Federal Circuit] professed to transform these principal officers into inferior ones by withdrawing statutory removal restrictions. The Court . . . concludes that the better way to judicially convert these principal officers to inferior ones is to allow the Director to review Board decisions unilaterally. That both the Federal Circuit and this Court would take so much care to ensure that administrative patent judges, appointed as inferior officers, would remain inferior officers at the end of the day suggests that perhaps they were inferior officers to begin with. Instead of rewriting the Director's statutory powers, I would simply leave intact the patent scheme Congress has created.

II

. . . . The Court has been careful not to create a rigid test to divide principal officers—those who must be Senate confirmed—from inferior ones. See, *e.g.*, *Edmond v. United States*, 520 U.S. 651, 661 (1997) (the Court has "not set forth an exclusive criterion"); *Morrison v. Olson*, 487 U.S. 654, 671 (1988) ("We need not attempt here to decide exactly where the line falls between the two types of officers"). Instead, the Court's opinions have traditionally used a case-by-case analysis. And those analyses invariably result in this Court deferring to Congress' choice of which constitutional appointment process works best. No party (nor the majority) has identified any instance in which this Court has found unconstitutional an appointment that aligns with one of the two processes outlined in the Constitution.

Our most exhaustive treatment of the inferior-officer question is found in *Edmond*. . . . Recognizing that no "definitive test" existed for distinguishing between inferior and principal officers, the Court set out two general guidelines. First, there is a formal, definitional requirement. The officer must be lower in rank to "a superior." But according to the Court in *Edmond*, formal inferiority is "not enough." So the Court imposed a functional requirement: The inferior officer's work must be "directed and supervised at some level by others who were appointed by Presidential nomination with advice and consent of the Senate." Because neither side asks us to overrule our precedent, I would apply this two-part guide.

There can be no dispute that administrative patent judges are, in fact, inferior: They are lower in rank to at least two different officers. As part of the Board, they serve in the Patent and Trademark Office, run by a Director "responsible for providing policy direction and management supervision for the Office and for the issuance of patents and the registration of trademarks." That Office, in turn, is "[w]ithin the Department of Commerce" and "subject to the policy direction of the Secretary of Commerce." The Secretary, in consultation with the Director, appoints administrative patent judges.

As a comparison to the facts in *Edmond* illustrates, the Director and Secretary are also functionally superior because they supervise and direct the work administrative patent judges perform. In *Edmond*, the Court focused on the supervision exercised by two different entities: the Judge Advocate General and the Court of Appeals for the Armed Forces (CAAF). The Judge Advocate General exercised general administrative oversight over the court on which the military judges sat. He possessed the power to prescribe uniform rules of procedure for the court and to formulate policies and procedure with respect to the review of court-martial cases in general. And he could remove a Court of Criminal Appeals judge from his judicial assignment without cause, a "powerful tool for control."

The Court noted, however, that "[t]he Judge Advocate General's control over Court of Criminal Appeals judges is . . . not complete." This was so for two reasons. He could "not attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings." And, he had "no power to reverse decisions of the court."

But this lack of complete control did not render the military judges principal officers. That is because one of the two missing powers resided, to a limited degree, in a different entity: the CAAF [Court of Appeals for the Armed Forces]. CAAF could not "reevaluate the facts" where "there [was] some competent evidence in the record to establish each element of the offense beyond a reasonable doubt." Still, it was "significant . . . that the judges of the Court of Criminal Appeals ha[d] no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." Having recounted the various means of supervision, the Court held that the military judges were inferior officers. Consistent with the Constitution, Congress had the power to vest the judges' appointments in the Secretary of Transportation.

The Director here possesses even greater functional power over the Board than that possessed by the Judge Advocate General. Like the Judge Advocate General, the Director exercises administrative oversight over the Board. Because the Board is within the Patent and Trademark Office, all of its powers and duties are ultimately held by the Director. He "direct[s]" and "supervis[es]" the Office and "the issuance of patents." He may even "fix the rate of basic pay for the administrative patent judges." . . .

He may issue binding policy directives that govern the Board. And he may release "instructions that include exemplary applications of patent laws to fact patterns, which the Board can refer to when presented with factually similar cases." His oversight is not just administrative; it is substantive as well.

The Director has yet another "powerful tool for control." He may designate which of the 250-plus administrative patent judges hear certain cases and may remove administrative patent judges from their specific assignments without cause. So, if any administrative patent judges depart from the Director's direction, he has ample power to rein them in to avoid erroneous decisions. And, if an administrative patent judge consistently fails to follow instructions, the Secretary has the authority to fire him.

To be sure, the Director's power over administrative patent judges is not complete. He cannot singlehandedly reverse decisions. Still, he has two powerful checks on Board decisions not found in *Edmond.*

Unlike the Judge Advocate General and CAAF in *Edmond*, the Director *may* influence individual proceedings. The Director decides in the first instance whether to institute, refuse to institute, or de-institute particular reviews, a decision that is "final and nonappealable." If the Director institutes review, he then may select which administrative patent judges will hear the challenge. Alternatively, he can avoid assigning *any* administrative patent judge to a specific dispute and instead designate himself, his Deputy Director, and the Commissioner of Patents. In addition, the Director decides which of the thousands of decisions issued each year bind other panels as precedent. No statute bars the Director from taking an active role to ensure the Board's decisions conform to his policy direction.

But, that is not all. If the administrative patent judges "(somehow) reach a result he does not like, the Director can add more members to the panel—including himself—and order the case reheard." There is a formalized process for this type of review. The Director may unilaterally convene a special panel—the Precedential Opinion Panel—to review a decision in a case and determine whether to order rehearing . . . . The default members of the panel are the Director, the Commissioner for Patents, and the Chief Administrative Patent Judge. So even if *all* administrative patent judges decide to defy the Director's authority and go their respective ways, the Director and the Commissioner for Patents can still put a stop to it. And, if the Commissioner for Patents is running amuck, the Director may expand the size of the panel or may replace the Commissioner with someone else, including his Deputy Director. Further, this panel is not limited to reviewing whether there is "competent evidence" as the CAAF was. It can correct anything that may "have been misapprehended or overlooked" in the previous opinion. This broad oversight ensures that administrative patent judges "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Edmond*, 520 U.S., at 665.

B

[T]he majority suggests most of *Edmond* is superfluous: All that matters is whether the Director has the statutory authority to individually reverse Board decisions.

The problem with that theory is that there is no precedential basis (or historical support) for boiling down "inferior-officer" status to the way Congress structured a particular agency's process for reviewing decisions. . . . Recall that the CAAF could not reevaluate certain factual conclusions reached by the military judges on the Court of Criminal Appeals. And recall that neither CAAF nor the Judge Advocate General could "attempt to influence" individual proceedings. Yet, those constraints on supervision and control did not matter because the Court in *Edmond*

considered all the means of supervision and control exercised by the superior officers. . . .

III

. . . . If the Court truly believed administrative patent judges are principal officers, then the Court would need to vacate the Board's decision. As this Court has twice explained, "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." *Lucia*, 138 S.Ct., at 2055. . . .

[A]nother problem arises: No constitutional violation has occurred in this suit. . . . Arthrex has not argued that it sought review by the Director. So to the extent "the source of the constitutional violation is the restraint on the review authority of the Director," his review was not constrained. Without any constitutional violation in this suit to correct, one wonders how the Court has the power to issue a remedy. . . .

IV

Although unnecessary to resolve this suit, at some point it may be worth taking a closer look at whether the functional element of our test in *Edmond*—the part that the Court relies on today—aligns with the text, history, and structure of the Constitution. The founding era history surrounding the Inferior Officer Clause points to at least three different definitions of an inferior officer, none of which requires a case-by-case functional examination of exactly how much supervision and control another officer has. The rationales on which *Edmond* relies to graft a functional element into the inferior-officer inquiry do not withstand close scrutiny.

A

Early discussions of inferior officers reflect at least three understandings of who these officers were—and who they were not—under the Appointments Clause. Though I do not purport to decide today which is best, it is worth noting that administrative patent judges would be inferior under each.

1

The narrowest understanding divides all executive officers into three categories: heads of departments, superior officers, and inferior officers. During the Constitutional Convention, James Madison supported this view in a brief discussion about the addition of the Inferior Officer Clause. 2 Records of the Federal Convention of 1787, p. 627 (M. Farrand ed. 1911) (Farrand); see also Mascott, Who Are "Officers of the United States," 70 Stan. L. Rev. 443, 468, n. 131 (2018). Gouverneur Morris moved to add the clause. But Madison initially resisted. He argued that it did "not go

far enough if it be necessary at all [because] Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 Farrand 627. The motion nonetheless passed. The crux of Madison's objection appears to rely on the idea that there are three types of officers: inferior officers, superior officers, and department heads. Congress could vest the appointment of inferior officers in the President, the courts, or a department head. But the others must be appointed by the President with Senate confirmation.

Some held a second understanding: Inferior officers encompass nearly *all* officers. As Justice Story put it, "[w]hether the *heads of departments* are inferior officers in the sense of the constitution, was much discussed, in the debate on the organization of the department of foreign affairs, in 1789." 3 Commentaries on the Constitution of the United States 386, n. 1 (1833) (emphasis added). Proponents of this understanding argued that the Secretary of State should be an inferior officer because he was inferior to the President . . . . [On this view, any officer not mentioned specifically in the Appointments Clause is inferior.—Ed.]

But others disagreed, contending this went "too far; because the Constitution" elsewhere specifies "'the principal officer in each of the Executive departments.'" 1 Annals of Cong. 459. These Framers endorsed a third understanding, which distinguished just between inferior and principal officers. See *id.*, at 518 ("We are to have a Secretary for Foreign Affairs, another for War, and another for the Treasury; now, are not these the principal officers in those departments"). A single officer could not simultaneously be both. Ultimately, this group won out, "expressly designat[ing]" the Secretary of the Department of Foreign Affairs as a "principal officer," not an inferior one. . . .

State constitutions at the founding lend credence to this idea that inferior officers encompass all officers except for the heads of departments. For example, the 1789 Georgia State Constitution provided that "militia officers and the secretaries of the governor ... shall be appointed by the governor." Art. IV, § 2. But "[t]he general assembly may vest the appointment of inferior officers in the governor, the courts of justice, or in such other manner as they may by law establish." The law thus distinguished between secretaries and inferior officers. Similarly, the Delaware Constitution directed that "[t]he State treasurer shall be appointed annually by the house of representatives, with the concurrence of the Senate." Art. VIII, § 3 (1792). But "all inferior officers in the treasury department" were to be "appointed in such manner as is or may be directed by law." § 6. . . .

