2023 SUPPLEMENT TO

ASIMOW & LEVIN'S

STATE AND FEDERAL ADMINISTRATIVE LAW

FIFTH EDITION

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AMERICAN CASEBOOK SERIES®

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Preface

This supplement contains updates on significant administrative law developments that have occurred since the fifth edition of our casebook went to press in April 2020. We are taking advantage of the ease of electronic distribution to produce a supplement that will provide instructors and students with updated teaching materials in selected important areas. The supplement includes three recent principal cases: *Seila Law LLC v. CFPB* and *Collins v. Yellen*, on presidential removal authority and the separation of powers, as well as *West Virginia v. EPA* on the major questions doctrine. Also included are notes on other court cases as well as executive actions taken by the Biden administration.

As always, we welcome feedback on all material in the casebook and the supplement.

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July 2023

TABLE OF CASES

This table includes only cases that appear in this supplement but not in the main volume. References are to page numbers in the supplement.

§ 1.2 REASONS FOR STUDYING ADMINISTRATIVE LAW

P. 3. Add after the second complete paragraph:

The election of President Joe Biden signaled a reversal of the deregulatory policies of President Donald Trump. Biden is committed to much stronger government regulation and more aggressive enforcement of regulatory statutes. For competing assessments of his initial track record, compare Margaret Poydock et al., *President Biden's first 18 months*, ECON. POL'Y INST., Aug. 25, 2022, *https://www.epi.org/publication/biden-first-18-months/* (highlighting economic benefits of Biden's initiatives), with Dan Goldbeck, *Tracking the Regulatory Record of Recent Administrations at the Halfway Point*, AM. ACTION FORUM, Feb, 7, 2023, *https://www.americanactionforum.org/insight/tracking-the-regulatory-record-of-recent-administrations-at-the-halfway-point/* (highlighting compliance costs). Biden also has appointed agency heads who support his regulatory philosophy. An example is his appointment of Lina Khan to be chair of the Federal Trade Commission. Khan's academic and practice work concentrated on antitrust enforcement against big tech companies like Amazon and Google. *See* David McCabe & Cecilia Kang, *One of Big Tech's Biggest Critics Is Now Its Regulator*, N.Y. TIMES, June 16, 2021, *https://www.nytimes.com/2021/06/16/technology/lina-khan-big-tech.html*.

§ 2.4 ELEMENTS OF A HEARING

P. 68. Add at the end of N.6:

The *Elhady* decision was reversed on appeal. *Elhady v. Kable,* 993 F.3d 208 (4th Cir. 2021). The court of appeals rejected an on-the-face challenge to the TSDB, since many persons listed on TSDB did not suffer serious inconvenience. It is improper to overturn an entire government program because some members of the class suffered serious inconveniences.

In general, the court held that listing someone on TSDB does not infringe a liberty interest. Government has always imposed reasonable restrictions on travel for reasons of public health and security. Listing on TSTB did not meet the "stigma plus" test (Casebook, § 2.2.2 N.7), because the government does not publicize the names of people on the list; moreover, enhanced screening at airports or the possibility that a person might not get hired for a job did not count as a "plus." Even if a protected due process interest were involved, the court declined to order across-the-board changes to DHS-TRIP procedures. Using *Mathews* balancing, the court cited the strength of the government's interest in combatting terrorism, the weakness of plaintiffs' interest in avoiding inconvenience, and the court's inability to second-guess government as to appropriate security-enhancing procedures.

P. 69. Add at end of N.9:

There has been an explosion of research and scholarship concerning application of AI to the adjudicatory process. For a good overview, see David Freeman Engstrom et al, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (ACUS 2020), https://www.acus.gov/projects/artificial-intelligence-federal-agencies. This report discusses the uses of AI in a variety of government functions. These include Social Security adjudication for the purpose of clustering cases so that adjudicators can specialize in deciding similar cases, identifying cases with a high likelihood of success, and identifying errors by adjudicators. It also discusses uses of AI in informal adjudication at the U.S. Patent and Trademark Office.

§ 3.3.5 BIAS: PERSONAL INTEREST, PREJUDGMENT, AND ANIMUS

P. 141. Add at the end of N. 5:

An agency does not violate due process by simultaneously engaging in rulemaking to ban a dangerous product in the future and later conducting an adjudication to sanction the sale of the same dangerous product in the past, even though the issues to be resolved in the two proceedings overlap. *Zen Magnets, LLC v. Consumer Product Safety Comm'n,* 968 F.3d 1156 (10th Cir. 2020). The *Zen Magnets* case involved small rare-earth magnets that looked like candy to small children, who had swallowed them and sustained serious injury or death. Zen failed to overcome the presumption that the CPSC commissioners had not prejudged the issues in the adjudication despite having resolved similar issues in the rulemaking.

The CPSC commissioners made public statements at the time they adopted the rule that might have indicated prejudgment. The court considered whether the statements involved legal or factual issues and whether the statements occurred within the course of performing official duties (that is, whether they were "in role"). These statements were "in role" even though they were reported in press releases and appeared on CPSC's website.

Another statement by CPSC Chairman Kaye was made somewhat "out of role." It occurred in the form of a press release issued after the rule was adopted but before the adjudication concluded. At the CPSC's request, the Department of Justice (DOJ) obtained an injunction from a federal district court. The injunction prohibited Zen from selling magnets it had purchased from another magnet company that had previously agreed to recall them. Kaye said: "Today's decision puts the rule of law and the safety of children above the profits sought by Zen…Our pursuit of this case makes clear we will not tolerate the sale of recalled goods in any form." This statement did not show that Kaye had prejudged the CPSC adjudication. Enforcing the recall order was unrelated to issues in the adjudication, which concerned whether the unrecalled magnets posed a substantial product hazard.

It is arguable whether Kaye's statement was in or out of role, since it concerned a CPSC enforcement proceeding, even though enforcement occurred in the form of an injunction in court that was sought by a different government unit (DOJ) after being requested by CPSC to do so.

§ 3.4.1 SELECTION AND INDEPENDENCE OF ALJS

P. 148. Add at the end of N.2:

One court of appeals has already held that tenure protection for ALJs at the SEC is unconstitutional for this reason. See *Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022). Certiorari has been granted in *Jarkesy*. 2023 WL 4278448 (U.S., June 30, 2023). For discussion of this issue, see §§ 7.5.2b N.5 of this supplement.

P. 149. Add at the end of the second paragraph of N.3:

An executive order issued by President Biden has essentially adhered to the provisions of the Trump order. Executive Order 14,029, 86 Fed. Reg. 27,025 (May 14, 2021).

§ 3.4.3 EXTERNAL SEPARATION OF FUNCTIONS

P. 154. Add after the second complete paragraph:

The American Bar Association recently adopted a resolution that "urges Congress to enact legislation establishing a tribunal, staffed by ALJs, to decide cases arising under federal benefit programs that is independent of the federal agencies that manage these programs." Resolution 200 (August 2022).

§ 4.1.1 NOTICE AND PARTIES TO ADJUDICATION

P. 164. Add to the end of N.3:

Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021), like *Bd. of Regents,* seems to represent a strict application of a statutory notice rationale to achieve a result the court feels is otherwise desirable.

An immigration statute provides that a resident alien can seek discretionary relief from deportation only if the alien has lived in the U.S. for ten continuous years. The ten-year clock stops running "when the alien is served a notice to appear" in a removal proceeding. The term "notice to appear" is defined as "written notice . . . specifying" certain information, such as the charges against the alien and the time and place at which the removal proceedings will be held.

Here the Department of Homeland Security (DHS) issued a notice within the ten-year period of the charges against the alien. Then it issued a second notice providing the date and time of a hearing. The Court held that all of the required information must be contained in the first notice in order to stop the clock. To some degree, the case was an exercise in principles of statutory interpretation, written by Justice Gorsuch, who is a strict textualist. He argued that the use of the word "a" before "notice to appear" meant that the government must put all of the required information into a single notice—not that it can do so in two or more separate notices.

The government claimed that its lack of knowledge about hearing officers' availability when it initiates removal proceedings makes it difficult to produce compliant notices. It also claimed that the requirement to provide time and place information in a notice to appear makes little sense when that information may later be changed. Besides, the government stressed, its own administrative regulations have always authorized its current practice.

But the Court noted that, on the government's account, DHS would be free to send a person who is not from this country—someone who may be unfamiliar with English and the habits of American bureaucracies—a series of letters over the course of weeks, months, maybe years, each containing a new morsel of vital information. Congress could reasonably have wished to foreclose that possibility. And ultimately, pleas of administrative inconvenience never "justify departing from the statute's clear text."

§ 4.3 The Decision Phase: Finding Facts and Stating Reasons

P. 202. Add at the end of N.5:

The Supreme Court applied the *Chenery I* principle to a case involving a banking agency's decision to ban a bank officer from further participation in banking activity and to assess a civil penalty against him. *Calcutt v. Federal Deposit Ins. Corp.*, 143 S. Ct. 1317 (2023). The Court of Appeals for the Sixth Circuit concluded that the agency had misapplied the applicable statute by ruling that the officer's actions did not have to be the "proximate cause" of losses to the bank, among other errors. Yet the Sixth Circuit upheld the agency decision banning the officer and imposing penalties. It felt that a remand would result in a "useless formality," given the strength of the evidence against the officer. But the Supreme Court summarily reversed. It held that the Sixth Circuit's decision violated *Chenery I*, because it is up to the agency, not the reviewing court, to apply the proximate cause standard and to determine the sanction for violation of the statute.