2

Regardless of which of the three interpretations is correct, all lead to the same result here. Administrative patent judges are inferior officers. . . .

It is agreed that administrative patent judges are not the heads of any department. Thus, to the extent a "principal officer . . . is the equivalent of the head of department," administrative patent judges are not one.

And under the Madisonian tripartite system, administrative patent judges would still be inferior. These judges are not heads of departments. Nor are they "superior officers." An administrative patent judge is not "[h]igher" than or "greater in dignity or excellence" to other officers inferior to him. 2 Johnson, Dictionary of the English Language (defining "Superiour"). Tellingly, neither respondent nor the majority identify a *single* officer lower in rank or subordinate to administrative patent judges. . . .

B

If anything, the Court's functional prong in *Edmond* may merit reconsideration. . . . [T]he accountability feature of the Appointments Clause was not about accountability for specific *decisions* made by inferior officers, but rather accountability for "'a bad nomination.'" [*Edmond*, 520 U.S.] at 660 (quoting The Federalist No. 77, p. 392 (M. Beloff ed. 1987)). . . .

[N]ot every officer was neatly categorized as a principal officer or an inferior one. For example, the Act of Congress Establishing the Treasury Department . . . does not label the Comptroller as a principal officer or a department head. Nor is he expressly designated as an inferior officer. Moreover, his duties extended beyond doing merely what the Secretary deemed proper. The Comptroller's statutory power and authority included "countersign[ing] all warrants drawn by the Secretary of Treasury," "provid[ing] for the regular and punctual payment of all monies which may be collected," and "direct[ing] prosecutions for all delinquencies of officers of the revenue, and for debts that are, or shall be due to the United States." . . .

The Court today draws a new line dividing inferior officers from principal ones. The fact that this line places administrative patent judges on the side of Ambassadors, Supreme Court Justices, and department heads suggests that something is not quite right. At some point, we should take stock of our precedent to see if it aligns with the Appointments Clause's original meaning. But, for now, we must apply the test we have. And, under that test, administrative patent judges are both formally and functionally inferior to the Director and to the Secretary. I respectfully dissent.

NOTES AND QUESTIONS

1. ***Is there a new test?*** Recall that in *Edmond*, the Court at least arguably created a *disjunctive* test: an officer is inferior if he or she can be removed by another officer at will, or if another officer can revise or countermand his or her decisions. Under this disjunctive test, is Justice Thomas correct that the APJs are inferior because the Director can remove them without cause from any specific assignment? Does the majority's opinion suggest that the more important part of the test is whether particular decisions are revisable? Does this convert *Edmond*'s disjunctive test into a single test? Does the majority ever recognize this, if so?

2. ***What's the majority's theory?*** Why does the majority focus so much on individual decisions by officers? Is their theory of executive power that the President must be able to exercise discretion over *every* decision by an executive-branch officer? If so, is it not enough for the President to be able to remove officers after they have made bad decisions? In a part of his opinion not excerpted above, Justice Thomas pointed out that an FBI officer might use unlawful force leading to someone's death. That exercise of executive power is not reversible. Has the President, by not personally exercising the power of FBI agents, been deprived of "the executive power," somehow? Or is "the executive power" really the power to oversee the execution of the laws?

3. ***Expertise or regulatory capture?*** Justice Breyer's opinion points to the need to create independent adjudicators with expertise. In a part of his opinion not excerpted above, Justice Gorsuch mentioned the example of an APJ who had worked for the corporation Apple and had ruled in Apple's favor in 96 percent of the IPR cases involving Apple on which he had served as an APJ. After six years, that APJ retired and rejoined Apple, presumably with quite a lucrative salary. Justice Breyer did not respond to this point—should he have?

4. ***How many types of officers are there?*** In Justice Thomas's dissent, he notes that there are three possible originalist views of inferior officers. One view is that all officers not specifically mentioned in the Appointments Clause are inferior, but this view is implausible because the Opinions Clause specifically references *the* "principal officer" of the respective departments, who are not otherwise enumerated in the Appointment Clause.

A more plausible view is related to the Opinions Clause, too: because the Clause refers to *the* principal officer (singular) of a department, this suggests that the principal officer is the equivalent of the head of the department in the Appointments Clause, and that each department has only one principal officer and all other officers are inferior. Note that this view tracks the *language* of the modern cases: there are only principal and inferior officers. But the modern cases suggest that many more officers are principal than merely the heads of the departments.

Justice Thomas points to a third view: that there is a principal officer (or head of department), and then there are inferior officers and non-inferior officers (or what he calls "superior" officers). This view is probably the most plausible because it accounts for the singular principal officer of the department, but that does not necessarily mean that all other officers are inferior. Take the Comptroller example. The Comptroller was not the principal officer of the Treasury Department, but was the Comptroller an inferior officer? Doesn't that depend on how much review and control the Secretary of the Treasury had over the Comptroller's duties? This suggests that it's perfectly plausible for a department to have a principal officer, and then several inferior and also non-inferior officers.

Justice Thomas claims that under this view, the APJs are inferior officers; they cannot be superior officers, he writes, because they have no subordinates. But take the example of the Comptroller again. Whether the Comptroller is inferior or *non-*

inferior has nothing to do with whether the Comptroller has a subordinate. It has everything to do with whether the Comptroller has a *superior* who can control the Comptroller or revise the Comptroller's work. If that's the case, doesn't that take us right back to *Edmond*? Put another way, if this is the correct of the three possible originalist views, isn't it still possible that *Edmond*'s "functional" test will be necessary to determine who is inferior and who is non-inferior? And once it is determined that an officer is non-inferior, that officer still (per the Appointments Clause) must be appointed by and with advice and consent, even if that officer is not *the* principal officer of the department.

B. Removals

Revised *Myers v. United States* excerpt:

Myers v. United States
272 U.S. 52 (1926)

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

Myers . . . was on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Or., for a term of four years. On January 20, 1920, Myers' resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. February 10th, Myers sent a petition to the President and another to the Senate committee on post offices, asking to be heard, if any charges were filed. He protested to the department against his removal, and continued to do so until the end of his term. He pursued no other occupation and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal, which, as claimed by supplemental petition filed after July 21, 1921, the end of his term, amounted to $8,838.71. In August, 1920, the President made a recess appointment of one Jones, who took office September 19, 1920. . . .

By the sixth section of the Act of Congress of July 12, 1876, 19 Stat. 80, 81, under which Myers was appointed with the advice and consent of the Senate as a first-class postmaster, it is provided that: 'Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.'

The Senate did not consent to the President's removal of Myers during his term. If this statute in its requirement that his term should be four years unless

sooner removed by the President by and with the consent of the Senate is valid, the appellant . . . is entitled to recover his unpaid salary for his full term . . . .

The relevant parts of article 2 of the Constitution are as follows:

'Section 1. The executive Power shall be vested in a President of the United States of America. * * *

'Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Officers, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

'He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

'The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

'Section 3. He shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

'Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.'

. . . . The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested, was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as section 4 of article 2, above quoted, provides for removal from office by impeachment. The subject was not discussed in the Constitutional Convention. . . .

In the House of Representatives of the First Congress, on Tuesday, May 18, 1789, Mr. Madison moved in the committee of the whole that there should be established three executive departments, one of Foreign Affairs, another of the Treasury, and a third of War, at the head of each of which there should be a Secretary,

to be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President. The committee agreed to the establishment of a Department of Foreign Affairs, but a discussion ensued as to making the Secretary removable by the President. 'The question was now taken and carried, by a considerable majority, in favor of declaring the power of removal to be in the President.'

On June 16, 1789, the House resolved itself into a committee of the whole on a bill proposed by Mr. Madison for establishing an executive department to be denominated the Department of Foreign Affairs, in which the first clause, after stating the title of the officer and describing his duties, had these words 'to be removable from office by the President of the United States.' After a very full discussion the question was put; Shall the words 'to be removable by the President' be struck out? It was determined in the negative—yeas 20, nays 34.

[The Court then describes a motion on June 22 by Representative Benson to amend the act to provide that a chief clerk, 'whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy,' should during such vacancy, have the charge and custody of all records, books, and papers appertaining to the department. Mr. Benson explained his motion as follows:—Ed.]

'Mr. Benson stated that his objection to the clause 'to be removable by the President' arose from an idea that the power of removal by the President hereafter might appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was fixed by a fair legislative construction of the Constitution.' 1 Annals of Congress, 579.

'Mr. Benson declared, if he succeeded in this amendment, he would move to strike out the words in the first clause, 'to be removable by the President,' which appeared somewhat like a grant. Now, the mode he took would evade that point and establish a legislative construction of the Constitution. He also hoped his amendment would succeed in reconciling both sides of the House to the decision, and quieting the minds of gentlemen.' 1 Annals of Congress, 578.

Mr. Madison admitted the objection made by [Benson] to the words in the bill. He said:

'They certainly may be construed to imply a legislative grant of the power. He wished everything like ambiguity expunged, and the sense of the House explicitly declared, and therefore seconded the motion. Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President, and what arguments were brought forward respecting the convenience or inconvenience of such disposition of the power were intended only to throw light upon what was meant by the compilers of the Constitution. Now, as the words proposed by the gentleman from New York expressed to his mind the meaning of the Constitution, he should be in favor of them, and would agree to strike out those agreed to in the committee.' 1 Annals of Congress, 578, 579.

[The first amendment, inserting the passive-voice language "whenever the principal officer shall be removed from office by the President of the United States," passed by a vote of 30 to 18. The second motion to strike out the original language, "to be removable by the President," passed by a vote of 31 to 18, although by different majorities, as the dissent points out.—Ed.]

It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. That was what the vote was taken for. Some effort has been made to question whether the decision carries the result claimed for it, but there is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson impeachment trial in 1868 its meaning was not doubted, even by those who questioned its soundness. . . .

It is convenient in the course of our discussion of this case to review the reasons advanced by Mr. Madison and his associates for their conclusion, supplementing them, so far as may be, by additional considerations which lead this court to concur therein.

First. Mr. Madison insisted that article 2 by vesting the executive power in the President was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that article. . . .

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. Fisher Ames, 1 Annals of Congress, 474. It was urged that the natural meaning of the term 'executive power' granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood. . . .

The requirement of the second section of article 2 that the Senate should advise and consent to the presidential appointments, was to be strictly construed. The words of section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the executive, not all inclusive, or were limitations upon the general grant of the executive power,

and as such, being limitations, should not be enlarged beyond the words used. Madison, 1 Annals, 462, 463, 464. The executive power was given in general terms strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the executive was convincing indication that none was intended. . . .

Second. The view of Mr. Madison and his associates was that not only did the grant of executive power to the President in the first section of article 2 carry with it the power of removal, but the express recognition of the power of appointment in the second section enforced this view on the well-approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment. . . . The reason for the principle is that those in charge of and responsible for administering functions of government, who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint.

Under section 2 of article 2, however, the power of appointment by the executive is restricted in its exercise by the provision that the Senate, a part of the legislative branch of the government, may check the action of the executive by rejecting the officers he selects. Does this make the Senate part of the removing power? And this, after the whole discussion in the House is read attentively, is the real point which was considered and decided in the negative by the vote already given. . . .

It was pointed out in this great debate that the power of removal, though equally essential to the executive power is different in its nature from that of appointment. A veto by the Senate—a part of the legislative branch of the government—upon removals is a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of a proposed appointment. It is not to be implied. The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such a check enables the Senate to prevent the filling of offices with bad or incompetent men, or with those against whom there is tenable objection.

The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may therefore be regarded as confined for very sound and

practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal. . . .

Another argument urged against the constitutional power of the President alone to remove executive officers appointed by him with the consent of the Senate is that, in the absence of an express power of removal granted to the President, power to make provision for removal of all such officers is vested in the Congress by section 8 of article 1 [the Necessary and Proper Clause.—Ed.]. Mr. Madison . . . answered it as follows:

'[Mr. Sherman] seems to think (if I understand him rightly) that the power of displacing from office is subject to legislative discretion, because, it having a right to create, it may limit or modify as it thinks proper. I shall not say but at first view this doctrine may seem to have some plausibility. But when I consider that the Constitution clearly intended to maintain a marked distinction between the legislative, executive and judicial powers of government, and when I consider that, if the Legislature has a power such as is contended for, they may subject and transfer at discretion powers from one department of our government to another, they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers, they may give to the Senate alone, or the President and Senate combined, they may vest it in the whole Congress, or they may reserve it to be exercised by this house. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I cannot subscribe to it.' 1 Annals of Congress, 495, 496.

. . . . [The] point is that by the specific constitutional provision for appointment of executive officers with its necessary incident of removal, the power of appointment and removal is clearly provided for by the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior offices in the clause that follows. This is 'but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.' These words, it has been held by this court, give to Congress the power to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them. United States v. Perkins, 116 U. S. 483, 485. Here then is an express provision introduced in words of exception for the exercise by Congress of legislative power in the matter of appointments and removals in the case of inferior executive officers. The phrase, 'But Congress may by law vest,' is equivalent to 'excepting that Congress may by law vest.' By the plainest implication it excludes congressional dealing with appointments or removals of executive officers not falling within the exception and leaves unaffected the executive power of the President to appoint and remove them.

A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. . . .

It is reasonable to suppose also that had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in article 1, or in the specified limitations on the executive power in article 2. The difference between the grant of legislative power under article 1 to Congress which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article 2 is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed, and that no express limit is placed on the power of removal by the executive is a convincing indication that none was intended.

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation. . . .

To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation—all except as otherwise provided by the Constitution. . . .

Mr. Madison and his associates pointed out with great force the unreasonable character of the view that the convention intended, without express provision, to give to Congress or the Senate, in case of political or other differences, the means of thwarting the executive in the exercise of his great powers and in the bearing of his great responsibility by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy might make his taking care that the laws be faithfully executed most difficult or impossible. . . .

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus

empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

We have devoted much space to this discussion and decision of the question of the presidential power of removal in the First Congress, not because a congressional conclusion on a constitutional issue is conclusive, but first because of our agreement with the reasons upon which it was avowedly based, second because this was the decision of the First Congress on a question of primary importance in the organization of the government made within two years after the Constitutional Convention and within a much shorter time after its ratification, and third because that Congress numbered among its leaders those who had been members of the convention. It must necessarily constitute a precedent upon which many future laws supplying the machinery of the new government would be based . . . .

[In omitted paragraphs, the Court discussed Chief Justice Marshall's opinion in *Marbury v. Madison,* in which the Court compelled President Jefferson and Secretary of State Madison to deliver a signed commission to William Marbury, who had been appointed as Justice of the Peace for the District of Columbia. In dictum, Marshall suggested that the result might be different if Marbury were removable at will, but noted that the statute does not allow the President to remove Marbury until Marbury's five-year term was up. The Court dismissed this as dictum, expressly disavowed in a subsequent case, and which Marshall himself seems to have disavowed a few years later.—Ed.]

Congress in a number of acts followed and enforced the legislative decision of 1789 for 74 years. . . . [Chief Justice Taft proceeds to discuss several congressional acts assuming or specifying that various executive officers were removable at pleasure by the President, and cites several cases and commentaries for the proposition that the whole country had acquiesced in the legislative construction of the Constitution in the decision of 1789.—Ed.]

We come now to consider an argument, advanced and strongly pressed on behalf of the complainant, that this case concerns only the removal of a postmaster, that a postmaster is an inferior officer, and that such an office was not included

within the legislative decision of 1789, which related only to superior officers to be appointed by the President by and with the advice and consent of the Senate. . . .

The very heated discussions during General Jackson's administration, except as to the removal of Secretary Duane, related to the distribution of offices, which were most of them inferior offices, and it was the operation of the legislative decision of 1789 upon the power of removal of incumbents of such offices that led the General to refuse to comply with the request of the Senate that he give his reasons for the removals therefrom. . . .

Section 2 of article 2, after providing that the President shall nominate and with the consent of the Senate appoint ambassadors, other public ministers, consuls, judges of the Supreme Court and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law, contains the proviso: 'But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law or in the heads of departments.'

In United States v. Perkins, 116 U. S. 483, a cadet engineer, a graduate of the Naval Academy, brought suit to recover his salary for the period after his removal by the Secretary of the Navy. It was decided that his right was established by Revised Statutes, § 1229, providing that no officer in the military or naval service should in time of peace be dismissed from service, except in pursuance of a sentence of court-martial. The section was claimed to be an infringement upon the constitutional prerogative of the executive. . . . We have no doubt that, when Congress by law vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. . . .

But the court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause, and to infringe the constitutional principle of the separation of governmental powers.

Assuming, then, the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering.

Whether the action of Congress in removing the necessity for the advice and consent of the Senate and putting the power of appointment in the President alone would make his power of removal in such case any more subject to Congressional legislation than before is a question this court did not decide in the Perkins Case.

Under the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it. . . .

Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article 2 excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent . . . .

We come now to a period in the history of the government when both houses of Congress attempted to reverse this constitutional construction, and to subject the power of removing executive officers appointed by the President and confirmed by the Senate to the control of the Senate, indeed finally to the assumed power in Congress to place the removal of such officers anywhere in the government.

This reversal grew out of the serious political difference between the two houses of Congress and President Johnson. There was a two-thirds majority of the Republican party, in control of each house of Congress, which resented what it feared would be Mr. Johnson's obstructive course in the enforcement of the reconstruction measures in respect to the states whose people had lately been at war against the national government. . . .

[T]he chief legislation in support of the reconstruction policy of Congress was the Tenure of Office Act of March 2, 1867, 14 Stat. 430, c. 154, providing that all officers appointed by and with the consent of the Senate should hold their offices until their successors should have in like manner been appointed and qualified; that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President by whom appointed and one month thereafter, subject to removal by consent of the Senate. The Tenure of Office Act was vetoed, but it was passed over the veto. The House of Representatives preferred articles of impeachment against President Johnson for refusal to comply with, and for conspiracy to defeat, the legislation above referred to, but he was acquitted for lack of a two-thirds vote for conviction in the Senate. . . .

The extreme provisions of all this legislation were a full justification for the considerations, so strongly advanced by Mr. Madison and his associates in the First Congress, for insisting that the power of removal of executive officers by the President alone was essential in the division of powers between the executive and the legislative bodies. It exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject to executive arm, and destroy the principle of executive responsibility, and separation of the powers sought for by the framers of our government, if the President had no power of removal save by consent of the

Senate. It was an attempt to redistribute the powers and minimize those of the President.

After President Johnson's term ended, the injury and invalidity of the Tenure of Office Act in its radical innovation were immediately recognized by the executive and objected to. General Grant, succeeding Mr. Johnson in the presidency, earnestly recommended in his first message the total repeal of the act . . . .

The attitude of the Presidents on this subject has been unchanged and uniform to the present day whenever an issue has clearly been raised. . . .

Since the provision for an Interstate Commerce Commission in 1887, many administrative boards have been created whose members are appointed by the President, by and with the advice and consent of the Senate, and in the statutes creating them have been provisions for the removal of the members for specified causes. Such provisions are claimed to be inconsistent with the independent power of removal by the President. This, however, is shown to be unfounded by the case of Shurtleff v. United States, 189 U. S. 311 (1903). That concerned an act creating a board of general appraisers, 26 Stat. 131, 136, c. 407, § 12, and provided for their removal for inefficiency, neglect of duty, or malfeasance in office. The President removed an appraiser without notice or hearing. It was forcibly contended that the affirmative language of the statute implied the negative of the power to remove except for cause and after a hearing. This would have been the usual rule of construction, but the court declined to apply it. Assuming for the purpose of that case only, but without deciding, that Congress might limit the President's power to remove, the court held that, in the absence of constitutional or statutory provision otherwise, the President could by virtue of his general power of appointment remove an officer . . . notwithstanding specific provisions for his removal for cause, on the ground that the power of removal inhered in the power to appoint. . . .

An argument [from inconvenience] has been made against our conclusion in favor of the executive power of removal by the President, without the consent of the Senate, that it will open the door to a reintroduction of the spoils system. The evil of the spoils system aimed at in the Civil Service Law and its amendments is in respect to inferior offices. . . . The independent power of removal by the President alone under present conditions works no practical interference with the merit system. Political appointments of inferior officers are still maintained in one important class, that of the first, second, and third class postmasters, collectors of internal revenue, marshals, collectors of customs, and other officers of that kind distributed through the country. They are appointed by the President with the consent of the Senate. It is the intervention of the Senate in their appointment, and not in their removal, which prevents their classification into the merit system. If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics, and that is what a number of Presidents have recommended. . . .