The Court noted that there is an exception to *Chenery I* "where there is not the slightest uncertainty as to the outcome of the agency's proceeding on remand." But that exception applies only in narrow circumstances. It does apply where an agency was "required" to take a particular action. But here the banking agency was not required to reach the result it did; the question of whether to sanction the officer, as well as the severity and type of any sanction that was imposed, is a discretionary judgment. That judgment is fact-specific and contextual. "To conclude, then, that any outcome in this case is foreordained is to deny the agency the flexibility in addressing issues in the banking sector as Congress has allowed."

P. 202. Insert the following after N.5:

5a. *Post hoc rationalizations in the DACA case*. The Supreme Court elaborated on the rule against post hoc rationalizations in *Dep't of Homeland Sec. (DHS) v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (also discussed in §§ 5.6, 9.3.2, and 10.5 of this supplement). This case involved the Deferred Action for Childhood Arrivals (DACA) program, which the Obama administration had established in 2012 through adoption of a memorandum. The program benefited so-called "Dreamers"—undocumented persons who had been brought to the United States as children. Under DACA, these persons (numbering about 700,000) could apply for "deferred action" status, meaning that DHS would forbear from deporting them for two years (subject to renewal), and they would also be eligible for collateral benefits such as work permits.

In 2017, after the Trump administration took office, Acting DHS Secretary Duke rescinded DACA by issuing another memorandum. Her statement relied primarily on the Attorney General's determination that DACA was unlawful. However, several court decisions set aside the rescission. Responding to one of these decisions in 2018, the new DHS Secretary, Kirstjen Nielsen, issued a second memorandum. That document cited policy arguments for the rescission, such as a claim that DACA should have been adopted by Congress rather than by the executive. Nielsen's memo stated that she "decline[d] to disturb the Duke memorandum's rescission of the DACA policy."

The Supreme Court, in an opinion by Chief Justice Roberts, ultimately held that the DHS rescission order was arbitrary and capricious (*see* § 9.3.2 of this supplement). For purposes of this review, the Court interpreted the Nielsen memorandum as merely an explanation of Duke's decision. On this premise, the Court refused to consider the arguments in Nielsen's memorandum, because they were post hoc rationalizations.

Justice Kavanaugh dissented on this point. In his view, Nielsen had reconsidered the DACA matter and had issued a new decision; thus, her reasons should have been considered on judicial review. Indeed, "[h]er memorandum was akin to common forms of agency action that follow earlier agency action on the same subject. . . . Courts often consider an agency's additional explanations of policy or additional explanations made, for example, on agency rehearing or reconsideration, or on remand from a court, even if the agency's bottom-line decision does not change."

Roberts responded that application of the rule against post hoc rationalization under these circumstances was not a useless formality. Rather, this rule

> serves important values of administrative law. Requiring a new decision before considering new reasons promotes "agency accountability," by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s]." Permitting agencies to invoke belated justifications, on the other hand, can upset "the orderly functioning of the process of review," forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation."

This reasoning, he added, was applicable even though the Nielsen memorandum had been issued by the agency head rather than by litigating attorneys.

Does the majority's approach threaten to create an unnecessary obstacle to an agency's ability to rehabilitate its decision following an initial remand? *Cf*. Benjamin Eidelson, *Unbundling DACA and Unpacking Regents: What Chief Justice Roberts Got Right*, BALKINIZATION, June 25, 2020, *https://balkin.blogspot.com/2020/06/unbundling-daca-and-unpacking-regents.html*.

In a subsequent case, the Supreme Court allowed the agency to make a new decision, supported by new reasons, to supersede an earlier decision that had been held by lower courts to be arbitrary and capricious. *Biden v. Texas,* 142 S. Ct. 2528 (2022). The *Biden* decision involved a program (referred to as MPP) adopted by the Trump administration to deny entry to migrants crossing the southern border who were not Mexicans. MPP required them to wait in Mexico while their removal cases were being adjudicated by the Immigration Court.

On President Biden's first day in office, January 20, 2021, the Acting Secretary of the Department of Homeland Security (DHS) suspended MPP. On June 1, 2021, the Secretary of DHS issued a memorandum that made the suspension decision final and terminated MPP. A lower court vacated the June 1 memorandum, holding that it violated the relevant statute and also was inadequately explained. The Government appealed this decision. Meanwhile, on October 29, 2021, the Secretary rescinded the June 1 memorandum and issued a new memorandum, again terminating MPP, but supported by a different set of reasons.

The Supreme Court upheld the legal validity of the rescission of MPP under the relevant statute. It also followed Justice Kavanaugh's opinion in the *Regents* case by treating the October 29 memo as a new final agency action. This depended on the fact that the lower court had vacated the June 1 memorandum, so it no longer existed. Therefore the courts should review the October 29 memo on the basis of the newly stated reasons, instead of treating the memo as an invalid effort to supply *post hoc* reasons for the June 1 action, as had occurred in *Regents*. The court remanded the case for consideration of the adequacy of that reasons statement.

Three justices dissented on this issue. Justice Alito, joined by Justices Thomas and Gorsuch, argued that DHS's October 29 memorandum should not have affected the appeal of the district court's decision invalidating the June 1 memorandum. Alito viewed the October 29 memorandum as an effort to thwart the normal appellate process. Justice Barrett dissented separately on jurisdictional grounds.

§ 4.4.1 RES JUDICATA AND COLLATERAL ESTOPPEL

P. 207. Add after the first paragraph of N.2:

Mahanoy Area School Dist. v. B. L., 141 S. Ct. 2038 (2021), suggests that J.S.'s website might have been protected by the First Amendment, but the case is distinguishable. B.L. issued a profane message on Snapchat complaining that she didn't make the varsity cheerleading squad. The school suspended her from the junior varsity cheerleading squad.

The Court indicated that *off-campus* student speech is usually protected by the First Amendment, but there are substantial exceptions—although none of them applied to B.L.'s case. Circumstances that may implicate a school's regulatory interests include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices. Because J.S.'s statements threatened a teacher, they might not have received First Amendment protection.

§ 5.6 FINDINGS AND REASONS

P. 318. Add at the end of N.6:

In *Dep't of Homeland Sec. (DHS) v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020) (more fully discussed in § 4.3 of this supplement), Justice Kavanaugh acknowledged in dissent that courts sometimes decline to consider after-the-fact agency explanations when they review agency *adjudications*. Adjudication implicates due process interests, he said, and "ordinarily focuses on what happened during the agency's adjudication process." He argued, however, that the same prohibition should not apply to official explanations (i.e., those rendered by agency heads rather than lower-level staff) that agencies render post hoc in the context of judicial review of *rulemaking*. In that context, he said, "[f]or purposes of arbitrary-and-capricious review, it does not matter whether the latest official explanation was two years ago or three years ago. What matters is whether the explanation was reasonable and followed the requisite procedures." The majority replied that the Court regularly does apply the basic principle to rulemakings. Should it?

§ 5.7 ISSUANCE AND PUBLICATION

P. 323. Add at the end of N.1:

The executive order described at the end of this note (and in § 6.1.4b N.3 of the casebook) has been rescinded. A supporter of the order writes: "When I saw that the last president had issued an executive order mandating a range of broadly-supported best practices regarding agency guidance documents, my reaction was not pleasant surprise that, just like a broken clock that is right twice a day, President Trump had finally, if accidentally, done something reasonable and deserving of support. It was, rather, discouragement that something reasonable and deserving of support had been irredeemably politicized merely by being associated with President Trump – and so the next president, if he or she were a Democrat, would probably feel compelled to rescind it. President Biden did just that, on his first day in office." Jamie Conrad, *EPA Promotes Opacity Regarding Guidance Documents*, YALE J. ON REG.: NOTICE & COMMENT, May 20, 2021, *https://www.yalejreg.com/nc/epa-promotes-opacity-regarding-guidance-documents-by-jamie-conrad/*.

P. 325. Replace the last sentence on the page with the following:

The tactic of withdrawing rules before the Office of the Federal Register has published them was long upheld in court as a permissible use of an option provided by that office's internal procedures, *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191 (D.C.Cir.1996), but this device has now fallen into disfavor. In *Humane Soc'y of the United States v. USDA*, 41 F.4th 564 (D.C. Cir. 2022), the D.C. Circuit limited *Kennecott* by holding that an agency can finalize a rule by filing it for public inspection, even before the rule has appeared in the Federal Register. Thus, when a new administration takes office, it will no longer be able to withdraw a midnight rule that is pending in the Office of Federal Register by simply asking that office to return it without publishing it.

§ 5.8.2 REGULATORY ANALYSIS IN FEDERAL AGENCIES: ELABORATIONS

P. 342. Add after N.3:

3a. *2023 update.* In 2023, President Biden issued an update to his regulatory oversight program, entitled *Modernizing Regulatory Review*. E.O. 14,094, 88 Fed. Reg. 21,8loper79 (April 6, 2023). The new order retained the basic structure and approach of E.O. 12,866 but made a few modifications, including the following: First, it raised the dollar threshold for economically significant rules (those that require cost-benefit analysis) to $200 million, indexed for inflation. This increase simply adjusted for inflation the $100 million figure that had stood unchanged for decades.

Second, it contained several provisions intended to enhance public participation in the rulemaking process, especially including outreach to representatives of underserved communities. Such outreach should include providing information to these representatives and facilitating meetings between them and rulemaking officials.

Third, the order laid the groundwork for adjustments to the manner in which agencies calculate costs and benefits in regulatory analysis. For example, under guidance to be issued by OIRA within a year, distributive impacts and equity should be considered more systematically, and calculation of the present value of future costs and benefits should be improved.

For evaluations of the executive order from multiple perspectives, see Symposium, *Modernizing Regulatory Review*, YALE J. ON REG.: NOTICE & COMMENT, May 25, 2023, *https://www.yalejreg.com/nc/introduction-to-our-symposium-on-modernizing-regulatory-review-by-jack-lienke/*.

§ 6.1.1 GOOD CAUSE EXEMPTIONS

P. 364. Add at the end of N.4:

In *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020), the Supreme Court apparently resolved the issue raised in the last paragraph of this note. The case arose out of the Trump administration's issuance of interim-final rules that broadly exempted employers from having to provide contraceptive coverage pursuant to the Affordable Care Act if they had religious or moral objections to doing so. Claiming good cause to forego notice and comment, the government issued the rules on an interim-final basis and invited post-promulgation comments. Subsequently, the government finalized the rules, responding to the public comments but making only minimal changes in the rules themselves. On appeal, the Third Circuit held that the good cause finding was erroneous and that the final rules were also invalid, because the government's issuance of virtually identical rules "[did] not reflect any real open-mindedness." The Supreme Court disagreed.

Without reaching the good cause question, the Court upheld the rules, because the completion of the rulemaking process "satisfied the APA's objective criteria." The lower court's open-mindedness test went beyond the requirements of the APA, thus violating the principles of *Vermont Yankee*. No one on the Court dissented on this issue.

Does the Court's holding give agencies too much incentive to resort to interim-final rulemaking, bypassing the regular notice-and-comment process? *Cf*. Kristin E. Hickman, *Did* Little Sisters of the Poor *just gut APA rulemaking procedures?*, YALE J. ON REG.: NOTICE AND COMMENT, July 9, 2020, *https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures* ("The Court's analysis in *Little Sisters* downgrades the statutory relevance of engagement and collaboration between agency officials and the public and, consequently, devalues and undermines public participation as a part of agency rulemaking.").

§ 7.2.1c REVIVAL OF THE NONDELEGATION DOCTRINE?

P. 446. Add at the end of N.9:

For real-world analogs to this problem, consider a few judicial responses to emergency measures that executive authorities in various states have imposed to curb the COVID-19 pandemic. In Pennsylvania, the state supreme court unanimously held that a broad package of such measures fell squarely within the statutory powers of the governor as prescribed in the state Emergency Code, and it rejected challenges based on separation of powers and procedural due process. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020).

On the other hand, the Supreme Court of Wisconsin struck down, by a 4-3 vote, a pandemic control measure that had been imposed by the secretary of the department of health services at the governor's direction. *Wisconsin Legislature v. Palm*, 942 N.W.2d 900 (Wis. 2020). The order was issued under a statute that authorized "emergency measures necessary to control communicable diseases." It instructed that, with limited exceptions, members of the public must remain in their homes, refrain from travel, and close all non-essential businesses, or else face possible criminal penalties. The justices in the majority declared that the statute could not be construed broadly enough to authorize the secretary's order, in part because of the principle of constitutional avoidance. Two concurring justices wrote at length about the separation of powers problems that they thought the statute embodied. They relied heavily on nondelegation themes, quoting at length from Justice Gorsuch's dissent in *Gundy*.

§ 7.3 DELEGATION OF ADJUDICATORY POWER TO AGENCIES

P. 464. Add at the end of N. 5:

An important Fifth Circuit decision has held that the right to jury trial applies to the imposition of civil penalties for securities fraud. Accordingly, the court said, the SEC cannot bring such cases through administrative adjudication before its own ALJs; it must bring them in federal court. The court asserted that civil fraud has historically been the subject of civil and criminal litigation to which the right to jury trial applies. Because such cases involve "traditional legal claims," they do not involve "public rights." The court distinguished *Atlas Roofing* by saying that agency rules requiring safe workplaces created a new form of liability unknown to the common law, unlike securities fraud. *Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022).

In addition, the *Jarkesy* decision held that the statute giving the SEC a choice of pursuing a case internally or enforcing it in federal court violated the nondelegation doctrine, because that statute supplied no standard that the SEC could use to determine how to make that choice. Finally, *Jarkesy* held that the structure of the SEC was unconstitutional, because its ALJs cannot be removed without good cause. (This last holding is discussed in § 3.4 N.2 and § 7.5.2b N.5 of this supplement.)

The dissenting opinion challenged all three of the majority's holdings. In particular, it argued that the SEC's enforcement action involves a public right and that the agency's ability to decide whether to bring a case internally or in court is simply a form of traditional prosecutorial discretion, to which the nondelegation doctrine should not apply.

The Supreme Court has granted certiorari to review the triple-barrel *Jarkesy* decision. 2023 WL 4278448 (U.S., June 30, 2023). If the Fifth Circuit's holdings are upheld, they would invalidate internal SEC enforcement of securities fraud cases, and their reasoning might apply to many other federal enforcement agencies as well. In this sense, the Supreme Court's ultimate decision during the 2023-24 term may profoundly reshape the future of administrative adjudication, at least in combined function agencies, especially if the Court upholds the jury trial claim.

§ 7.4.1 THE LEGISLATIVE VETO AND CONTROL OF FEDERAL AGENCIES

P. 479. Insert after the third paragraph of N.8:

In June 2021 the Democratic Congress passed, and President Biden signed, three resolutions that used the Congressional Review Act to disapprove rules issued by the Trump administration. As one scholar summarized, "The first rule rejected was a Treasury Department rule [that] enabled high-interest lenders (e.g. "payday lenders") to circumvent interest rate caps by affiliating with banks. The second was a rule from the Equal Employment Opportunity Commission intended to make it easier for accused firms to pursue conciliation to resolve discrimination complaints. Third, and perhaps most significantly, the House voted to disapprove of the Environmental Protection Agency's loosened federal regulations governing methane emissions from oil and gas production." Jonathan H. Adler, *Democrats Learn to Love the Congressional Review Act (At Least a Little Bit)*, Volokh Conspiracy, June 29, 2021, *https://reason.com/volokh/2021/06/29/democrats-learn-to-love-the-congressional-review-act-at-least-a-little-bit/*.

§ 7.5.1a FEDERAL APPOINTMENTS

P. 499. Replace the last paragraph of N.5 with the following:

In *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), the Supreme Court faced a similar problem but found a different means of remedying it. The case involved an "inter partes" proceeding, in which litigants engaged in an adversarial contest before the Patent Trial and Appeal Board (PTAB) over the validity of a patent. *See* Casebook, § 7.3 N.4. The Court noted that administrative patent judges (APJs), who hear such cases, could not be removed without cause and could render final decisions that could not be reviewed within the executive branch. Speaking through Chief Justice Roberts, the Court found that this combination of features violated the Appointments Clause. These responsibilities should be exercised only by principal officers, yet the APJs had been appointed as inferior officers. Nevertheless, the Court declined to strip away the APJs' tenure protection. Instead, the Court focused on statutory language that appeared to vest final decisional authority in the APJs alone in inter partes cases. To avoid a constitutional problem, the Court held that the provision "cannot constitutionally be enforced to the extent that its requirements prevent the Director [of the Patent and Trademark Office] from reviewing final decisions rendered by APJs." The Director was a principal officer, so the availability of an appeal to the Director would render the APJs' role consistent with their status as inferior officers.

Justice Thomas, dissenting, protested that the Court had never before invoked the Appointments Clause to invalidate a congressional decision to allow a department head to appoint a federal officer. He noted that the Director had available plenty of ways to control APJs' decisions, such as by deciding which judges would sit on a panel and deciding which rulings should be reheard by another panel. He saw no basis for the Court to impose a flat rule that any specific power is inherently a "principal-officer power." Justice Breyer, joined by Justices Kagan and Sotomayor, joined most of Thomas's dissent and also urged the Court to eschew formalist rules in favor of functional reasoning that would resolve structural constitutional questions in light of their practical consequences. The flexibility of such an approach would accommodate the immense variety of federal agencies and the need for adaptations over time.

Roberts replied that, in the interest of political accountability, an inter partes ruling—which might involve billions of dollars—should be made, or at least reviewed, by an official who has been nominated by the President and confirmed by the Senate. The alternative measures favored by the dissenters would only blur the lines of accountability, so that no one could be sure about whom to blame for a bad decision.

Who had the better of this exchange? Was the majority's disposition defensible on functional grounds? *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141 (2019).

§ 7.5.2a THE RISE OF THE INDEPENDENT AGENCY

P. 510. Add at the end of N.1:

Still, Congress is sometimes imprecise in its terminology. In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), a statute provided that the Director of the Federal Housing Finance Agency was removable only "for cause," but it contained no parallel restriction for an Acting Director. The Court thus concluded that an Acting Director would be removable at will. Although the statute did refer to the FHFA as an "independent agency," the Court saw little significance in the label. It pointed to a variety of statutes in which Congress has referred to an agency as "independent" without imposing removal restrictions, or vice versa. In this instance, the Court said, the term "independent" only meant that the FHFA would be "independent of any other unit of the Federal Government."

§ 7.5.2b REMOVAL ISSUES IN THE MODERN ERA

Pp. 512-21. Replace *Morrison v. Olson* as a principal case with the following:

MORRISON v. OLSON

487 U.S. 654 (1988)

REHNQUIST, C.J.:

[The 1978 Ethics in Government Act created a special court (the Special Division) that was authorized, in response to a request by the Attorney General, to appoint an independent counsel to investigate and prosecute possible violations of federal law by certain high ranking government officials. The Act provided that the Attorney General could remove the independent counsel, but only for "good cause." Pursuant to the procedures outlined in the Act, the Special Division appointed Morrison an independent counsel to investigate Assistant Attorney General Olson's alleged obstruction of a congressional inquiry. In

Morrison v. Olson, 487 U.S. 654 (1988), the Supreme Court first held that Morrison's appointment was consistent with the Appointments Clause, *see* Casebook § 7.5.1 N.2, and then upheld the provision that protected the independent counsel from removal except for "good cause.":]

. . . In our view, the removal provisions of the Act make this case more analogous to *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), and *Wiener v. United States,* 357 U.S. 349 (1958), than to *Myers* or *Bowsher [v. Synar,* 478 U.S. 714 (1986)].