When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as

it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so. . . .

The separate [dissenting] opinion of Mr. Justice McReynolds.

* * *

V. For the United States it is asserted: Except certain judges, the President may remove all officers whether executive or judicial appointed by him with the Senate's consent, and therein he cannot be limited or restricted by Congress. The argument runs thus: The Constitution gives the President all executive power of the national government, except as this is checked or controlled by some other definite provision; power to remove is executive and unconfined; accordingly, the President may remove at will. Further, the President is required to take care that the laws be faithfully executed; he cannot do this unless he may remove at will all officers whom he appoints; therefore he has such authority.

The argument assumes far too much. Generally, the actual ouster of an officer is executive action; but to prescribe the conditions under which this may be done is legislative. . . .

The Legislature may create post offices and prescribe qualifications, duties, compensation, and term. And it may protect the incumbent in the enjoyment of his term unless in some way restrained therefrom. The real question, therefore, comes to this: Does any constitutional provision definitely limit the otherwise plenary power of Congress over postmasters, when they are appointed by the President with the consent of the Senate? The question is not the much-mooted one whether the Senate is part of the appointing power under the Constitution and therefore must participate in removals.

Here the restriction is imposed by statute alone and thereby made a condition of the tenure. I suppose that beyond doubt Congress could authorize the Postmaster General to appoint all postmasters and restrain him in respect of removals.

Concerning the insistence that power to remove is a necessary incident of the President's duty to enforce the laws, it is enough now to say: The general duty to enforce all laws cannot justify infraction of some of them. Moreover, Congress, in the exercise of its unquestioned power, may deprive the President of the right either to appoint or to remove any inferior officer, by vesting the authority to appoint in another. Yet in that event his duty touching enforcement of the laws would remain. He must utilize the force which Congress gives. He cannot, without permission, appoint the humblest clerk or expend a dollar of the public funds. . . .

Nor is the situation the one which arises when the statute creates an office without a specified term, authorizes appointment and says nothing of removal. In the latter event, under long-continued practice and supposed early legislative construction, it is now accepted doctrine that the President may remove at pleasure. This is entirely consistent with implied legislative assent; power to remove is commonly incident to the right to appoint when not forbidden by law. But there has never been any such usage where the statute prescribed restrictions. From its first

session down to the last one Congress has consistently asserted its power to prescribe conditions concerning the removal of inferior officers. The executive has habitually observed them, and this court has affirmed the power of Congress therein.

* * *

XIV. If the framers of the Constitution had intended 'the executive power,' in article 2, § 1, to include all power of an executive nature, they would not have added the carefully defined grants of section 2. They were scholarly men, and it exceeds belief 'that the known advocates in the convention for a jealous grant and cautious definition of federal powers should have silently permitted the introduction of words and phrases in a sense rendering fruitless the restrictions and definitions elaborated by them.' Why say, the President shall be commander-in-chief; may require opinions in writing of the principal officers in each of the executive departments; shall have power to grant reprieves and pardons; shall give information to Congress concerning the state of the union; shall receive ambassadors; shall take care that the laws be faithfully executed—if all of these things and more had already been vested in him by the general words? . . .

* * *

XVIII. In any rational search for answer to the questions arising upon this record, it is important not to forget—

That this is a government of limited powers, definitely enumerated and granted by a written Constitution.

That the Constitution must be interpreted by attributing to its words the meaning which they bore at the time of its adoption, and in view of commonly-accepted canons of construction, its history, early and long-continued practices under it, and relevant opinions of this court. . . .

That the Constitution contains no words which specifically grant to the President power to remove duly appointed officers. And it is definitely settled that he cannot remove those whom he has not appointed—certainly they can be removed only as Congress may permit. . . .

That many Presidents have approved statutes limiting the power of the executive to remove, and that from the beginning such limitations have been respected in practice.

That this court, as early as 1803, in an opinion [in Marbury v. Madison] never overruled and rendered in a case where it was necessary to decide the question, positively declared that the President had no power to remove at will an inferior officer appointed with consent of the Senate to serve for a definite term fixed by an act of Congress. . . .

Mr. Justice Brandeis, dissenting.

In 1833 Mr. Justice Story, after discussing in sections 1537–1543 his Commentaries on the Constitution the much debated question concerning the President's power of removal, said in section 1544:

'If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to 'inferior officers' (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases.'

Postmasters are inferior officer. Congress might have vested their appointment in the head of the department. . . . May the President, having acted under the statute in so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place?

It is this narrow question, and this only, which we are required to decide. We need not consider what power the President, being Commander-in-Chief, has over officers in the Army and the Navy. We need not determine whether the President, acting alone, may remove high political officers. We need not even determine whether, acting alone, he may remove inferior civil officers when the Senate is not in session. It was in session when the President purported to remove Myers, and for a long time thereafter. . . .

It is settled that if Congress had, under clause 2 of section 2, art. 2, vested the appointment in the Postmaster General, it could have limited his power of removal by requiring consent of the Senate. United States v. Perkins, 116 U. S. 483. It is not questioned here that the President, acting alone, has the constitutional power to suspend an officer in the executive branch of the government. But Myers was not suspended. . . . The sole question is whether, in respect to inferior offices, Congress may impose upon the Senate both responsibilities, as it may deny to it participation in the exercise of either function. . . .

The contention that Congress is powerless to make consent of the Senate a condition of removal by the President from an executive office rests mainly upon the clause in section 1 of article 2 which declares that 'the executive Power shall be vested in a President.' The argument is that appointment and removal of officials are executive prerogatives; that the grant to the President of 'the executive power' confers upon him, as inherent in the office, the power to exercise these two functions without restriction by Congress, except in so far as the power to restrict his exercise of then is expressly conferred upon Congress by the Constitution; that in respect to appointment certain restrictions of the executive power are so provided for; but that in respect to removal there is no express grant to Congress of any power to limit the President's prerogative.

The simple answer to the argument is this: The ability to remove a subordinate executive officer, being an essential of effective government, will, in the absence of express constitutional provision to the contrary, be deemed to have been

vested in some person or body. But it is not a power inherent in a chief executive. The President's power of removal from statutory civil inferior offices, like the power of appointment to them, comes immediately from Congress. It is true that the exercise of the power of removal is said to be an executive act, and that when the Senate grants or withholds consent to a removal by the President, it participates in an executive act. But the Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof; and it has not in terms denied to Congress the power to control removals. To prescribe the tenure involves prescribing the conditions under which incumbency shall cease. For the possibility of removal is a condition or qualification of the tenure. When Congress provides that the incumbent shall hold the office for four years unless sooner removed with the consent of the Senate, it prescribes the term of the tenure.

It is also argued that the clauses in article 2, § 3, of the Constitution, which declare that the President 'shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States' imply a grant to the President of the alleged uncontrollable power of removal. . . . A power essential to protection against pressing dangers incident to disloyalty in the civil service may well be deemed inherent in the executive office. But that need, and also insubordination and neglect of duty, are adequately provided against by implying in the President the constitutional power of suspension. . . . But power to remove an inferior administrative officer appointed for a fixed term cannot conceivably be deemed an essential of government. . . .

Over removal from inferior civil offices, Congress has, from the foundation of our government, exercised continuously some measure of control by legislation. . . . Thus, the Act of September 2, 1789, c. 12, 1 Stat. 65, 67, establishing the Treasury Department, provided by section 8, that if any person appointed to any office by that act should be convicted of offending against any of its provisions, he shall 'upon conviction be removed from office.' . . . The Act of January 31, 1823, 3 Stat. 723, directed that officers receiving public money and failing to account quarterly shall be dismissed by the President unless they shall account for such default to his satisfaction. . . . The Act of July 17, 1854, 10 Stat. 305, 306, which authorized the President to appoint registers and receivers, provided that 'on satisfactory proof that either of said officers, or any other officer, has charged or received fees or other rewards not authorized by law, he shall be forthwith removed from office.'

In the later period, which began after the spoils system had prevailed for a generation, the control of Congress over inferior offices was exerted to prevent removals. The removal clause here in question was first introduced by the Currency Act of February 25, 1863, 12 Stat. 665, which was approved by President Lincoln. That statute provided for the appointment of the Comptroller, and that he 'shall hold his office for the term of five years unless sooner removed by the President, by and with the advice and consent of the Senate.' In 1867 this provision was inserted in the Tenure of Office Act of March 2, 1867, 14 Stat. 430, 431, which applied, in substance, to all presidential offices. It was passed over President Johnson's veto. . . .

It is significant that President Johnson, who vetoed in 1867 the Tenure of Office Act, which required the Senate's consent to the removal of high political officers, approved other acts containing the removal clause which related only to inferior officers. Thus, he had approved the Act of July 13, 1866, 14 Stat. 90, 92, which provided that 'no officer in the military or naval service shall in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.' . . .

Every President who has held office since 1861, except President Garfield, approved one or more of such statutes. Some of these statutes, prescribing a fixed term, provide that removal shall be made only for one of several specified causes. Some provide a fixed term, subject generally to removal for cause. Some provide for removal only after hearing. Some provide a fixed term, subject to removal for reasons to be communicated by the President to the Senate. . . .

The assertion that the mere grant by the Constitution of executive power confers upon the President as a prerogative the unrestricted power of appointment and of removal from executive offices, except so far as otherwise expressly provided by the Constitution, is clearly inconsistent also with those statutes which restrict the exercise by the President of the power of nomination. There is not a word in the Constitution which in terms authorizes Congress to limit the President's freedom of choice in making nominations for executive offices. . . . But a multitude of laws have been enacted which limit the President's power to make nominations, and which through the restrictions imposed, may prevent the selection of the person deemed by him best fitted. Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the government. . . .

Thus Congress has, from time to time, restricted the President's selection by the requirement of citizenship. It has limited the power of nomination by providing that the office may be held only by a resident of the United States; of a state; of a particular state; of a particular district; of a particular territory; of the District of Columbia; of a particular foreign country. It has limited the power of nomination further by prescribing specific professional attainments, or occupational experience. . . .

The practical disadvantage to the public service of denying to the President the uncontrollable power of removal from inferior civil offices would seem to have been exaggerated. . . . For he can, at any time, exercise his constitutional right to suspend an officer and designate some other person to act temporarily in his stead . . . .

The long delay in adopting legislation to curb removals was not because Congress accepted the doctrine that the Constitution had vested in the President uncontrollable power over removal. It was because the spoils system held sway. . . .