Appellees contend that *Humphrey's Executor* and *Wiener* are distinguishable from this case because they did not involve officials who performed a "core executive function." They argue that our decision in *Humphrey's Executor* rests on a distinction between "purely executive" officials and officials who exercise "quasi-legislative" and "quasi-judicial" powers. . . . We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers,* but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." . . . We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light. . . .

. . . There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

. . . This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing her statutory responsibilities in a manner that comports with the provisions of the Act. . . . Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

SCALIA, J., dissenting:

The Court concedes that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive'.". . . Governmental investigation and prosecution of crimes is a quintessentially executive function.

[T]he statute before us deprives the President of exclusive control over that quintessentially executive activity: The Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the statute. Instead, the Court points out that the President, through his Attorney General, has at least *some* control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that "some" presidential control. "Most importan[t]" among these controls, the Court asserts, is the Attorney General's "power to remove the counsel for 'good cause.' " This is somewhat like referring to shackles as an effective means of locomotion. As we recognized in *Humphrey's Executor*—indeed, what *Humphrey's Executor* was all about—limiting removal power to "good cause" is an impediment to, not an effective grant of, presidential control. . . .

. . . It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.

The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a "balancing test." What are the standards to determine how the balance is to be struck, that is, how much removal of presidential power is too much? Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply *announces,* with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not "so central to the functioning of the Executive Branch" as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so. . . . This is not only not the government of laws that the Constitution established; it is not a government of laws at all.

In my view, moreover, even as an ad hoc, standardless judgment the Court's conclusion must be wrong. . . . It deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff. That is the whole object of the law, of course, and I cannot imagine why the Court believes it does not succeed. . . .

Since our 1935 decision in *Humphrey's Executor*, . . . it has been established that the line of permissible restriction upon removal of principal officers lies at the point at which the powers exercised by those officers are no longer purely executive. Thus, removal restrictions have been generally regarded as lawful for so-called "independent regulatory agencies," such as the Federal Trade Commission, the Interstate Commerce Commission, and the Consumer Products Safety Commission, which engage substantially in what has been called the "quasi-legislative activity" of rulemaking, and for members of Article I courts, such as the Court of Military Appeals, who engage in the "quasi-judicial" function of adjudication. It has often been observed, correctly in my view, that the line between "purely executive" functions and "quasi-legislative" or "quasi-judicial" functions is not a clear one or even a rational one. But . . . *Humphrey's Executor* at least had the decency formally to observe the constitutional principle that the President had to be the repository of *all* executive power, which, as *Myers* carefully explained, necessarily means that he must be able to discharge those who do not perform executive functions according to his liking. . . . By contrast, "our present considered view" is simply that *any* executive officer's removal can be restricted, so long as the President remains "able to accomplish his constitutional role." There are now no lines. If the removal of a prosecutor, the virtual embodiment of the power to "take care that the laws be faithfully executed," can be restricted, what officer's removal cannot?

SEILA LAW LLC v. CONSUMER FINANCIAL PROTECTION BUREAU

140 S. Ct. 2183 (2020)

ROBERTS, C.J.:

[The CFPB issued a civil investigative demand to Seila Law, a California law firm that provides debt-related services to clients. The demand (essentially a subpoena) directed Seila Law to produce information and documents related to its business practices. Seila Law refused to comply, objecting on separation of powers grounds to the structure of the Bureau. The lower courts upheld the demand, but the Supreme Court vacated and remanded. The introduction to the majority opinion summarized its reasoning:]

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy. The question before us is whether this arrangement violates the Constitution's separation of powers.

Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1; *id.,* §3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund v. Public Company Accounting Oversight Bd.,* 561 U. S. 477 (2010) [discussed in N.4 of this section of the casebook], we reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties." "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."

The President's power to remove—and thus supervise— those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers* v. *United States*. Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor* v. *United States,* we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. And in *United States* v. *Perkins,* 116 U. S. 483 (1886), and *Morrison* v. *Olson,* 487 U. S. 654 (1988), we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.

We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will. . . .

[The majority elaborated on some of its objections to the CFPB's structure as follows:]

In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.

"The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." . . . Most prominently, the Framers bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate, each composed of multiple Members and Senators. . . . By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. . . . To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people."

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. . . .

The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. Yet the Director may *unilaterally,* without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans. . . .

[S]everal other features of the CFPB combine to make the Director's removal protection even more problematic. . . . Because the CFPB is headed by a single Director with a five-year term, some

Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. . . .

The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend or veto spending bills that affect the operation of administrative agencies. . . . But no similar opportunity exists for the President to influence the CFPB Director. Instead, the Director receives over $500 million per year to fund the agency's chosen priorities. And the Director receives that money from the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will "slip from the Executive's control, and thus from that of the people." . . .

THOMAS, J., whom GORSUCH, J., joins, concurring in part and dissenting in part. . . .

The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent. . . . [Thomas and Gorsuch dissented from the Court's decision to sever the removal restriction from the Act. They said that the Court should simply have denied the CFPB's information demand, without reaching the severability issue.]

KAGAN, J., with whom GINSBURG, BREYER, and SOTOMAYOR, JJ., join, concurring in the judgment with respect to severability and dissenting in part.

Throughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the Consumer Financial Protection Bureau (CFPB).

Our Constitution and history demand that result. The text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties. Still more, the Framers' choice to give the political branches wide discretion over administrative offices has played out through American history in ways that have settled the constitutional meaning. . . .

The Court today fails to respect its proper role. It recognizes that this Court has approved limits on the President's removal power over heads of agencies much like the CFPB. Agencies possessing similar powers, agencies charged with similar missions, agencies created for similar reasons. The majority's explanation is that the heads of those agencies fall within an "exception"—one for multimember bodies and another for inferior officers—to a "general rule" of unrestricted presidential removal power. And the majority says the CFPB Director does not. That account, though, is wrong in every respect. The majority's general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority's work—between multimember bodies and single directors—does not respond to the constitutional values at stake. If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. . . .

. . . [T]o make sense on the majority's own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily "slip" from the President's grasp. But the majority has nothing to offer. In fact, the opposite is more likely to be true: . . . A multimember structure reduces accountability to the President because it's harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director. Indeed, that is *why* Congress so often resorts to hydra-headed agencies. . . .

The majority says a single head is the greater threat because he may wield power "*unilaterally*" and "[w]ith no colleagues to persuade" (emphasis in original). . . . [T]he majority has nothing but intuition to back up its essentially functionalist claim that the CFPB would be less capable of exercising power if it had more than one Director (even supposing that were a suitable issue for a court to address).[11]

COLLINS v. YELLEN

141 S. Ct. 1761 (2021)

ALITO, J.:

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. [One such] 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. . . . [W]ith 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

[11] The majority briefly mentions, but understandably does not rely on, two other features of Congress's scheme. First, the majority notes that the CFPB receives its funding outside the normal appropriations process. But so too do other financial regulators, including the Federal Reserve Board and the FDIC. And budgetary independence comes mostly at the expense of Congress's control over the agency, not the President's. (Because that is so, it actually works to the President's advantage.) Second, the majority complains that the Director's five-year term may prevent a President from "shap[ing the agency's] leadership" through appointments. But again that is true, to one degree or another, of quite a few longstanding independent agencies, including the Federal Reserve, the FTC, the Merit Systems Protection Board, and the Postal Service Board of Governors. . . . [Repositioned footnote.]

a pay down on Treasury's investment. [The Supreme Court rejected the shareholders' statutory claim and then turned to the constitutional claim. Because the federal government parties had declined to defend the removal provision, the Court had appointed an amicus curiae, Professor Aaron Nielson, to argue that the FHFA's structure was constitutional.] . . .

The Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers. Indeed, our decision last Term in *Seila Law* is all but dispositive. . . . 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, *amicus* 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. . . .

. . . But the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head. 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, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote. In addition, because the President, unlike agency officials, is elected, this control is essential to subject Executive Branch actions to a degree of electoral accountability. At-will removal ensures that "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community" [quoting Madison]. These purposes are implicated whenever an agency does important work, and nothing about the size or role of the FHFA convinces us that its Director should be treated differently from the Director of the CFPB.

[The amicus also sought to distinguish *Seila Law* on the grounds that (1) the FHFA's role as a conservator did not entail executive power; (2) the FHFA regulated government entities rather than the public; and (3) the Recovery Act's provision allowing the Director to be removed "for cause" was broader than the corresponding language in the Dodd-Frank Act. The Court rejected all of these arguments. The Court then remanded the case for consideration of remedial issues, as discussed in N.3b below.]

KAGAN, J., concurring in the judgment.

I agree with the majority that *Seila Law* governs the constitutional question here . . . For two reasons, however, I do not join the majority's discussion of the constitutional issue. First is the majority's political theory. . . . At-will removal authority, the majority intones, "is essential to subject Executive Branch actions to a degree of electoral accountability"—and so courts should grant the President that power in cases like this one. I see the matter differently (as, I might add, did the Framers). 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" [citing to her dissent in *Seila Law*, which had said that "Congress, not this Court, [should] decide on agency design"].

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. . . . 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.

SOTOMAYOR, J., joined by BREYER, J., dissenting. . . .

. . . In striking down the independence of the FHFA Director, the Court reaches further than ever before, refusing tenure protections to an Agency head who neither wields significant executive power nor regulates private individuals. . . . Because I would afford Congress the freedom it has long possessed to make officers like the FHFA Director independent from Presidential control, I respectfully dissent.

P. 522. Replace N.3 with the following:

3. *Single agency head.* The holdings in *Seila Law* and *Collins* apply only to removal requirements pertaining to agencies headed by a single individual. Note Justice Thomas's argument in *Seila Law* that the Court should have gone further by overruling *Humphrey's Executor* altogether. Does any reasoning in the majority opinions suggest that the Court would reach a different result in a case involving a multi-member agency? One observer suggests that the narrowness of the *Seila Law* holding reflects Chief Justice Roberts's desire to avoid rulings that would cause broad disruptions. Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau, https://lawreviewblog.uchicago.edu/2020/08/27/seila-adler/*

(2020). If he is correct, has the Court reached a palatable compromise solution?

3a. *Presidential prerogative.* An important premise of the majority opinions in *Seila Law* and *Collins* is that limitations on the President's removal power should not be too freely allowed, because that power enables the President to control subordinates in accordance with his policies, and the President in turn is accountable to the people through elections. Is this account of the Framers' "constitutional strategy" persuasive? Or is the concentration of such unfettered power in the hands of a single President itself a threat to liberty? *See generally* Series, Seila Law *and the Roberts Court*, *https:// lawreviewblog. uchicago.edu/2020/08/27/seila-series/* (2020).

3b. *Remedy issues in Collins*. The Justices disagreed on the issue of remedy in *Collins*. Justice Alito, writing for the Court, recognized the shareholders' claim that "the third amendment must be completely undone. They seek an order setting aside the amendment and requiring the 'return to Fannie and Freddie [of] all dividend payments made pursuant to [it].'" But he was unpersuaded: "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." Still, he said, it was *possible* that the unconstitutional provision had caused harm, so the Court remanded the case for further consideration. Justice Kagan, concurring, interpreted this disposition to mean that "plaintiffs alleging a removal violation are entitled to injunctive relief . . . only when the President's inability to fire an agency head affected the complained-of decision." She supported this approach, because it would prevent the invalidation of "actions the President supports" or "that would never have risen to a President's attention." (On remand, the plaintiffs failed to prove a causal link. *Collins v. Lew*, 2022 WL 17170955 (S.D. Tex. Nov. 22, 2022) (appeal pending).)

Justice Gorsuch dissented on this issue, agreeing with the shareholders' position. He lamented that "the Court sounds the call to arms and declares a constitutional violation only to head for the hills as soon as it's faced with a request for meaningful relief." Asserting that the causation inquiry contemplated by the majority was unprecedented and would be hopelessly speculative, he favored a "simpler and more familiar path. . . . . [O]fficials cannot wield executive power except as Article II provides, [and] where individuals are burdened with unconstitutional executive action, they are 'entitled to relief.'"

3c. *Collins aftermath*. Only a few hours after the Court announced its decision in *Collins*, President Biden fired the FHFA Director. And more fallout was to come. In her concurring opinion in *Collins*, Justice Kagan had remarked that "[t]he 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." Sure enough: two weeks later, the President dismissed the Commissioner of the Social Security Administration. Both of these officials had been appointed by President Trump and had aggressively pursued Trumpian policies. Note that, with these firings, Biden made use of an option that the Court's conservatives had favored and its liberals had opposed.

Pp. 525-26. Add at the end of N.5:

Applying the rationale of *Free Enterprise Fund*, the Fifth Circuit has held that the insulation of the SEC's ALJs from removal without good cause is unconstitutional. *Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022). The Supreme Court has granted certiorari to review this holding, as well as two other holdings in *Jarkesy*. For discussion of those other issues, see § 7.3 of this supplement.

Pp. 528-29. Add at the end of N.8:

In *Seila Law*, the Court declined to rely on revisionist interpretation to avoid the constitutional problem in that case. Roberts noted that Congress had made plain its intention to make the CFPB an "independent bureau," and it was not clear how this objective could be achieved "if its head were required to implement the President's policies upon pain of removal." He concluded: "Without a proffered interpretation that is rooted in the statutory text and structure, and would avoid the constitutional violation we have identified, we take Congress at its word that it meant to impose a meaningful restriction on the President's removal authority."

§ 7.6 EXECUTIVE OVERSIGHT

P. 544. Add at the end of N.9:

Presidential administration is alive and well in the Biden era. On his first day in office, President Biden rescinded a host of President Trump's executive orders, including the "one in, two out" order described in N.8, as well as the Trump order on guidance documents (see § 5.7 of this supplement). As his term has progressed, Biden has also used executive orders to advance his own agenda. *See, e.g.,* Andrew Restuccia & Jacob M. Schlesinger, *Biden's Business Order Shows How He's Taking Executive Power to Shape Economy*, WALL ST. J., July 8, 2021, *https://www.wsj.com/articles/bidens-business-order-shows-how-hes-using-executive-power-to-shape-economy-11625856377* ("President Biden's sweeping order Friday seeking to spur competition and curb the power of big business [included] directing at one time more than a dozen agencies to explore 72 actions touching an array of issues, including expanding labor rights, lowering prescription drug prices, restricting airline fees, and giving bank customers more flexibility to change accounts."). Overall, Biden issued 77 executive orders during his first year in office—the highest number since the administration of President Gerald Ford. "Actions related to vehicle emissions and

COVID-19 safety measures provided the vast majority of [the regulatory costs of these orders]. Dan Goldbeck & Dan Bosch, *"Year One": Assessing the Biden Regulatory Record Against Recent Administrations*, AM. ACTION FORUM, Jan. 20, 2022, *https://www.americanactionforum.org/research/year-one-assessing-the-biden-regulatory-record-against-recent-administrations/*.

§ 8.1.1 PROTECTING DELIBERATION: § 552(b)(5)

P. 561. Add at end of N.3:

The deliberative process privilege applies to a document that is pre-decisional and deliberative. Even if the document is not followed by any further agency action, that fact does not make it a "final opinion." *United States Fish & Wildlife Serv. v. Sierra Club,* 141 S. Ct. 777 (2021).

This case involved Environmental Protection Agency (EPA) rulemaking concerning factory cooling towers. By statute, EPA must consult with Fish and Wildlife Service (FWS) concerning risk to endangered species. If FWS submits a "jeopardy opinion," EPA must modify the rule. Here, FWS first sent a jeopardy opinion that caused EPA to revise a proposed regulation. FWS scientists did not believe the revised proposed rule adequately reduced the risk to endangered species, so they produced another draft jeopardy opinion. This time, FWS shelved the draft opinion and never submitted it to EPA, which later adopted a substitute rule. The Sierra Club sought disclosure of the second draft opinion, but the Court held it was protected by the deliberative process privilege. The draft opinion was pre-decisional and deliberative—and, because FWS never acted on it, it could not be considered a "final opinion" that must be disclosed.

§ 9.2.2 THE CHEVRON DOCTRINE

Add at the end of N.3:

In the coming term, the Supreme Court will hear a case that could result in a major reassessment of the *Chevron* doctrine. *See Loper Bright Enterprises v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023). The Magnuson-Stevens Act empowers the National Marine Fisheries Service to approve fishery management plans that may "require that one or more observers be carried on board a vessel . . . for the purpose of collecting data necessary for the conservation and management of the fishery." It also authorizes the Service to adopt rules "necessary and appropriate" to achieve the Act's goals. The Service adopted a rule that would require owners of fishing vessels to pay the salaries of such observers. A group of herring fishing companies brought suit to contest the rule, arguing that the Act does provide for cost-shifting in a few contexts but not in this one. On review, the D.C. Circuit acknowledged that the relevant provision was silent on the issue of industry-funded monitoring, but it held, under *Chevron* step two, that the statutory language "provides a reasonable basis for the Service to infer that the practical steps to implement a monitoring program, including the choice of funding mechanism and cost-shifting determinations, are . . .'necessary and appropriate' to implementation of the Act."

The Supreme Court granted review to consider the following question: "Whether the court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." It is certainly possible that the Court will decide only the narrow issue framed by the latter half of this question. Nevertheless, litigants, amici, and commentators have devoted extensive attention to briefing and debating the broad issue of whether the *Chevron* doctrine should be overruled or substantially overhauled.

§ 9.2.3A MAJOR QUESTIONS

P. 629. Insert this new section after § 9.2.3:

In recent years, the major questions doctrine discussed in § 9.2.3 N.5 has continued to provoke extensive discussion and litigation. The controversy over this evolving doctrine came to a head in the following case.

WEST VIRGINIA v. ENVIRONMENTAL PROTECTION AGENCY

142 S. Ct. 2587 (2022)

ROBERTS, C.J.:

[Section 111 of 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. 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. 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. [That approach was called "generation shifting." The 2015 rule as a whole, known as the Clean Power Plan, was a cornerstone of the Obama administration's climate change policy.

As litigation to contest the Clean Power Plan commenced, the Supreme Court entered a stay to prevent the plan from going into effect immediately. Thereafter, the Trump administration took office and adopted a rule to rescind the plan, but the D.C. Circuit vacated this rescission rule, thus bringing the Clean Power Plan back into legal effect. The Supreme Court granted review to consider whether generation shifting is within the authority granted to EPA by the Clean Air Act.] . . .

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA* v. *Brown & Williamson Tobacco Corp*. 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.*

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.,* [141 S. Ct. 2485 (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* [Casebook § 9.2.2 N.5] addressed another question regarding EPA's authority—namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." 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,* [142 S.Ct. 661 (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,* 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]." 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 v. AT&T* [Casebook § 9.2.2 N.4] . . . We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."

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

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).

[After much discussion of the Clean Air Act, the Court concluded:] 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. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed. . . .

GORSUCH, J., with whom ALITO, J., joins, concurring. . . .

The major questions doctrine works in much the same way [as other clear-statement principles in statutory interpretation do:] 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,* [23 U.S.] 1, 42-43 (1825). Doubtless, what qualifies as an important subject and what constitutes a detail may be debated. But no less than its rules against retroactive legislation or protecting sovereign immunity, the Constitution's rule vesting federal legislative power in Congress is "vital to the integrity and maintenance of the system of government ordained by the Constitution."