Nor does the debate [in 1789] show that the majority of those then in Congress thought that the President had the uncontrollable power of removal. The Senators divided equally in their votes [Vice President John Adams had to break the tie in the Senate.—Ed.]. As to their individual views we lack knowledge; for the

debate was secret. In the House only 24 of the 54 members voting took part in the debate. Of the 24, only 6 appear to have held the opinion that the President possessed the uncontrollable power of removal. The clause which involved a denial of the claim that the Senate had the constitutional right to participate in removals was adopted, so far as appears, by aid of the votes of others who believed it expedient for Congress to confer the power of removal upon the President alone. This is indicated both by Madison's appeal for support and by the action taken on Benson's motions. . . .

Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose; or because Congress, having created the office, declines to make the indispensable appropriation; or because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted. . . .

Mr. Justice Holmes, dissenting.

My Brothers McReynolds and Brandeis have discussed the question before us with exhaustive research and I say a few words merely to emphasize my agreement with their conclusion.

The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spiders' webs inadequate to control the dominant facts.

We have to deal with an office that owes its existence to Congress and that Congress may abolish to-morrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.

3. The Return of Formalism?

To be inserted after Seila Law v. CFPB:

The following decision came out one year after *Seila Law*, and is arguably a simple application of that case. For that reason, Justice Kagan joined the majority. The opinion might be more interesting for the debate between the competing opinions over severability and the appropriate remedy.

Collins v. Yellen
141 S. Ct. 1761 (2021)

Justice ALITO delivered the opinion of the Court.

Fannie Mae and Freddie Mac are two of the Nation's leading sources of mortgage financing. When the housing crisis hit in 2008, the companies suffered significant losses, and many feared that their troubling financial condition would imperil the national economy. To address that concern, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act). Among other things, that law created the Federal Housing Finance Agency (FHFA), "an independent agency" tasked with regulating the companies and, if necessary, stepping in as their conservator or receiver. At its head, Congress installed a single Director, whom the President could remove only "for cause."

Shortly after the FHFA came into existence, it placed Fannie Mae and Freddie Mac into conservatorship and negotiated agreements for the companies with the Department of Treasury. Under those agreements, Treasury committed to providing each company with up to $100 billion in capital, and in exchange received, among other things, senior preferred shares and quarterly fixed-rate dividends. Four years later, the FHFA and Treasury amended the agreements and replaced the fixed-rate dividend formula with a variable one that required the companies to make quarterly payments consisting of their entire net worth minus a small specified capital reserve. This deal, which the parties refer to as the "third amendment" or "net worth sweep," caused the companies to transfer enormous amounts of wealth to Treasury. It also resulted in a slew of lawsuits, including the one before us today.

A group of Fannie Mae's and Freddie Mac's shareholders challenged the third amendment on statutory and constitutional grounds. With respect to their statutory claim, the shareholders contended that the Agency exceeded its authority as a conservator under the Recovery Act when it agreed to a variable dividend formula that would transfer nearly all of the companies' net worth to the Federal Government. And with respect to their constitutional claim, the shareholders argued that the FHFA's structure violates the separation of powers because the Agency is led by a single Director who may be removed by the President only "for cause." They sought declaratory and injunctive relief, including an order requiring Treasury either to return the variable dividend payments or to re-characterize those payments as a pay down on Treasury's investment.

We hold that the shareholders' statutory claim is barred by the Recovery Act, which prohibits courts from taking "any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." But we conclude that the FHFA's structure violates the separation of powers, and we remand for further proceedings to determine what remedy, if any, the shareholders are entitled to receive on their constitutional claim.

I

A

Congress created the Federal National Mortgage Association (Fannie Mae) in 1938 and the Federal Home Loan Mortgage Corporation (Freddie Mac) in 1970 to support the Nation's home mortgage system. The companies operate under congressional charters as for-profit corporations owned by private shareholders. Their primary business is purchasing mortgages, pooling them into mortgage-backed securities, and selling them to investors. By doing so, the companies "relieve mortgage lenders of the risk of default and free up their capital to make more loans," and this, in turn, increases the liquidity and stability of America's home lending market and promotes access to mortgage credit.

By 2007, the companies' mortgage portfolios had a combined value of approximately $5 trillion and accounted for almost half of the Nation's mortgage market. So, when the housing bubble burst in 2008, the companies took a sizeable hit. In fact, they lost more that year than they had earned in the previous 37 years combined. Though they remained solvent, many feared the companies would eventually default and throw the housing market into a tailspin.

To address that concern, Congress enacted the Recovery Act. Two aspects of that statute are relevant here.

First, the Recovery Act authorized Treasury to purchase Fannie Mae's and Freddie Mac's stock if it determined that infusing the companies with capital would protect taxpayers and be beneficial to the financial and mortgage markets. The statute further provided that Treasury's purchasing authority would automatically expire at the end of the 2009 calendar year.

Second, the Recovery Act created the FHFA to regulate the companies and, in certain specified circumstances, step in as their conservator or receiver. A few features of the Agency deserve mention.

The FHFA is led by a single Director who is appointed by the President with the advice and consent of the Senate. The Director serves a 5-year term but may be removed by the President "for cause." . . .

The Agency is tasked with supervising nearly every aspect of the companies' management and operations. For example, the Agency must approve any new products that the companies would like to offer. It may reject acquisitions and certain transfers of interests the companies seek to execute. It establishes criteria governing the companies' portfolio holdings. It may order the companies to dispose

of or acquire any asset. It may impose caps on how much the companies compensate their executives . . . .

The statute empowers the Agency with broad investigative and enforcement authority to ensure compliance with these standards. Among other things, the Agency may hold hearings, issue subpoenas, remove or suspend corporate officers, issue cease-and-desist orders, bring civil actions in federal court, and impose penalties ranging from $2,000 to $2 million per day.

In addition to vesting the FHFA with these supervisory and enforcement powers, the Recovery Act authorizes the Agency to act as the companies' conservator or receiver for the purposes of reorganizing the companies, rehabilitating them, or winding down their affairs. . . . From there, the Agency has the authority to take control of the companies' assets and operations, conduct business on their behalf, and transfer or sell any of their assets or liabilities. . . .

Finally, the FHFA is not funded through the ordinary appropriations process. Rather, the Agency's budget comes from the assessments it imposes on the entities it regulates, which include Fannie Mae, Freddie Mac, and the Nation's federal home loan banks. Those assessments are unlimited so long as they do not exceed the "reasonable costs . . . and expenses of the Agency." In fiscal year 2020, the FHFA collected more than $311 million. . . .

* * *

III

[In omitted parts of the Opinion, the Court concludes, among other things, that the Acting Director who adopted the third amendment was removable at will.—Ed.]

B

The Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers. . . . A straightforward application of our reasoning in *Seila Law* dictates the result here. The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President's removal power. Fulfilling his obligation to defend the constitutionality of the Recovery Act's removal restriction, [Court-appointed] *amicus* [Professor Aaron Nielson] attempts to distinguish the FHFA from the CFPB. We do not find any of these distinctions sufficient to justify a different result.

Amicus first argues that Congress should have greater leeway to restrict the President's power to remove the FHFA Director because the FHFA's authority is more limited than that of the CFPB. *Amicus* points out that the CFPB administers 19 statutes while the FHFA administers only 1; the CFPB regulates millions of individuals and businesses whereas the FHFA regulates a small number of Government-sponsored enterprises; the CFPB has broad rulemaking and

enforcement authority and the FHFA has little; and the CFPB receives a large budget from the Federal Reserve while the FHFA collects roughly half the amount from regulated entities. . . .

[T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head. The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies. The removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch . . . . [N]othing about the size or role of the FHFA convinces us that its Director should be treated differently from the Director of the CFPB. . . .

Amicus next contends that Congress may restrict the removal of the FHFA Director because when the Agency steps into the shoes of a regulated entity as its conservator or receiver, it takes on the status of a private party and thus does not wield executive power. But the Agency does not always act in such a capacity, and even when it acts as conservator or receiver, its authority stems from a special statute, not the laws that generally govern conservators and receivers. . . .

[T]he FHFA's powers under the Recovery Act differ critically from those of most conservators and receivers. It can subordinate the best interests of the company to its own best interests and those of the public. Its business decisions are protected from judicial review. It is empowered to issue a "regulation or order" requiring stockholders, directors, and officers to exercise certain functions. It is authorized to issue subpoenas. And of course, it has the power to put the company into conservatorship and simultaneously appoint itself as conservator. For these reasons, the FHFA clearly exercises executive power. . . .

Finally, *amicus* contends that there is no constitutional problem in this case because the Recovery Act offers only "modest [tenure] protection." That is so, *amicus* claims, because the for-cause standard would be satisfied whenever a Director "disobey[ed] a lawful [Presidential] order," including one about the Agency's policy discretion.

We acknowledge that the Recovery Act's "for cause" restriction appears to give the President more removal authority than other removal provisions reviewed by this Court. And it is certainly true that disobeying an order is generally regarded as "cause" for removal.

But as we explained last Term, the Constitution prohibits even "modest restrictions" on the President's power to remove the head of an agency with a single top officer. The President must be able to remove not just officers who disobey his commands but also those he finds "negligent and inefficient," those who exercise their discretion in a way that is not "intelligen[t] or wis[e]," those who have "different views of policy," those who come "from a competing political party who is dead set against [the President's] agenda," and those in whom he has simply lost confidence. *Amicus* recognizes that "'for cause' . . . does not mean the same thing as 'at will,'" and

therefore the removal restriction in the Recovery Act violates the separation of powers. . . .

C

Having found that the removal restriction violates the Constitution, we turn to the shareholders' request for relief. . . . We have already explained that the Acting Director who *adopted* the third amendment was removable at will. That conclusion defeats the shareholders' argument for setting aside the third amendment in its entirety. We therefore consider the shareholders' contention about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures. But even as applied to that subset of actions, the shareholders' argument is neither logical nor supported by precedent. All the officers who headed the FHFA during the time in question were properly *appointed*. Although the statute unconstitutionally limited the President's authority to *remove* the confirmed Directors, there was no constitutional defect in the statutorily prescribed method of appointment to that office. As a result, there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void.

The shareholders argue that our decisions in prior separation-of-powers cases support their position, but most of the cases they cite involved a Government actor's exercise of power that the actor did not lawfully possess. As we have explained, there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office. . . .

That does not necessarily mean, however, that the shareholders have no entitlement to retrospective relief. Although an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment), it is still possible for an unconstitutional provision to inflict compensable harm. And the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out. Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way. In those situations, the statutory provision would clearly cause harm.

In the present case, the situation is less clear-cut, but the shareholders nevertheless claim that the unconstitutional removal provision inflicted harm. Were it not for that provision, they suggest, the President might have replaced one of the confirmed Directors who supervised the implementation of the third amendment, or a confirmed Director might have altered his behavior in a way that would have benefited the shareholders.

The federal parties dispute the possibility that the unconstitutional removal restriction caused any such harm. They argue that, irrespective of the President's power to remove the FHFA Director, he "retained the power to supervise the [Third] Amendment's adoption . . . because FHFA's counterparty to the Amendment was Treasury—an executive department led by a Secretary subject to removal at will by the President." The parties' arguments should be resolved in the first instance by the lower courts.

Justice THOMAS, concurring.

I join the Court's opinion in full. I agree that the Directors were properly appointed and could lawfully exercise executive power. And I agree that, to the extent a Government action violates the Constitution, the remedy should fit the injury. But I write separately because I worry that the Court and the parties have glossed over a fundamental problem with removal-restriction cases such as these: The Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract. . . .

For the shareholders to prevail, identifying some conflict between the Constitution and a statute is not enough. They must show that the challenged Government action at issue—the adoption and implementation of the Third Amendment—was, in fact, unlawful. . . .

The shareholders suggest that the removal restriction inherently renders the Agency's actions void. In support, they point to our Appointments Clause cases and our other separation-of-powers cases. But the cases on which they rely prove quite the opposite. . . .

The Appointments Clause cases . . . ask whether an officer can lawfully exercise the statutory power of his office at all in light of the rule that an officer must be properly appointed before he can legally act as an officer. . . .

The mere existence of an unconstitutional removal provision, too, generally does not automatically taint Government action by an official unlawfully insulated. It is true the removal restriction here is unlawful. But while the shareholders are correct that the Constitution authorizes the President to dismiss the FHFA Director for any reason, no statute can take that Presidential power away.

That the Constitution automatically trumps an inconsistent statute creates a paradox for the shareholders. Had the removal restriction *not* conflicted with the Constitution, the law would never have unconstitutionally insulated any Director. And while the provision *does* conflict with the Constitution, the Constitution has always displaced it and the President has always had the power to fire the Director for any reason. So regardless of whether the removal restriction was lawful or not, the President always had the legal power to remove the Director in a manner consistent with the Constitution. . . .

[Justice Thomas then distinguished *Seila Law* and *Free Enterprise Fund* from these principles on the ground that no one in those cases raised the remedial over severability question.—Ed.]

I do not understand the parties to have sought review of these issues in this Court. So the Court correctly resolves the legal issues presented. . . .

Justice GORSUCH, concurring in part.

I agree with the Court on the merits and am pleased to join nearly all of its opinion. I part ways only when it comes to the question of remedy . . . .

[T]he Court submits, we should treat this suit differently because the Director was unconstitutionally insulated from removal rather than unconstitutionally appointed. It is unclear to me why this distinction should make a difference. Either way, governmental action is taken by someone erroneously claiming the mantle of executive power—and thus taken with no authority at all. The Court points to not a single precedent in 230 years of history for the distinction it would have us draw. Nor could it. The course it pursues today defies our precedents. In *Bowsher v. Synar*, 478 U.S. 714 (1986), this Court concluded that Congress had vested the Comptroller General with "the very essence" of executive power, but that he was (impermissibly) removable only by Congress. In *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 140 S.Ct. 2183 (2020), we found Congress had assigned the CFPB Director sweeping authority over the financial sector while insulating him "from removal by an accountable President." In both cases that meant the officers could "not be entrusted with executive powers" from day one, and the challenged actions were "void."

If anything, removal restrictions may be a greater constitutional evil than appointment defects. New Presidents *always* inherit thousands of Executive Branch officials whom they did not select. It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office. . . .

In the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property. The chain of dependence between those who govern and those who endow them with power is broken. . . .

Other problems attend the Court's remedial science fiction. It proceeds on an assumption that Congress would have adopted a version of the Housing and Economic Recovery Act (HERA) that allowed the President to remove the Director. But that is sheer speculation. It is equally possible that—had Congress known it could not have a Director independent from presidential supervision—it would have deployed different tools to rein in Fannie Mae and Freddie Mac. . . .

Consider the guidance the Court offers. It says lower courts should examine clues such as whether the President made a "public statement expressing displeasure" about something the Director did, or whether the President "attempted"

to remove the Director but was stymied by lower courts. But what if the President never considered the possibility of removing the Director because he was never advised of that possibility? . . .

[R]ather than carve out some suit-specific, removal-only, money-in-the-bank exception to our normal rules for Article II violations, I would take a simpler and more familiar path. Whether unconstitutionally installed or improperly unsupervised, officials cannot wield executive power except as Article II provides. . . .

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join as to Part II, concurring in part and concurring in the judgment.

I

. . . . [T]he issue now is not whether *Seila Law* was correct. The question is whether that case is distinguishable from this one. And it is not. As I observed in *Seila Law*, the FHFA "plays a crucial role in overseeing the mortgage market, on which millions of Americans annually rely." It thus wields "significant executive power," much as the agency in *Seila Law* did. And I agree with the majority that there is no other legally relevant distinction between the two.

For two reasons, however, I do not join the majority's discussion of the constitutional issue. First is the majority's political theory. Throughout the relevant part of its opinion, the majority offers a contestable—and, in my view, deeply flawed—account of how our government should work. . . . The right way to ensure that government operates with "electoral accountability" is to lodge decisions about its structure with, well, "the branches accountable to the people." I will subscribe to decisions contrary to my view where precedent, fairly read, controls (and there is no special justification for reversal). But I will not join the majority's mistaken musings about how to create "a workable government." . . .

My second objection is to the majority's extension of *Seila Law*'s holding. Again and again, *Seila Law* emphasized that its rule was limited to single-director agencies "wield[ing] significant executive power." . . . But today's majority careens right past that boundary line. Without even mentioning *Seila Law*'s "significant executive power" framing, the majority announces that, actually, "the constitutionality of removal restrictions" does not "hinge[ ]" on "the nature and breadth of an agency's authority." Any "agency led by a single Director," no matter how much executive power it wields, now becomes subject to the requirement of at-will removal. . . . I concur in the judgment only.

II

I also agree that plaintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action—only when the President's inability to fire an agency head affected the complained-of decision. . . .

[T]he majority's approach should help protect agency decisions that would never have risen to the President's notice. Consider the hundreds of thousands of decisions that the Social Security Administration (SSA) makes each year. The SSA has a single head with for-cause removal protection; so a betting person might wager that the agency's removal provision is next on the chopping block. But given the majority's remedial analysis, I doubt the mass of SSA decisions—which would not concern the President at all—would need to be undone. . . . When an agency decision would not capture a President's attention, his removal authority could not make a difference—and so no injunction should issue. . . .

[A dissent by Justice Sotomayor, joined by Justice Breyer, is omitted. They concluded that the FHFA does not exercise "significant" executive power, and argued that its powers were similar those of the 1935 Federal Trade Commission, for which removal restrictions were approved in *Humphrey's Executor*.—Ed.]

NOTES AND QUESTIONS

1. ***Should the amount of executive power make a difference?*** What do you think of *Seila Law*'s supposed "significant authority" test? Should the amount of executive power being exercised make a difference in a removal power case? Where else have we seen a significant authority test? If the government official is exercising sufficient authority to be deemed an *officer*, should that be enough for purposes of this removal power jurisprudence? Should different rules apply to different exercises of executive power? On the other hand, would any of the Court's reasoning apply to mere employees?

2. ***What's the remedy?*** In *Arthrex*, the Justices assume that an appointment problem would have created ultra vires government action. *Collins* reveals that the Justices are much more divided on the remedial question in removal cases. The majority remanded for a factual analysis of whether the Director's actions might have been different with knowledge about the President's power to remove, or perhaps whether the President in fact indicated that different actions would have been taken.

Justice Thomas seems to argue that there is no remedy for removal power cases because a properly appointed officer is exercising power lawfully. Indeed, because the removal power is unconstitutional, the President always in fact had the power to remove the Director—even if the President did not know it. And if the President had the power, there is nothing to remedy. Justice Gorsuch, in contrast, argues that an officer cannot wield executive power if improperly appointed *or* if improperly unsupervised. Which view do you find persuasive? Does it affect your view to recall that *Myers*, *Humphrey's Executor*, and *Wiener* all involved suits by the *officers themselves*, who had been removed and were suing for their salaries? Until *Free Enterprise Fund*, *Seila Law*, and *Collins*, had any removal case involved something other than a salary suit?

Chapter Eight: Reviewability

C. Constitutional Standing

To be inserted after Massachusetts v. EPA:

Maloney v. Murphy
984 F.3d 50 (D.C. Cir. 2020)

Millett, Circuit Judge:

Federal law expressly authorizes seven or more members (less than a majority) of the House of Representatives' Committee on Oversight and Reform to request and to receive information from government agencies as relevant to the performance of their Committee duties. *See* 5 U.S.C. § 2954. In 2017, the Ranking Member of the Committee and seven other members sent such a request to the General Services Administration seeking information related to property owned by the United States government. The agency refused to comply.

The sole question before the court is whether the members who requested agency information under Section 2954 have standing under Article III to enforce their statutorily conferred right to information. We hold that they do. Informational injuries have long satisfied the injury requirement of Article III. A rebuffed request for information to which the requester is statutorily entitled is a concrete, particularized, and individualized personal injury, within the meaning of Article III. That traditional form of injury is quite distinct from the non-cognizable, generalized injuries claimed by legislators that are tied broadly to the law-making process and that affect all legislators equally. And nothing in Article III erects a categorical bar against legislators suing to enforce statutorily created informational rights against federal agencies, whether under the Freedom of Information Act, 5 U.S.C. § 552, or under Section 2954. Because the plaintiffs have standing, we reverse the district court's dismissal of the case and remand for further proceedings.

I
A

Under Section 2954 of Title 5, committee members on the House and Senate committees dedicated to governmental oversight may request and receive information from federal agencies that pertains to those members' committee work. Section 2954 provides in full:

> An Executive agency, on request of the Committee on Government Operations of the House of Representatives [now the Committee on Oversight and Reform], or of any seven members

> thereof, or on request of the Committee on [Homeland Security and] Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

. . . . As now constituted, the two committees covered by Section 2954 are uniquely focused on governmental oversight and accountability. . . .

Previously, 128 different statutes scattered across the United States Code had obligated certain federal agencies to submit periodic reports and information to Congress. Congress repealed those mandatory reporting requirements and replaced them with Section 2954, ensuring that legislators serving on the two committees directly responsible for government oversight could more effectively and more timely receive the information from federal agencies that is necessary and useful to their performance of their legislative duties.

Section 2954 is distinct from Congress's institutional authority to request or subpoena documents and witnesses. Those measures require formal authorization by Congress, a Chamber of Congress, or a committee. But an information request under Section 2954 can be made by just a small group of legislators—a true minority—who make the individual judgment to seek the information as a means of better informing their committee work. As both the House and Senate Reports explained: "If any information is desired by any Member or committee upon a particular subject that information can be better secured by a request made by an individual Member or committee, so framed as to bring out the special information desired."

B

In February 2017, the then–House Oversight Committee Ranking Member, Representative Elijah Cummings, and seven other members of the House Oversight Committee (collectively, "Requesters"), issued a Section 2954 request for information to the General Services Administration ("GSA") after the agency had repeatedly rebuffed their efforts to obtain the information voluntarily.

The Requesters' inquiry has its origin in the GSA's 2013 lease of the Old Post Office building in Washington, D.C., to Trump Old Post Office LLC ("Company"), a business owned by the now-President Donald Trump and his children. The lease agreement explicitly barred any federal or District of Columbia elected official from participating in or benefiting from the lease . . . .

In November 2016, following President Trump's election, Representative Cummings and three other Committee members requested that the GSA provide a briefing on the lease, as well as unredacted copies of lease documents and the Company's monthly and annual statements. After the request was again made by Representative Cummings and ten other Committee members, invoking Section 2954, the GSA produced records including lease amendments, a 2017 budget

estimate, and monthly income statements. The GSA stated that it was releasing the information "[c]onsistent with [Section 2954.]"

In January 2017, following President Trump's inauguration, Representative Cummings and three other Committee members requested additional information from the GSA relating to the agency's enforcement of the lease terms. . . .

The GSA did not respond. After submitting a number of follow-up inquiries, the Requesters sent a lengthier letter explaining the background and function of Section 2954. On July 6, 2017, the Requesters reiterated their informational inquiry in a third formal communication to the GSA, again invoking Section 2954.

Finally, in July 2017, the GSA rejected those three formal requests in a one-page letter. The letter expressed the agency's view that "[i]ndividual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee." The letter did not mention Section 2954.

C

The Requesters filed suit in November 2017 against the then–Acting Administrator of the GSA, asserting that the agency's refusal to comply with the statute "deprived the plaintiffs of information to which they are entitled by law[.]" . . .

III

A

. . . . [T]he Constitution confines the judicial power "only to 'Cases' and 'Controversies.'" Embedded in that "case-or-controversy requirement" is the obligation of plaintiffs who seek to invoke the jurisdiction of a federal court to establish their standing to sue.

To establish Article III standing, a plaintiff must allege "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." . . . Given that "the law of [Article] III standing is built on . . . the idea of separation of powers[,]" "our standing inquiry has been especially rigorous" when the suit pits members of the two Political Branches against each other. Nonetheless, "the Judiciary has a responsibility to decide cases properly before it[.]" "Courts cannot avoid their responsibility merely because the issues have political implications."

B

The agency's failure to provide information to which the Requesters are statutorily entitled is a quintessential form of concrete and particularized injury within the meaning of Article III. . . .

Cases under the Freedom of Information Act, 5 U.S.C. § 552, and the Government in the Sunshine Act, *id.* § 552b, drive the point home. Supreme Court "decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records" to establish standing. . . .

[T]he Requesters have identified a deprivation of information that, on their reading of the statute, they are legally entitled to receive. The deprivation is accomplished and complete, and the absence of information has been and continues to be felt by the Requesters. As the Supreme Court has recognized numerous times, that denial works a concrete injury.

Second, the Requesters have alleged that the withholding of information has affected each of them "in a personal and individual way." Section 2954 confers its informational right directly on these specific legislators so that they personally can properly perform their roles on the oversight committees. . . .

In sum, ample precedent establishes that the statutory informational injury alleged by the Requesters here amounts to a concrete and particularized injury in fact for purposes of Article III standing.

C

. . . The GSA's position . . . is that an informational injury under Section 2954 does not count for Article III purposes simply because that statute vests the informational right only in legislators.

That is not how Article III's injury-in-fact requirement works. For starters, remember, the point of Article III's standing requirement is to ensure that there is a "case or controversy" for the federal court to resolve, U.S. CONST. Art. III, § 2. By demonstrating (i) an injury in fact in the form of the deprivation of information to which the plaintiffs are statutorily entitled (ii) that is concrete and particularized to the Requesters themselves and them alone, (iii) that was caused by the agency's refusal to provide the information, and (iv) that would be redressed by a judicial order to provide the information, a case or controversy has been joined here, just as directly and completely as it has in countless other informational injury cases. It is no different for standing purposes than if these same Requesters had filed a FOIA request for the same information.

In addition, in analyzing the standing of legislators, cases have traditionally asked whether the asserted injury is "institutional" or "personal." An institutional injury is one that belongs to the legislative body of which the legislator is a member. Such institutional injuries afflict the interests of the legislature as an entity; they do not have a distinct personal, particularized effect on individual legislators.

A personal injury, by contrast, refers to an injury suffered directly by the individual legislators to a right that they themselves individually hold. A personal injury to a legislator, for Article III purposes, is not limited to injuries suffered in a purely private capacity, wholly divorced from their occupation. Rather, in the context

of legislator lawsuits, an injury is also "personal" if it harms the legal rights of the individual legislator, as distinct from injuries to the institution in which they work or to legislators as a body.

The GSA's argument, like the Dissenting Opinion, fundamentally confuses those categories by adopting a sweeping definition of institutional injury that would cut out of Article III even those individualized and particularized injuries experienced by a single legislator alone. The GSA tries to ground its overly broad definition of institutional injury in the Supreme Court's decision in *Raines*.

But *Raines* was quite different. In that case, six Members of Congress who had voted against passage of the Line Item Veto Act filed suit to challenge the constitutionality of the statute after they were outvoted. [Raines v. Byrd, 521 U.S. 811, 814 (1997)]. The Line Item Veto Act gave the President the authority to cancel spending or tax measures after they were passed by both Chambers of Congress and signed into law. The legislators asserted as injuries the alteration in the balance of powers between the Executive and Congress caused by the law, the supplanting of Congress's veto power, and diminution of the effectiveness of legislative votes.

Those injuries, though, were not personal and particularized to the six legislators, but instead trod on powers vested in the House and Senate and their members as a whole. The six legislators sought to vindicate a diffuse "institutional injury"—"the diminution of legislative power"—that was suffered by Congress as an entity, and so "necessarily damage[d] all Members of Congress and both Houses of Congress *equally*." *Raines*, 521 U.S. at 821 (emphasis added). There was, after all, no claim that, under the Line Item Veto Act, the plaintiff legislators were "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies." *Id.* So the injury on which the suing legislators in *Raines* tried to predicate standing was not personal and particularized to them. It was Congres's ox that was gored, not their own.

The same mismatch between the suing plaintiff and the injured party occurred in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). There, a group of legislators challenged the issuance of an executive order on the ground that its "issuance . . . , without statutory authority therefor, deprived the plaintiffs of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation involving interstate commerce, federal lands, the expenditure of federal monies, and implementation of the [National Environmental Policy Act]." *Id.* at 113. As in *Raines*, any such harm befell the institution as a whole and all legislators collectively. No personal injury occurred that was individualized to the plaintiffs. *See also* . . . *Campbell v. Clinton*, 203 F.3d 19, 20, 22–23 (D.C. Cir. 2000) (legislators lacked standing to challenge the use of American forces against Yugoslavia on the grounds that the President violated the War Powers Clause of the Constitution and the War Powers Resolution because the claimed injuries were to the legislative power as a whole).

The Requesters' injury is a horse of a different color. The Requesters do not assert an injury to institutional powers or functions that "damages all Members of

Congress and both Houses of Congress equally." *Raines*, 521 U.S. at 821. The injury they claim—the denial of information to which they as individual legislators are statutorily entitled—befell them and only them. Section 2954 vested them specifically and particularly with the right to obtain information. The 34 other members of the Committee who never sought the information suffered no deprivation when it was withheld. Neither did the nearly 400 other Members of the House who were not on the Committee suffer any informational injury. Nor was the House (or Senate) itself harmed because the statutory right does not belong to those institutions. In other words, their request did not and could not, given their non-majority status, constitute the type of "legislative . . . act" that might warrant treating them differently from private plaintiffs for standing purposes. Instead, the Requesters sought the information covered by Section 2954 in this case to inform and equip them personally to fulfill their professional duties as Committee members. They alone felt the informational loss caused by the agency's withholding. And they alone had an incentive to seek a remedy.

In that regard, the injury is the same as one suffered by a FOIA plaintiff. All persons, including legislators, are statutorily permitted under FOIA to seek information from federal agencies to monitor and scrutinize the activities of federal agencies. 5 U.S.C. § 552(a)(3)(A). But not all individuals have standing to sue following the denial of a FOIA request. Instead, only the individual or entity who filed the request and was denied the information has suffered a cognizable informational injury that can be enforced in federal court. . . .

So too here. Although all Committee members have the right to pursue a request under Section 2954, an Article III injury occurs only after a request that has been made is denied. And that injury is inflicted only on those who asked for the information. Here, the Requesters are the only ones who sought the information from the GSA, and so were the only ones who suffered a concrete and particularized injury by the GSA's denial. . . . To be sure, Congress created the Requesters' underlying informational right. But that does not transform the particularized injury suffered by rebuffed requesters into one dispersed across all of Congress. Just as Congress's enactment of FOIA does not mean that the particularized injury suffered by a legislator's unsuccessful FOIA request is shared by Congress as the body that empowered such requests.

The Supreme Court'' decision in *Powell* confirms the personal nature of the Requesters' informational injury. In *Powell*, the Court concluded that a congressman, Adam Clayton Powell, Jr., had standing to sue Members of Congress and the leadership of the United States House of Representatives after he was barred from taking his seat. [Powell v. McCormack, 395 U.S. 486, 489 (1969)]. In addition to the denial of his seat, Powell's salary was withheld. The Court concluded that the suit satisfied Article III's requirement that legislators sue based on a personal injury. While the harms pertained directly to his fulfillment of his role as a legislator, they were individualized and confined to him. No other Representative suffered the loss of Powell's seat or of Powell's salary. . . .

[W]hat made the claims in *Raines* institutional rather than personal was that the interest asserted there ran with the seat in that "the claim would be possessed by [the legislator's] successor," and so belonged to Congress, not the individual Member. *Raines*, 521 U.S. at 821. . . .

The GSA does not contend, nor could it, that the informational injury asserted here runs with the Committee seat such that any legislators replacing the Requesters would be successors to this claim. While the *legal right* to request information under Section 2954 runs with Committee membership, the injury arises from the asking and its rebuff, not from the seat itself. If one of the Requesters were to leave the Committee, the injury sued upon would end with her service. . . .

In other words, for Article III purposes, the requirement that a legislator suffer a "personal" injury does not mean that the injury must be *private*. . . .

The Dissenting Opinion responds that "[n]othing in the statute [Section 2954] suggests this mechanism for requesting documents is a personal benefit for [m]embers of the Committee, rather than a practical tool" that members can use to "advanc[e] the work of the Committee." That overlooks Section 2954's express conferral of its informational right on a *minority* of committee members. Committee tools like subpoenas, by contrast, require the majority's assent to be exercised. . . .

D

When called upon to adjudicate disputes between the Political Branches and their members, we apply the standing inquiry with special rigor. We have done so here, and we find that Article III's standing requirements are fully met. . . .

[U]nlike in *Raines*, relief cannot be obtained through the legislative process itself. . . . To require the requesting members to obtain enforcement by a majority of the Committee or Chamber, as the Dissenting Opinion proposes, would be to empty the statute of all meaning, since a Committee or the Chamber can already subpoena desired information. . . .

Nor does this case implicate any potentially special circumstances. It is not a suit against the President or a claim for information from him.

Information requests against agencies like this are commonplace, and the informational deficit suffered is not lessened just because the Requesters are legislators. . . . The GSA admits as much when it concedes that these same Requesters would suffer an Article III-cognizable informational injury if they sought the same information under FOIA. Yet the GSA offers no sound reason, grounded in Article III principles, as to why the informational injury becomes more or less sufficient under Article III based on whether non-legislative people could, if they wanted, also ask for information under the same statute. Indeed, the fact that information requests under Section 2954 are less widely available than record requests under FOIA would seem to make the injury more personal and particularized, not less.

Notably, the GSA's opposition to legislator standing is categorical; it does not argue that any difference between the scope of Section 2954 and FOIA is itself of separation-of-powers moment.

For similar reasons, the Dissenting Opinion's worry that recognizing standing "ruinous[ly]" opens the judicial floodgates to suits by "errant" Members of Congress "acting contrary to the will of their committee, the will of their party, and the will of the House" falls flat. That is because every Member of Congress, errant or otherwise, has been able under FOIA since 1966 to seek similar information from Executive Branch agencies as was requested here, with no hint of such untoward results.

The separation of powers, it must be remembered, is not a one-way street that runs to the aggrandizement of the Executive Branch. When the Political Branches duly enact a statute that confers a right, the impairment of which courts have long recognized to be an Article III injury, proper adherence to the limited constitutional role of the federal courts favors judicial respect for and recognition of that injury. . . .

Ginsburg, Senior Circuit Judge, dissenting:

When this court recently considered the standing of a committee of the House of Representatives to enforce a subpoena, we asked ourselves the same question we must answer today: "whether the claimed injury is personal to the plaintiff or else shared by a larger group of which the plaintiff is only a component – in other words, whether the injury is particularized." *Committee on the Judiciary, U.S. House of Representatives v. McGahn,* 968 F.3d 755, 767 (2020). We held a House committee had standing to seek judicial enforcement of a subpoena that it had issued to a former Executive Branch official and that it had been authorized by a vote of the full House to pursue in court. Because the committee was acting on behalf of the full House, the committee was "an institutional plaintiff asserting an institutional injury," so there was no "mismatch" between the plaintiff and the injured party.

This case is fundamentally different. Here, 15 individual Members of the House claim a statute enacted in 1928 and never successfully invoked in litigation gives each of them a personal right to exercise the investigative powers of the House of Representatives. *See* 5 U.S.C. § 2954. Although, as my colleagues remind us more than once, "'our standing inquiry has been especially rigorous' when the suit pits members of the two Political Branches against each other," the Court today strains Supreme Court precedent to uphold the standing of Plaintiff-Members to assert the interests of the whole House.

Again, the key question in this case is this: Whether the harm the Plaintiff-Members allege is personal to each of them or is a harm to the House as an institution. The Supreme Court has clearly stated that "individual members lack standing to assert the institutional interests of a legislature." *Virginia House of Delegates v. Bethune-Hill*, __ U.S. __, 139 S. Ct. 1945, 1950, 1953-54 (2019) (citing *Raines*, 521 U.S. at 829, and holding "a single chamber of a bicameral [state] legislature" lacks

standing to appeal the invalidation of a redistricting plan because redistricting authority is vested in the legislature as a whole);. In other words, there can be no "mismatch between the [party] seeking to litigate and the body" that suffered the alleged harm. *McGahn*, 968 F.3d at 767. Here, the mismatch is plain. The harm the Plaintiff-Members allege – *viz*., the "impedance of [their] legislative and oversight responsibilities" – is a harm to the House of Representatives, of which each plaintiff is only one among 435 Members. Accordingly, the Plaintiff-Members lack standing to bring this case. . . .

Separation of powers concerns are "particularly acute . . . when a legislator attempts to bring an essentially political dispute into a judicial forum." *Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999).

To establish their standing, the plaintiffs must allege they suffered an injury-in-fact that is both concrete and particularized. . . . The particularization requirement helps to ensure the plaintiff is the appropriate party to vindicate the claim.

The particularization inquiry is of special importance when the plaintiffs are legislators. . . . Legislators assert a personal injury when they allege they were "deprived of something to which they *personally* are entitled — such as their seats as Members of Congress after their constituents had elected *them*." *Raines*, 521 U.S. at 821. In contrast, legislators assert an institutional injury when they allege "a loss of political power," *id.*, and an institutional injury requires an "institutional plaintiff." *AIRC*, 135 S. Ct. at 2664. Maintaining this distinction helps avoid a mismatch between the party suing and the party harmed.

The Plaintiff-Members here allege harm to the House rather than to themselves personally. Their theory of injury is that the General Services Administration (GSA), by refusing their request for certain documents, hindered their efforts to oversee the Executive and potentially to pass remedial legislation. The Complaint is clear and consistent on this point: The Plaintiff-Members were harmed through the "impedance of the oversight and legislative responsibilities that have been delegated to them by Congress involving government management and accounting measures and the economy, efficiency, and management of government operations and activities." More specifically, the Plaintiffs-Members, who sit on the Committee on Oversight and Reform, allege the denial of their requests under 5 U.S.C. § 2954 thwarted their efforts to evaluate several aspects of the GSA's management of the Trump Old Post Office lease, and hence their ability to "recommend to the Committee, and to the House of Representatives, legislative and other actions that should be taken to cure any existing conflict of interest, mismanagement, or irregularity in federal contracting." That the allegations of harm go to the Plaintiff-Members' responsibilities for oversight and legislation makes manifest the institutional nature of the harm in this case.

When a defendant impedes legislators in the fulfillment of their legislative duties, the defendant harms the legislature, not the legislators. . . . Any legislative power delegated to a legislator "is not personal to the legislator but belongs to the

people; the legislator has no personal right to it." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011). . . .

Just as the legislative power is not vested personally in individual legislators, neither is the auxiliary power of oversight. Indeed, the power of oversight is so squarely committed to the institution that an investigation is illegitimate if it is conducted to further the personal interests of legislators rather than to aid the House in legislating.

The Plaintiff-Members sought information from the GSA in order to search for a "conflict of interest, mismanagement, or irregularity" and to recommend remedial legislation – a clear exercise of the oversight power of the House. When their request was refused, it was the House that suffered a legally cognizable injury-in-fact, not the Members who bring this suit. . . .

The Members' injury here is also quite different from the denial of Powell's seat. Powell sought the position to which he had been elected and all its benefits. The political power of the House was not diminished by his absence – the harm fell upon Powell alone. Claiming a seat in the House of Representatives is personal; wielding the investigative power of the House is not.

That § 2954 delegates authority to certain Members to request information from an Executive agency does not mean it confers a right personal to each of them. The Congress enacted § 2954 in an apparent attempt to "reform Congress's oversight of public expenditures." Appellant's Br. at 13-14. The Member-Plaintiffs inform us that prior to the passage of § 2954 various statutes required federal agencies to send hundreds of periodic reports to the House for review. By 1928, many of these reports had become outdated and irrelevant. The statute discontinued these reports, while providing a mechanism for the Committee on Oversight, "or any seven members thereof," to make more targeted and useful requests of the Executive. Nothing in the statute suggests this mechanism for requesting documents is a personal benefit for Members of the Committee, rather than a practical tool made available to Members for the purpose of advancing the work of the Committee. . . .

Requests must come from Members of the Committee, but it does not follow that Committee Members suffer a *personal* harm when a request is denied. . . .

Making a request for information is just the first step in the process of congressional oversight of an Executive agency. An Executive agency is likely to grant routine requests. If a request is refused, the Committee on Oversight and Reform can issue a subpoena. If the subpoena is ignored, the House can, by majority vote, authorize the Committee to seek judicial enforcement or to hold the respondent in contempt. This process is more cumbersome than allowing seven individual Members to sue without persuading a majority of their colleagues, but it is necessary to safeguard against investigative demands made for "personal aggrandizement of the investigators" or for other idiosyncratic reasons. Once their party became the majority in the House, if not earlier, the Plaintiff-Members in this case might well have obtained a subpoena from the Committee and, if necessary, a House Resolution authorizing suit. . . .

The consequences of allowing a handful of members to enforce in court demands for Executive Branch documents without regard to the wishes of the House majority are sure to be ruinous. Judicial enforcement of requests under § 2954 will allow the minority party (or even an ideological fringe of the minority party) to distract and harass Executive agencies and their most senior officials; as the district court said, it would subject the Executive to "the caprice of a restless minority of Members." . . . Today's ruling . . . blazes a trail for judicial enforcement of requests made by an errant group of Members acting contrary to the will of their committee, the will of their party, and the will of the House. . . .