It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable "ministers." The Federalist No. 11 (A. Hamilton). From time to time, some have questioned that assessment. But by vesting the law-making power in the people's elected representatives, the Constitution sought to ensure "not only that all power [w]ould be derived from the people," but also "that those [e]ntrusted with it should be kept in dependence on the people." *Id.,* No. 37 (J. Madison). The Constitution, too, placed its trust not in the hands of "a few, but [in] a number of hands," so that those who make our laws would better reflect the diversity of the people they represent and have an "immediate dependence on, and an intimate sympathy with, the people." *Id.,* No. 52 (J. Madison). Today, some might describe the Constitution as having designed the federal lawmaking process to capture the wisdom of the masses.

Admittedly, lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident. The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty. See The Federalist No. 48 (J. Madison); see also *id.,* No. 73 (A. Hamilton). As a result, the framers deliberately sought to make lawmaking difficult by insisting that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto.

The difficulty of the design sought to serve other ends too. By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time. See *id.,* No. 10 (J. Madison). The need for compromise inherent in this design also sought to protect minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority. See *id.,* No. 51 (J. Madison). The difficulty of legislating at the federal level aimed as well to preserve room for lawmaking "by governments more local and more accountable than a distant federal" authority, and in this way allow States to serve as "laborator[ies]" for "novel social and economic experiments,"

Permitting Congress to divest its legislative power to the Executive Branch would "dash [this] whole scheme." Legislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him. In a world like that, agencies could churn out new laws more or less at whim. Intrusions on liberty would not be difficult and rare, but easy and profuse. See The Federalist No. 47 (J. Madison); *id.,* No. 62 (J. Madison). Stability would be lost, with vast numbers of laws changing with every new presidential administration. Rather than embody a wide social consensus and input from minority voices, laws would more often bear the support only of the party currently in power. Powerful special interests, which are sometimes "uniquely" able to influence the agendas of administrative agencies, would flourish while others would be left to ever-shifting winds. Finally, little would remain to stop agencies from moving into areas where state authority has traditionally predominated. That would be a particularly ironic outcome, given that so many States have robust nondelegation doctrines designed to ensure democratic accountability in their state lawmaking processes. . . .

The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does "not inadvertently cross constitutional lines." . . . The doctrine does so by ensuring that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond" those the people's representatives actually conferred on them.

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." Because today's decision helps safeguard that foundational constitutional promise, I am pleased to concur.

KAGAN, J., with whom BREYER and SOTOMAYOR, JJ., join, dissenting. . . .

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. The "best system" full stop—no ifs, ands, or buts of any kind relevant here. . . .

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 . . . with all the Clean Air Act's provisions. That the Plan addresses major issues of public policy does not upend the analysis. Congress wanted EPA to do just that. Section 111 entrusts important matters to EPA in the expectation that the Agency will use that authority to combat pollution—and that courts will not interfere. . . .

Some years ago, I remarked that "[w]e're all textualists now." 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. . . .

It is not surprising that Congress has always delegated, and continues to do so—including on important policy issues. As this Court has recognized, it is often "unreasonable and impracticable" for Congress to do anything else. 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." 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. . . .

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. . . .

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

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

Notes and Questions

1. *Decoding the doctrine.* Does the major questions doctrine, as expounded in *West Virginia*, rest on the Court's perceptions about what Congress typically does intend, or on what it *should* intend? Do the factors that the Court says give it "reason to hesitate" before finding statutory authority in a major questions case justify a requirement that the agency must demonstrate "clear congressional authorization" for its action?

2. *Clear statement principle*. *Should* an agency be foreclosed from adopting a rule that would have vast economic and political consequences, where Congress has not provided the agency with "clear" statutory authorization? Can a pressing policy issue of current concern, such as climate change or a pandemic, justify an agency in adopting a

new or novel application of a longstanding statute, without waiting for explicit congressional authorization? Is it realistic to expect Congress to take responsibility for resolving the policy issues presented in such cases?

3. *Separation of powers*. According to Justice Gorsuch, separation of powers considerations justify the limitations on agency authority that the Court imposed in *West Virginia*. His concurrence reads like an attack on delegation as such. Does his analysis explain why the requirement of "clear congressional authorization" should apply only to "major questions" as opposed to non-major questions?

4. *Aftermath*. *West Virginia* did not settle very much. A survey of the cases applying it in the first year following its issuance found that "judges have taken vastly different approaches to defining and applying the [major questions] doctrine—even within the same circuit." Natasha Brunstein, *Taking Stock of West Virginia on its One-Year Anniversary,* YALE J. ON REG.: NOTICE & COMMENT, June 18, 2023, https://www.yalejreg.com/nc/taking-stock-of-west-virginia-on-its-one-year-anniversary-by-natasha-brunstein/. For a compilation of much of the voluminous commentary on the doctrine, see Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REG.: NOTICE & COMMENT, Nov. 21, 2022, https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/.

5. *Student loans*. The Court revisited the major questions doctrine in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). This case invalidated the Biden administration's student loan forgiveness program. The program had canceled $10,000 in debts for borrowers with incomes below $125,000, and up to $20,000 for Pell Grant recipients. The Secretary of Education had adopted the program by relying on the so-called HEROES Act, which authorized the Secretary to "waive or modify" provisions of student loan legislation as necessary to alleviate financial hardship resulting from a national emergency. Presidents Trump and Biden had indeed declared the COVID pandemic to be a national emergency.

Six states brought suit to challenge the program. After finding that Missouri had standing (see § 11.1.2 N.6 in this supplement), the Supreme Court sustained their challenge. Chief Justice Roberts again wrote for the Court. He concluded that the terms "modify" and "waive" connote modest changes and could not reasonably be construed to allow the Secretary to rewrite the statute from the ground up. More broadly, he stated:

> 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. . . . 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 . . ."
>
> 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. . . [I]magine . . . asking the enacting Congress . . .: "Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?" We can't believe the answer would be yes. . . . "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."

The Secretary argued that the major questions doctrine should apply only to agency decisions to regulate, not the provision of government benefits, such as the program in this case. But the Court rejected the distinction: "Among Congress's most important authorities is its control of the purse. . . . It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations."

Roberts concluded: "All this leads the Court to conclude that 'the 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, the Court has required the Secretary to 'point to "clear congressional authorization"' to justify the challenged program."

Justice Kagan, joined by Justices Sotomayor and Jackson, dissented. She wrote that the majority's major questions doctrine

> prevents Congress from doing its policy-making job in the way it thinks best. . . . 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. . . . 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. . . .
>
> . . . The policy judgments, under our separation of powers, are supposed to come from Congress and the President. But they don't when the Court refuses to respect the full scope of the delegations that Congress makes to the Executive Branch. When that happens, the Court becomes the arbiter—indeed, the maker—of national policy. That is no proper role for a court. And it is a danger to a democratic order.

6. *Barrett's concurrence.* Justice Barrett joined the majority opinion in *Nebraska* but also wrote a concurring opinion to outline a different basis for the major questions doctrine. While recognizing that some of the cases refer to the doctrine as a clear statement rule, she did not favor that approach, because it "'loads the dice' so that a plausible antidelegation interpretation wins even if the agency's interpretation is better." Nevertheless, she continued, statutes should be construed in light of their text and their full context, which includes legal conventions and common sense. The major questions doctrine grows out of "commonsense principles of communication," including "the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies." Thus, "in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details." She asserted that previous cases associated with the major questions doctrine, including *Brown & Williamson*, *Utility Air*, and *West Virginia*, can be explained in these terms. Yet in all of these cases, as well as in *Nebraska*, the Court was deeply split. Does Barrett's approach require an assumption that the justices in the majority in these cases were better informed than the dissenters were, or had more common sense?

§ 9.3.2 POLITICS, POLICY, AND THE HARD LOOK

P. 674. Add after N.2:

2a. *The DACA case.* In *Dep't of Homeland Sec. (DHS) v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (more fully discussed in § 4.3 of this supplement), the Court held that DHS's rescission of the Deferred Action for Childhood Arrivals (DACA) program was arbitrary and capricious. Chief Justice Roberts' opinion for the Court found that the agency had, in the words of *State Farm*, "failed to consider . . . important aspect[s] of the problem," in two respects.

First, deferred action under DACA basically consisted of two elements. Recipients would be shielded from deportation for two years ("forbearance"), and they would also become eligible for work authorization and Social Security and Medicare benefits. In rescinding the program, DHS had focused on what it regarded as the illegality of the government benefits; it had not directly considered the legality of forbearance. In that light, said the Court, the agency should have considered, as an alternative to total rescission of DACA, the option of leaving the forbearance aspect of deferred action in place, while rescinding only the affirmative benefits aspect. The Court compared its rationale to one of the grounds for the holding in *State Farm*: NHTSA's rescission of the passive restraints rule had been arbitrary and capricious because the agency, having identified problems with the seatbelt option in the prior rule, had failed to consider the option of requiring manufacturers to comply by installing airbags.

Second, Roberts contended that DHS should have considered the reliance interests that would be impaired if the program were discontinued. Rescission would profoundly affect the recipients of deferred action, as well as their families, employers, etc. Although deferred action was conferred only in two-year increments and could be revoked at any time, that fact did not mean that DHS could ignore these reliance interests, according to the Court.

Was the Court's reasoning persuasive? In dissent, Justice Thomas argued that DHS ought to be able to discontinue DACA without having to consider whether some portion of it could be salvaged. As for reliance, what, if anything, gave the Court the prerogative to treat that factor as an "important aspect of the problem," which the agency was required to consider? (*Cf. Michigan v. EPA*, Casebook § 5.8.1 N.4.) More generally, might the use of a judicial hard look in this context threaten to make it too difficult for an agency to discontinue a purely voluntary program of nonenforcement? *Cf*. Zachary Price, *DACA and the need for symmetrical legal principles*, SCOTUSBLOG, June 19, 2020 (warning that, under the Court's logic, "executive officials could convert enforcement discretion into a power to change law if inviting reliance on promised forbearance were sufficient to freeze a permissive policy in place").

P. 680. Add at the end of N.8:

Justice Gorsuch maintained his skepticism about universal relief in *United States v. Texas*, 143 S. Ct. 1964 (2023). As discussed in § 11.1.2 N.6 of this supplement, the majority held that states lacked standing to challenge immigration guidelines in court, because the guidelines caused them no cognizable injury. Gorsuch, in a concurring opinion joined by Justices Thomas and Barrett, would have denied standing for a different reason: The states' injuries were not redressable, because the APA does not authorize the remedy they sought—vacatur of the guidelines. He argued that, although the Act does say that courts may "set aside" unlawful agency action, the language of the Act taken as a whole casts doubt on the idea that its authors meant to create a vacatur remedy. Does Gorsuch's interpretation take adequate account of post-APA developments, such as the rise of rulemaking as a standard vehicle for policymaking? For a defense of modern vacatur practice, see Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997 (2023).

§ 9.4 REVIEW OF FACT ISSUES IN INFORMAL PROCEEDINGS

P. 684. Add at the end of N.3:

For a recent example of the predictive facts doctrine, see *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021). Longstanding rules of the Federal Communications Commission had limited the number of broadcast stations that a single entity could own in a given media market. In 2017, the Commission concluded that the rules were obsolete and sought to repeal them. The Commission disagreed with public interest groups' contention that removal of these rules could lead to a reduction in the number of minority- or female-owned stations.

The Third Circuit held that the Commission's analysis underlying this predictive judgment had been inadequate, but the Supreme Court unanimously reversed in an opinion by Justice Kavanaugh. The Court wrote that, in applying the arbitrary-and-capricious standard, 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."

In this instance, the Court said, the Commission predicted that the change in the rules would have no adverse impact on minority or female ownership levels. The Commission did recognize that a media reform group had submitted studies purporting to show the contrary, but those studies were purely backward-looking and offered no statistical analysis of the likely future effects of the FCC's proposals.

Summing up, the Court wrote:

> 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. . . . 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.

§ 10.2.2a BASES OF LIABILITY FOR CONSTITUTIONAL TORTS

P. 795. Add at the end of this section:

In two cases, the Supreme Court continued to narrow the *Bivens* doctrine by arguing that Congress rather than the courts should decide how to remedy violations of constitutional rights by federal officials. In *Hernández v. Mesa*, 140 S. Ct. 735 (2020), Hernández sought damages after a federal border patrol agent shot him by firing across the United States-Mexico border, allegedly using excessive force. The Court concluded that plaintiff could not bring suit against the officer on the basis of *Bivens*, especially in light of the novelty of the claim and the potential foreign relations ramifications of entertaining the suit.

Egbert v. Boule, 142 S. Ct. 1793 (2022), relied heavily on *Hernández.* In *Egbert,* Boule owned a hotel on the U.S.-Canadian border. He claimed that a border patrol agent physically abused him in violation of the Fourth Amendment. Boule also alleged that the agent retaliated against him after he complained about the abuse, thus violating his First Amendment rights. As in *Hernández*, the majority opinion rejected the excessive force claim because of national security concerns and because the Border Patrol has an administrative complaint procedure that appears to provide an adequate remedy. The First Amendment retaliation claim was rejected because of its novelty and concerns that it would open the door to harassing litigation. Neither claim warranted an extension of *Bivens*. In both cases, two concurring justices stated that they would overrule *Bivens* entirely. In both cases, the liberal justices dissented.

§10.4 PRECLUSION OF JUDICIAL REVIEW

P. 715. Add after N.1:

1a. *Implied preclusion of district court jurisdiction.* Many regulatory statutes provide for judicial review of final agency action in a court of appeals. Traditionally, such statutes have been deemed to foreclose challenges to non-final agency actions in the federal district court under the general federal question jurisdictional statute. 28 U.S.C. § 1331 (see § 10.1.1. c.). After all, if such district court challenges were allowed, defendants could make an end run around the final order and exhaustion of remedies doctrines that normally prevent premature judicial review. In addition, such litigation could seriously delay the administrative enforcement proceedings. This foreclosure of immediate judicial review is often explained in terms of timing doctrines such as finality and exhaustion of remedies. See Casebook §§ 11.2.2 and 11.2.3.

Alternatively, this situation can be described as one in which the statutory review provision impliedly precludes district court jurisdiction. *Thunder Basin Coal Co. v. Reich*, 510 U. S. 200 (1994), for example, involved a district court challenge to the mine safety agency's practice of requiring a union official to be present for mine inspections. The Court found that the mining agency had extensive experience in dealing with issues relating to mine inspections. This suggested that Congress probably intended to preclude pre-decisional district court review of issues relating to such inspections. The Court has applied similar reasoning even where the litigant objected to the agency's order on constitutional grounds. *See Elgin v. Dep't of Treasury* (discussed in § 11.2.3 N.5).

Nevertheless, the Supreme Court has held in several cases that district court review of constitutional challenges in cases pending before agencies is not always impliedly precluded. In *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023), Axon was the respondent in a pending FTC enforcement case. Axon challenged the constitutionality of administrative hearings conducted by ALJs. The basis for the challenge was that ALJs are unconstitutionally protected against removal without cause—an important and as yet unresolved separation of powers issue. See Casebook § 3.4 N.2.

The Supreme Court held that preclusion of district court review would "foreclose all meaningful judicial review" of Axon's claim, because the constitutional injury was the "here and now" subjection of Axon to trial before an illegally appointed administrative judge. Moreover, the constitutional issue was wholly collateral to the merits of the case. In addition, in contrast to the situation in *Thunder Basin*, the FTC had no expertise in applying the separation of functions provisions of the Constitution. The *Axon* decision followed easily from the Court's earlier decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, §7.5.1 N.5, which also allowed pre-decisional district court review of a sweeping separation of powers claim.

§ 10.5 COMMITMENT TO AGENCY DISCRETION

P. 728. Add at the end of N.5:

The Supreme Court addressed another variation on the *Chaney* theme in *Dep't of Homeland Sec. (DHS) v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020). As discussed in earlier sections of this supplement (§§ 4.3, 5.6, 9.3.2), this case involved the Trump Administration's efforts to rescind the Deferred Action for Childhood Arrivals (DACA) policy. Under that program, members of a class of 700,000 undocumented noncitizens who had been brought to the United States as young children could apply for "deferred action" status. Such status, when conferred, protected them temporarily from deportation and also allowed them to work and to receive Social Security and Medicare benefits.

In a suit challenging the legality of DHS's rescission, the government argued that DACA was essentially a non-enforcement policy, so that both the adoption of that policy and its rescission were decisions committed to agency discretion under *Heckler v. Chaney*. The Court held, however, that the rescission was reviewable, because DACA was much more than just a non-enforcement policy. "[T]he DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an 'action [that] provides a focus for judicial review.'" Moreover, deferred action made recipients eligible for significant government benefits, and rescission withdrew those benefits. "Access to these types of benefits is an interest courts often are called upon to protect."

Judicial resistance to hearing challenges to an agency's decision *not* to enforce the law can also be expressed through the rules relating to standing to sue. *See United States v. Texas*, 143 S. Ct. 1964 (2023), discussed in § 11.1.2 N.6 of this supplement.

§ 11.1.2 CONSTITUTIONAL STANDING DOCTRINES

P. 751. Add at the end of N.1:

Adams**,** an attorney in Delaware, challenged provisions in the Delaware constitution that limit applications for judgeships to members of the two leading political parties but not independents. But Adams flunked the imminence test, since he failed to allege or prove that he was ready and able to apply for a judicial appointment. Absent that, he asserted only a generalized grievance common to all citizens of Delaware, and that sort of injury cannot support standing. *Carney v. Adams,* 141 S. Ct. 493 (2020).

P. 751. Add at the end of N.2:

The Court built on the *Spokeo* analysis in *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190 (2021). Again, class action plaintiffs sued a credit reporting agency for violating the Fair Credit Reporting Act (FCRA) by failing to follow reasonable procedures to assure maximum possible accuracy of credit reports. This time, TransUnion, a credit reporting agency, placed an "alert" on 8185 consumer accounts because, in each case, a person with the same first and last name had been listed by the Office of Foreign Assets Control (OFAC) of the Treasury Department as a terrorist, drug trafficker, or other serious criminal. Of course, there were many "false positives," since thousands of consumers shared the same name with persons on the OFAC list. TransUnion took no other precautions to prevent mistakes. Within this group, TransUnion provided the names of only 1853 class members to third parties.

Even though the FCRA provided that consumers can sue and recover damages (including statutory damages even if no actual damages could be proved, as well as punitive damages) for violation of the "reasonable procedures" requirement, Congress cannot provide standing to persons who lack an injury in fact by enacting an "injury" into existence that is not remotely harmful.

The Court said that whether plaintiffs suffered a "concrete" injury for standing purposes depends on whether they suffered a harm with a "close relationship" to a harm "traditionally" recognized as providing the basis for a lawsuit. Thus the 1853 persons whose names were given to a third party suffered a concrete injury akin to defamation. But the 6332 class members whose names were not furnished to third parties did not suffer concrete harm. True, they were at risk of suffering future harm, but a mere risk of future harm cannot qualify as concrete injury in a suit for damages—and even that harm was speculative (as in *Clapper,* Casebook N.1). The existence of inaccurate information without disclosure of the information had never provided the basis for a lawsuit for damages in American courts.

Class representative Ramirez identified additional violations of the FCRA. TransUnion had failed to provide him with his complete credit file in its initial reply to his request for disclosure of the file (although it did disclose the OFAC alert in a second mailing). The FCRA also requires that credit reporting agencies provide a summary of rights to consumers in *each* mailing, and TransUnion failed to provide the list in its second mailing. Again, neither of these harms had a close relationship to a harm traditionally recognized as providing a basis for a lawsuit, so they did not suffice for standing.

Interestingly, Justice Thomas wrote a dissent in which the Court's three liberals joined. Thomas argued that when a statute establishes a "private right" to collect damages on an individualized basis, any person who is deprived of the right described in the statute has a right to recover. Any of the three violations defined by the FCRA and suffered by the plaintiffs should suffice for standing purposes. In suggesting that a concrete injury is not always required for Article III standing, much of Thomas' discussion casts doubt on the whole edifice of standing law built up since the 1990s.

In a separate dissent, Justice Kagan largely agreed with Thomas. She added that, although she continued to believe a concrete injury should be required for standing, "Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. . . . Overriding an authorization to sue is appropriate when but only when Congress could not reasonably have thought that a suit will contribute to compensating or preventing the harm at issue." The risks implicated by TransUnion's conduct easily met the test of harms that Congress may make enforceable.

P. 754. Add at the end of the third paragraph on the page:

The causation doctrine surprisingly provided the tool by which the Court preserved the constitutionality of the Affordable Care Act (the ACA, also known as Obamacare) in *California v. Texas*, 141 S. Ct. 2104 (2021). Originally, § 5000A of the ACA imposed a minimum coverage requirement on virtually everyone and also imposed a tax on anyone who failed to sign up for coverage. That provision allowed the Court to uphold the ACA as a tax measure. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

In 2017 Congress reduced the tax to $0. That move opened the way for individuals and Texas to launch another attack on the minimum coverage requirement. Moreover, the plaintiffs argued that the provision was non-severable, so that if that provision were struck down, the rest of the ACA would go down with it. For standing purposes, the individuals claimed that their harm was the cost of buying insurance. The Court held, however, that, because the minimum coverage requirement was now unenforceable, it did not cause the harms the plaintiffs complained of.

Texas complained that the minimum coverage provision caused more people to enroll in state health insurance programs like Medicaid, and Texas must pay for that coverage. Since the federal mandate was unenforceable, however, it couldn't be forcing anyone to enroll in a state program if they would not have done so anyway. Furthermore, although the state did have to incur expenses in order to comply with other provisions of the ACA, no one claimed that the latter provisions were themselves unconstitutional, so these expenses were not "fairly traceable" to the allegedly unconstitutional minimum coverage provision. Consequently, the challenge to the ACA failed, because none of the plaintiffs had standing.

P. 755. Add at the end of N.5:

Suppose that, in a damage action, the plaintiff can prove no damages from illegal conduct of the defendant. The Supreme Court held that such a plaintiff could avoid this problem by making a claim for nominal damages (that is, a token sum like $1). In *Uzuegbunam v. Preczewski,* 141 S. Ct. 792 (2021), plaintiff was prevented from religious proselytizing on campus. The college then changed its rules and claimed the case was moot. Because plaintiff sought nominal damages, the case was not moot; and the claim for nominal damages satisfied the redressability test for standing.

P. 756. Add at end of N.6:

Another case that applied standing rules leniently in order to reach the merits was *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), which overturned President Biden's student loan forgiveness program (see § 9.3A of this supplement). One plaintiff in the debt forgiveness case was the state of Missouri. The alleged injury was incurred by a corporation called MOHELA, which the state had created to service student loans. Cancellation of student loans would reduce MOHELA's revenue from fees, a harm that qualified as injury in fact. But Missouri was the plaintiff, not MOHELA. The Court held that Missouri had suffered the necessary injury because MOHELA is a "public instrumentality," so that harm to MOHELA could be treated as harm to Missouri. MOHELA is governed by state officials and appointees, and it uses its profits to help fund education in Missouri by financing development projects and providing scholarships for Missouri students. The Court compared this case to *Arkansas v. Texas*, 346 U.S. 368 (1953), which had held that injury to the University of Arkansas could be treated for standing purposes as an injury to Arkansas itself.

The dissent, however, pointed to Missouri law, which stressed the independence of public corporations like MOHELA from the state. MOHELA's revenues do not flow to the state, and Missouri decisions hold that the state is not liable for the debts of such public corporations. Consequently, the dissent argued, only the party directly injured (MOHELA) could sue to rectify its injury. As the dissent put it, "If MOHELA had brought this suit, we would have had to resolve it, however hot or divisive. But Missouri? In adjudicating Missouri's claim, the majority reaches out to decide a matter it has no business deciding. It blows through a constitutional guardrail intended to keep courts acting like courts."

Another important Supreme Court case denied standing to states to challenge President Biden's immigration-enforcement guidelines. *United States v. Texas,* 143 S. Ct. 1964 (2023). These guidelines prioritized the arrest and removal of noncitizens who are suspected terrorists or dangerous criminals or who have recently entered the country unlawfully. Thus removal of other illegal immigrants has a lower priority. Texas and Louisiana claimed that these guidelines contravened several immigration statutes and increased the costs the states had incurred to deal with unlawful immigrants who would not be removed.

The Court denied standing to Texas and Louisiana, but relied on a theory that more closely resembled its case law on reviewability than its case law on standing. (*See* Casebook, § 10.5 and supplement thereto.) The Court stated that the states had not suffered a "cognizable" injury, because nobody (state or otherwise) has standing to challenge a decision *not* to arrest or prosecute someone else. The Court cited an earlier decision that had ruled that a plaintiff lacks standing to bring a suit challenging non-enforcement "when he himself is neither prosecuted nor threatened with prosecution." See *Linda R. S.* v. *Richard D.,* 410 U. S. 614 (1973). In the *Texas* case, the Court articulated a number of exceptions to this standing rule, but none of them applied to the instant case.

Justice Gorsuch, concurring in the judgment, would have found that the states lacked standing for a different reason—lack of redressability. For discussion, see § 9.3.2 of this supplement.

§ 11.2.2 FINAL AGENCY ACTION

P. 776. Add at the end of N.4:

The definition of which wetlands are "waters of the United States" and thus subject to federal regulation continues to be very controversial. In *Sackett v. EPA,* 143 S. Ct. 1322 (2023), the Supreme Court sharply narrowed the definition. Wetlands subject to federal regulation are those with "a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between waters and wetlands." Probably, development of wetlands of the sort described in *Hawkes* will no longer require federal permitting.

The Supreme Court continues to send uncertain signals about how to apply the second prong of *Bennett v. Spear. Salinas v. Railroad Retirement Bd.*, 141 S. Ct. 91 (2021).

The Board rejected several applications by Salinas for disability benefits before finally granting the application in 2013. It refused to consider reopening a 2006 decision in which it had denied benefits, because the plaintiff had not filed his request to reopen on the basis of new and material evidence within four years of the 2006 decision. By a 5-4 vote, the Court held that the Board's decision refusing to consider reopening was a "final order" and thus subject to judicial review. The decision not to consider reopening had a legal effect—it prevented the Board from deciding whether the 2006 decision should be reopened. If the Board had reopened and reversed its earlier decision, Salinas would have received back benefits from 2006 onward. The Court relied on the presumption favoring judicial review discussed in § 10.4.

The dissent argued that refusing to consider reopening was not a final order, because it did not determine any rights or liabilities. Whether to reopen was a purely discretionary process under the regulations, and Salinas had no right to have the 2006 decision reopened. Consequently, the dissent argued, a refusal to reopen has no legal effect. Moreover, a decision not to reopen is a decision committed to agency discretion (see Casebook, § 10.5 N.2), so allowing judicial review to occur in this situation would be meaningless. (The majority did not address the latter point explicitly, but it said that "the decision to grant or deny reopening is guided by objective criteria, including whether 'there is new and material evidence or there was adjudicative error not consistent with the evidence of record at the time of adjudication.' § 261.2(b)"; although that decision was discretionary, "[j]udicial review plays a modest, but important, role in guarding against decisions that are arbitrary, inconsistent with the standards set by the Board's own regulations, or otherwise contrary to law.")

11.2.3 EXHAUSTION OF ADMINISTRATIVE REMEDIES

P. 787. Add to the end of the paragraph that begins "Fourth":

However, the holdings in this line of cases are mixed. See discussion in § 10.4 of this supplement.

P. 788. Add at the end of N.6:

Sims v. Apfel was extended in *Carr v. Saul,* 141 S. Ct. 1352 (2021). The underlying issue in *Carr* was whether administrative law judges deciding Social Security disability cases must be appointed by the head of the Social Security Administration, rather than by lower-level personnel, under authority of *Lucia v. SEC*, Casebook § 3.4 N.2. The applicants in *Carr* did not raise this issue in their hearings or before the Appeals Council, which is hardly surprising, given that *Lucia* had not yet been decided. The Supreme Court held that the issue exhaustion requirement did not apply and the applicants could raise the *Lucia* issue on appeal.

Although *Sims* applied to issue exhaustion at the agency's Appeals Council rather than at the hearing, the reasoning was similar. Social Security hearings are not adversarial, so applicants are often unrepresented by counsel and are often quite unsophisticated. Social Security is not represented at the hearing; the ALJs are expected to assist applicants to raise issues the applicant may have overlooked. Moreover, "this Court has often observed that agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise" (see N.5). As a result, the futility exception to exhaustion applied (see N.2): "It makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested."