Summer 2023 Cumulative Updates to

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ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT

3d Edition

Foundation Press 2020

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Preface

This cumulative summer update covers cases and other materials that have appeared since the publication of the third edition. It includes discussion of the following United States Supreme Court decisions with implications for administrative law:

- *AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341 (2021)
- *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890 (2023)
- *Baldwin v. United States*, 140 S. Ct. 690 (2020)
- *Biden v. Nebraska*, 143 S. Ct. 2355 (2023)
- *Biden v. Texas*, 142 S. Ct. 2528 (2022)
- *Bittner v. United States*, 143 S. Ct. 713 (2023)
- *Buffington v. McDonough*, 143 S. Ct. 14 (2022)
- *Calcutt v. Federal Deposit Ins, Corp.*, 143 S. Ct. 1317 (2023)
- *California v. Texas*, 141 S. Ct. 2104 (2021)
- ***Carr v. Saul*, 141 S. Ct. 1352 (2021) (new principal case)**
- *Collins v. Yellen*, 141 S. Ct. 1761 (2021)
- *Department of Educ. v. Brown*, 143 S. Ct. 2343 (2023)
- *Department of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020)
- *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021)
- *Financial Oversight and Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020)
- *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association*, 141 S. Ct. 2172 (2021)
- *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (U.S. 2021)
- *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020)
- *Little Sisters of the Poor Saints Peters and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020)
- *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020)
- *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021)
- *Pereira v. Sessions*, 138 S. Ct. 2105 (2018)
- *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020)
- *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020)
- *Thryv, Inc. v. Click-to-Call Tech., L.P.*, 140 S. Ct. 1367 (2020)
- *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)
- *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020)
- *Sackett v. EPA*, 143 S. Ct. 1322 (2023)
- *Salinas v. U.S. RR. Retirement Bd.*, 141 S. Ct. 691 (2021)
- *Santos-Zacaria v. Garland*, 143 S. Ct. 1103 (2023)
- *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021)
- *United States v. Texas*, 143 S. Ct. 1964 (2023)*U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021)
- *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021)

- ***West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (new principal case)**

In addition, we have added references to a number of recent lower court decisions and secondary literature addressing current issues.

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CHAPTER 1

Unit 1.1

p. 2, add to the last full paragraph before "Agencies take many forms":

Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 62 (2020), argues that *Franklin* conflicts with the plain meaning and history of the APA and presents the normative case for treating the President like an agency for purposes of the APA.

pp. 2-3, carryover paragraph: An updated version of the SOURCEBOOK referred to in the text is now available online. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, https://sourcebook.acus.gov/wiki/Federal_Administrative_Procedure_Sourcebook/view.

p. 6, add at the end of the 1st full paragraph: For a timeline of the creation of important administrative agencies, dating back to the founding of the Republic, see *Timeline of Federal Agencies*, WASH. POST (Apr. 2, 2023).

Unit 1.2

p. 36, delete the phrase "and the issue has never been litigated" in the second to the last sentence and add before the final sentence of the 1st full paragraph: *Exela Enter. Solutions, Inc. v. NLRB*, 32 F.4th 436 (5th Cir. 2022), held that, in the absence of explicit statutory restrictions on removal, the General Counsel is removable at will by the President; *accord United Natural Foods, Inc. v. NLRB*, 66 F.4th 536, 548 (5th Cir. 2023) (applying *Exela*); *NLRB v. Aakash, Inc.*, 58 F.4th 1099, 1103-06 (9th Cir. 2023 (following *Exela*)

p. 41, add at the end of the second paragraph: In *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court vacated and remanded the Ninth Circuit's decision cited in the text and held that the CFPB's structure violates the separation of powers because it is an independent agency that wields significant executive power and it is headed by a single individual subject to removal only for good cause. Similarly, the Court upheld the 5th Circuit's decision in *Collins* in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). We discuss these decision (and others addressing good-cause removal restrictions for executive officers) at length in the updates to Units 1.4 and 1.6 below.

Unit 1.3

p. 74, in party C1, add the following before the sentence beginning "Second" and then start a new paragraph:

In *Richardson*, however, the Court did not resolve this question, concluding instead that the hearing requirements of the Social Security Act itself were the same as the hearing requirements of the APA. After *Richardson*, it was nonetheless generally assumed that §§ 554, 556, and 557 applied to Social Security disability adjudications. Recently, however, the SSA issued a regulation

providing for the adjudication of disability claims in some cases by administrative appeals judges who are not ALJs. *See* 85 Fed. Reg. 73,138 (Nov. 16, 2020) (finalizing rule). The agency reasoned primarily that the APA's adjudicatory procedures contemplate an adversarial hearing, while disability hearings are "inquisitorial." *See generally id.* at 73,138-44 (responding to comments arguing that the use of non-ALJ adjudicators violates the APA, which requires formal adjudications for SSA disability proceedings).

Unit 1.4

p. 79, add after the block quote: *See also* Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances* 101 TEX. L. REV. 89 (2022) (arguing that the Framers intended that separation of powers reflect an "anti-domination principle" under which separation of powers would be breached only if one branch deprives another of its procedural capacity to check another).

p. 83, add before the last sentence of the carryover paragraph: *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1996 (2021) (Breyer, J., concurring) (bemoaning the Court's "shift in our separation-of-powers jurisprudence" from a functional to a formalist approach, and asserting that "a more functional approach to constitutional interpretation in this area is superior").

p. 83, add to the string citation at the end of the 1st full paragraph after the citation to *Schor*: ; *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2226, 2238, (2020) (Kagan, J., concurring in the judgment in part and dissenting in part) (stating that "the separation of powers is, by design, neither rigid nor complete" and criticizing the majority for applying "a dogmatic, inflexible approach to American governance" in invalidating good-cause removal requirements for the Director of the CFPB)

p. 85, after the first full paragraph, add the following new paragraph:

Congress may also attempt to control agencies through oversight hearings. Because bicameralism and presentment requirements do not apply, either the House or the Senate may initiate oversight hearings in aid of its legislative functions and issue binding subpoenas to gather information. In *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), the Supreme Court confirmed that the subpoena power of congressional committees extends to any valid legislative purposes and is not subject to any requirement that the committee demonstrate a particular need for the documents or testimony in question. Nonetheless, the subpoena power is also subject to constitutional limits, including individual rights (such as the privilege against self-incrimination) and separation of powers principles (such as executive privilege). The issue in *Trump v. Mazars*, a high profile and controversial case, was the validity of a congressional committee's subpoena seeking President Trump's personal financial records from a private party. Although the Court rejected President Trump's claim that the committee lacked the authority to issue the subpoena, it held that in this case the lower courts had improperly discounted the separation of powers concerns raised in the case. Specifically, although the President's personal financial records were not within the scope of the executive privilege, the subpoena was at the center of a political dispute between a Republican President and the House of Representatives, controlled by the Democratic Party. *Compare Trump v. Vance*, 140 S. Ct. 2412 (2020) (upholding subpoena issued by state prosecutor for President Trump's financial records).

On remand, the D.C. Circuit upheld the Committee's authority to subpoena former President Trump's financial records from his accountant in furtherance of enumerated legislative purposes, but it narrowed the subpoena's scope to conform to the Supreme Court's requirement that the subpoena be no broader than reasonably necessary to support Congress's legislative objectives. *Trump v. Mazars USA, LLP*, 39 F.4th 774 (D.C. Cir. 2022). The overarching question was whether the subpoena was related to, and in furtherance of, a legitimate congressional task. The court found that it was, although its scope was excessive. The subpoenaed information was relevant to potential legislation concerning presidential receipt of emoluments, restrictions on contracts between the federal government and a sitting President, and ethics legislation that would require disclosure by presidential candidates of their tax returns. The court rejected Mr. Trump's claim that the subpoena lacked a valid legislative purpose because it improperly sought to expose his wrongdoing, concluding that it was designed to advance a valid legislative purpose, not an illegitimate law enforcement purpose. The court also refused to find the subpoena invalid on the ground that the subpoena failed to offer assurances that the financial information obtained would be kept confidential from other members of Congress or the public at large. But *Mazars* requires consideration of the burdens imposed on the President by the subpoena. The court noted that because Mr. Trump was no longer in office, the subpoena would not distract him from presidential duties. Further, the Committee did not have to demonstrate that the information sought was "demonstrably critical" to its legislative purposes..

In another case involving a conflict over congressional investigations, *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021), the court refused to issue a preliminary injunction blocking access by a House Select Committee investigating the January 6, 2021, attack on Congress to records maintained by the National Archives and Records Administration. The court emphasized that "the profound interests in disclosure advanced by President Biden and the January 6th Committee far exceed [former President Trump's] generalized concerns for Executive Branch confidentiality." *Id*. at 33; *see also id*. at 38 ("When a former and incumbent President disagree about the need to preserve the confidentiality of presidential communications, the incumbent's judgment warrants deference because it is the incumbent who is 'vitally concerned with and in the best position to assess the present and future needs of the Executive Branch[.]' "). Further, the court rejected the former President's claim, based on *Mazars*, that the Committee's request to the Archives was broader than necessary to support congressional objectives. "He has made no claim that the documents at issue in this appeal are not relevant to the Committee's purpose or that a request capturing those documents is overbroad. Nor could he. All of the documents currently at issue pertain to presidential activities on or around January 6th, or surrounding the election and its aftermath." *Id*. at 43. The Supreme Court denied a stay pending Court review, reasoning that because the D.C. Circuit found that Trump's claims would have failed even if he were the incumbent, Trump's status as a former President made no difference to the decision. Any discussion by the D.C. Circuit of Trump's status as a former President was nonbinding dicta. *Trump v. Thompson*, 142 S. Ct. 6870 (2022). The Supreme Court later denied cert. *Trump v. Thompson*, 142 S. Ct. 1350 (2022).

In the administrative law context, committee hearings may be used to put pressure on agencies, as in *FCC v. Fox Televisions Stations*, although the impact of this pressure may depend on whether there is a realistic prospect of legislative retaliation. When a hostile committee uses

the subpoena power in an effort to pursue allegations of corruption or mismanagement, agency officials may assert executive privilege—which has been a common issue in these hyperpartisan times. *United States House of Representatives v. McGahn*, 969 F.3d 353 (D.C. Cir. 2020) (concluding that the House Judiciary Committee had standing to enforce a subpoena to former White House official over the President's assertion of absolute immunity from any requirement to testify); *Committee on Oversight and Government Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016) (rejecting executive privilege claims and ordering production of records relating to controversial operation by Bureau of Alcohol, Tobacco, and Firearms under the Obama Administration).

p. 98, add at the end of the 1st full paragraph: For examples of recent unsuccessful nondelegation challenges, *see Consumers Research v. FCC*, 67 F.4th 773, 787-95 (6th Cir. 2023) (holding that the Federal Communications Act did not violate the nondelegation doctrine by delegating to the FCC authority to administer a fund to be used to expand and advance telecommunications services); *Consumers Research v. FCC*, 63 F.4th 441 (5th Cir. 2023), *reh'g en banc granted*, 2023 WL 4241690 (5th Cir. 2023) (same); *Consumer Fin. Prot. Bureau v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 183-84 (2d Cir. 2023) (holding that the CFPB's funding apparatus did not violate the nondelegation doctrine); *Community Financial Servs. Ass'n of Am. v. Consumer Financial Prot. Bureau*, 51 F.4th 616, 633-35 (5th Cir. 2022) (holding that delegation to the CFPB of the authority to prescribe rules "identifying as unlawful unfair, deceptive, or abusive acts or practices" was constrained by a sufficient intelligible principle in light of the statutory enunciation of the agency's purposes and objectives); *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436 (5th Cir. 2020) (rejecting claim by manufacturer of electronic nicotine delivery systems that § 901(b) of the Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387a(b), which authorizes regulation of listed tobacco products and of "any other tobacco products that the Secretary of HHS by regulation deems to be subject to [the Act]," violates the nondelegation doctrine); *Braidwood Mgmt. Inc. v. Becerra*, 627 F. Supp. 3d 624, 648-52 (N.D. Tex. 2022) (rejecting claim that provisions of the Affordable Care Act delegating authority to agencies affiliated with the Department of Health and Human Services to unilaterally determine what kinds of preventive care fall with the statute's mandatory insurance coverage violates the nondelegation doctrine). *But see Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 2023 WL 4278448 (2023) (concluding that SEC's standardless discretion to seek enforcement in federal court or to adjudicate the matter before an agency ALJ violated the nondelegation doctrine).

p. 98, add to the 2d full paragraph before "*South Dakota*": *City of Chicago v. Barr*, 961 F.3d 882, 907-09 (7th Cir. 2020) (relying on the nondelegation doctrine to hold that the Attorney General's authority under 34 U.S.C. § 10153(a)(5)(D) to condition state and local law enforcement formula grants on certification that the applicant will comply with "all other applicable Federal laws" did not include federal immigration laws that restrict communications about individuals' immigration status);

p. 99, add to the carryover paragraph before "For further discussion": Scholars and judges who support reinvigoration of the doctrine have argued that doing so will create incentives for Congress to legislate in greater detail. For a contrary view, see Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication,"* 108 CORNELL L. REV. 401 (2023). The authors find weak empirical

support at best for such an effect in light of the behavior of state legislatures following decisions by their courts enforcing the nondelegation doctrine under state law. Indeed, they find that judicial decisions enforcing the nondelegation doctrine can sometimes lead to more implied delegation through imprecise statutory language.

p. 99, add the following new paragraph after the end of the carryover paragraph:

The Supreme Court recently granted review in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 2023 WL 4278448 (2023), a case that applied a strict separation of powers analysis to restrict the SEC's authority to adjudicate enforcement actions under the securities laws. Of particular relevance here, the statute gave the SEC discretion to seek enforcement in federal court or to adjudicate the matter before an agency ALJ. The Fifth Circuit ruled that this discretion violated the nondelegation doctrine because the statute provided no standard for its exercise.

p. 101, add at the end of the carryover sentence before the period: ; *see also U.S. Postal Serv. v. Postal Regulatory Comm'n*, 963 F.3d 137, 143-44 (D.C. Cir. 2020) (Rao, J., concurring) (noting "the constitutional quandary raised by a federal court resolving a lawsuit between" two independent agencies in light of the Constitution's creation of a unitary executive, which arguably precludes a case between two agencies from qualifying as a case or controversy that is justiciable by an Article III court)

p. 102, add at the end of the carryover paragraph: President Biden revoked Executive Order 13,771. Exec. Order No. 13,992, § 2, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049 (Jan. 20, 2021).

pp. 103-04, add at the end of § 3, replace the last sentence in the paragraph with the following:

The Supreme Court vacated and remanded the Ninth Circuit's decision in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020). It held, 5-4, that the CFPB's structure violated the separation of powers because it is "an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain criteria are met." *Id*. at 2192. In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Court relied on *Seila Law* to invalidate the for-cause removal provision for the Director of the Federal Housing Finance Agency. For further discussion, see the updates to Unit 1.6 below.

p. 105, in the 2d bullet point on the page, replace the final sentence with the following: Decisions like *Free Enterprise Fund*, *Seila Law*, and *Collins v. Yellen* limit the ability of Congress to use for-cause removal provisions to increase the independence of some agency officials.

p. 106, add at the end of the carryover paragraph before the period: ; *see also* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 7 (2019) (arguing that recent Supreme Court decisions reinforce "the sense that the goal of Roberts Court administrative law may be to pull back on government for its own sake, rather than to better achieve constitutional values")

Unit 1.5

p. 109, add the following at the end of the first full paragraph, and start a new paragraph after it:

Similarly, principles of standing may impose a barrier on those who want to challenge an executive agency's failure to enforce statutory provisions. *See United States v. Texas*, 143 S. Ct. 1964 (2023) (concluding that plaintiff states lacked standing to challenge alleged underenforcement of immigration laws); *see generally infra* Unit 8.5.C.1 (discussing standing on an "unlevel playing field").

p. 110, add after the carryover paragraph:

The Supreme Court, on review of the Ninth Circuit's decision in *Regents of the University of California*, invalidated the Trump Administration's rescission of DACA. *Department of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). The Court began by acknowledging that no one questioned DHS's authority to rescind DACA. The case turned instead on the procedures DHS followed in doing so. The Court first ruled that review was not precluded by the "committed to agency discretion" exception in § 701(a)(2) of the APA. The government claimed that rescission of a general non-enforcement policy, like adoption of such a policy, is unreviewable. The Court, however, contested the government's characterization of DACA as "simply a non-enforcement policy." *Id*. at 1906. It concluded instead that DACA created a program for conferring affirmative immigration relief. The Court held that "[b]ecause the DACA program is more than a non-enforcement policy, its rescission is subject to review under the APA." *Id*. Turning to the merits, the Court held that the rescission was arbitrary and capricious because DHS relied on the Attorney General's conclusion that it was illegal to extend work authorization and other government benefits to DACA recipients and did not offer a contemporaneous reason for terminating forbearance from deportation. DHS also failed to consider the option of continuing the nonremoval policy while halting the benefits component of the program. Finally, the Court emphasized that DHS failed to consider the effect of rescission on the reliance interests created by DACA. This part of the analysis may heighten the duty of agencies to consider reliance interests. It is noteworthy that the Court characterized these deficiencies as a violation of "the *procedural requirement* that [DHS] provide a reasoned explanation for its action," *id*. at 1916 (emphasis added), rather than as a violation of the substantive standard of review.

p. 113, add at the end of the 1st bullet point before the period: ; *see also* F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 285 (2021) (arguing that "Congress's authority to delegate the writing of criminal laws should be more circumscribed than its power to delegate the writing of other laws . . . because criminal laws are generally subject to greater restrictions, because the reasons against delegation have more force in the context of criminal laws, and because the standard justifications for delegations to agencies do not support—or at best only weakly support—delegations in the criminal context").

p. 113, add after the 3d bullet point:

Independently of the nondelegation doctrine, delegation of legislative functions to agencies may violate other constitutional provisions, such as the Appropriations Clause, art. I, § 9 ("No

money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). This issue has divided the courts of appeals in relation to the constitutionality of the funding mechanism for the CFPB. In *Community Financial Servs. Ass'n of Am. v. Consumer Financial Prot. Bureau*, 51 F.4th 616 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023), the court held that the "self-actualizing, perpetual" mechanism for funding the CFPB under the Consumer Financial Protection Act violated the Appropriations Clause, which vests in Congress the exclusive power over the federal purse. *Id*. at 637 (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990)). The statute authorizes the CFPB to requisition funds from the Federal Reserve each year in an amount the CFPB's Director determines to be reasonably necessary to carry out its functions. The Federal Reserve itself is outside the appropriations process, as it is funded through bank assessments. The court characterized this "double insulation from Congress's purse strings" as unprecedented and unconstitutional, especially given the Bureau's "capacious portfolio of authority." *Id*. at 639-40. The court found that "the Bureau's express insulation from congressional budgetary review, single Director answerable to the President, and plenary regulatory authority combine to render the Bureau . . . . an innovation with no foothold in history or tradition." *Id*. at 642 (quoting *Seila Law*, 140 S. Ct. at 2202). *Consumer Fin. Prot. Bureau v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174 (2d Cir. 2023), however, held to the contrary. It rejected the contentions that the Appropriations Clause requires Congress to provide "meaningful guidance, limitation, or control" on agency appropriations and that appropriations must be time-limited or drawn from a particular source. CFPB's funding structure was authorized by the CFPA, and the Appropriations Clause requires nothing more. The Supreme Court granted *certiorari* and may resolve this Circuit split.

p. 114, add to the citations in the carryover paragraph before "The issue": ; *cf. Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021), *reh'g en banc denied*, 993 F.3d 408 (5th Cir. 2021) ("Agencies may subdelegate to private entities so long as the entities 'function subordinately to' the federal agency and the federal agency 'has authority and surveillance over [their] activities.' ") (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940))

p. 114, start a new paragraph with the sentence in the carryover paragraph beginning with "The issue" and add the following after that sentence:

In *National Horsemen's Benevolent and Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022), for example, the court held that the Horseracing Integrity and Safety Act violated what the court referred to as the "private nondelegation doctrine," which allows a private entity to wield governmental power only if it is subordinate to an agency with authority and surveillance over its functions. The Act created the Horseracing Integrity and Safety Authority (HISA), a private, independent, non-profit corporation whose activities were placed under the "oversight" of the FTC. HISA had the authority to formulate proposed rules concerning anti-doping, medication control, and racetrack safety requirements. It had to submit its proposed rules to the FCT, which was required to approve them if it found them to be consistent with the statute. The FTC could recommend changes, which HISA "may" incorporate into its final rules. HISA had the authority to investigate violations and pursue administrative enforcement. Civil sanctions imposed by HISA were subject to de novo review by both an ALJ and the FTC. The court held that the statute was facially unconstitutional as an improper delegation of regulatory authority to a private entity that was not subject to adequate supervision by the FTC.

As reflected in *Black*, recent decisions have stated that the redelegation of agency authority to private persons and entities implicates the "private nondelegation doctrine," which has "continuing force" even though "it has been " 'largely dormant' for nearly a century." *Consumers' Research v. FCC*, 63 F.4th 441, 450 (5th Cir. 2023). The doctrine prevents agencies from giving private parties "the 'unrestrained ability to decide whether another citizen's property rights can be restricted' because 'any resulting deprivation happens without due process of law.' " *Id*. According to one court, "[u]ltimately, a statute does not violate the private nondelegation doctrine if it imposes a standard to guide the private party and (2) provides review of that determination that prevents the [private party] from having the final say." *Id*. at 451 (internal quotations omitted) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936)). *Consumers' Research* held that the FCC's redelegation of authority to administer a fund to be used to expand telecommunications services did not violate the doctrine. The Sixth Circuit reached the same conclusion, adopting much of its rationale. *Consumers' Research v. FCC*, 67 F.4th 773, 795-97 (6th Cir. 2023). The 5th Circuit subsequently voted to rehear its case en banc. *Consumers' Research v. FCC*, 2023 WL 4241690 (D.C. Cir. 2023).

p. 114, add to the last partial paragraph at the end of the string citation before "The federal courts of appeals": ; *cf. Doe # 1 v. Trump*, 984 F.3d 848 (9th Cir. 2020) (holding that 8 U.S.C. § 1182(f), which authorizes the President to suspend immigration or impose on aliens "any restrictions he may deem appropriate" upon finding that the entry of aliens "would be detrimental to the interests of the United States," contains a sufficient intelligible principle to defeat a nondelegation challeng); *Bradford v. U.S. Dep't of Labor*, 582 F. Supp. 3d 819, 846-48 (D. Colo. 2022) (holding that a statute delegating authority to the President to set minimum wages for contractors with the federal government did not violate the nondelegation doctrine)

p. 115, add to the last partial; paragraph before "FERC": *Tiger Lily, LLC v. U.S. Dep't of Housing and Urban Dev.*, 5 F.4th 666 (6th Cir. 2021) (relying on constitutional avoidance canon to interpret the Coronavirus Aid, Relief, and Economic Security Act of 2020 as not authorizing the Centers for Disease Control to impose an eviction moratorium on rental properties across the country in order to prevent congregation in settings like homeless shelters where COVID-19 might spread).

p. 126, add before the *Kuretski* case:

Note to Teachers: The following case might also be used as a new principal case in Unit 3.1, perhaps replacing *National Petrochemical Refiners*.

West Virginia v. EPA

142 S. Ct. 2587 (2022)

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, AND BARRETT, JJ., joined GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. KAGAN, J., filed a dissenting opinion, in which BREYER and SOTOMYAOR, JJ., joined.

■ Chief Justice ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into the air. 42 U.S.C. §7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the "best system of emission reduction" [BSER] that the Agency has determined to be "adequately demonstrated" for the particular category. §§7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

I

A . . .

[Section 111, codified at 42 U.S.C. § 7411] directs EPA to list "categories of stationary sources" that it determines "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." §7411(b)(1)(A). Under Section 111(b), the Agency must then promulgate for each category "Federal standards of performance for new sources." . . .

. . . Under Section 111(d), once EPA "has set *new* source standards addressing emissions of a particular pollutant under . . . section 111(b)," 80 Fed. Reg. 64711, it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under [other Clean Air Act programs]. . . . Section 111(d) thus "operates as a gap-filler,"

empowering EPA to regulate harmful emissions not already controlled under the Agency's other authorities. *American Lung Assn. v. EPA*, 985 F.3d 914, 932 (CADC 2021).

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, "the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities." 40 CFR § 60.22(b)(5) (2021). The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA.

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. . . . It was thus only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an "obscure, never-used section of the law" [citing hearings before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works in 1987].

B

Things changed in October 2015, when EPA promulgated two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). . . .

[The first rule established CO_2 emission limits for new fossil-fuel-fired electric steam generating units (mostly coal fired) and natural-gas-fired stationary combustion turbines. Because EPA was now regulating CO_2 from *new* coal and gas plants, §111(d) required it regulate those emissions from *existing* coal and gas plants. See §7411(d)(1). It did so under the second rule, which it called the Clean Power Plan [CPP] rule. That rule established "final emission guidelines for states to follow in developing plans" to regulate existing power plants within their borders. To arrive at the guideline limits, EPA identified the BSER, just as it does when adopting regulations for new sources. The BSER for existing plants included three types of measures, which EPA called "building blocks." The first of these was based on practices regulated plants could use to burn coal more efficiently. But because coal-fired power plants were already operating near optimum efficiency, EPA concluded that "much larger emission reductions [were] needed from [coal-fired plants] to address climate change."]

So the Agency included two additional building blocks in its BSER, both of which involve what it called "generation shifting from higher-emitting to lower-emitting" producers of electricity. Building block two was a shift in electricity production from existing coal-fired power plants to natural-gas-fired plants. Because natural gas plants produce "typically less than half as much" carbon dioxide per unit of electricity created as coal-fired plants, the Agency explained, "this generation shift [would] reduce[ ] CO_2 emissions." Building block three worked the same way, except that the shift was from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," mainly wind and solar. "Most of the CO_2 controls" in the rule came from the application of building blocks two and three.

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

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. . . .

Having decided that the "best system of emission reduction . . . adequately demonstrated" was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. 42 U.S.C. § 7411(a)(1). The Agency settled on what it regarded as a "reasonable" amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014.

From these significant projected reductions in generation, EPA developed a series of complex equations to "determine the emission performance rates" that States would be required to implement. The calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation described above. . . .

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

C

[The Supreme Court in 2016 stayed the CPP before it ever went into effect. During the Trump Administration, EPA repealed the CPP and replaced it with a much weaker set of regulations called the Affordable Clean Energy (ACE) Rule that relied exclusively on building block one of the CPP. EPA explained then that under its interpretation of §111(d), it lacked the authority to implement building blocks two or three because the statute limits EPA to restricting emissions at a source itself. On the last day of the Trump Administration, the Court of Appeals for the D.C. Circuit invalidated the ACE Rule, concluding that it "rested critically on a mistaken reading of the Clean Air Act," i.e., that generation shifting cannot be a "system of emission reduction" under §111. After President Biden took office, EPA asked the D.C. Circuit to stay the

issuance of its mandate so as not to bring the CPP, which the ACE Rule had repealed, back into effect because EPA was considering whether to adopt a new §111(d) rule. The court granted the stay. Several states defending the repeal of the CPP sought certiorari.]

II

[EPA argued both that the appellants lacked standing and that the case was moot because neither the CPP nor the ACE Rule was in effect any longer and EPA had not yet adopted a replacement rule. The Court disagreed, concluding that the *possibility* that EPA would decide to readopt the CPP *or something like it* was sufficient to overcome standing and mootness hurdles.]

III

A . . .

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

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. *Id.*, at 126–127. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." *Id.*, at 160. In *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 141 S. Ct. 2485, 2487 (2021) (*per curiam*), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the . . . spread of" disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so. *Id.*, at 2488–90. . . .

. . . 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, 665 (2022) (*per curiam*). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure. *Id.*, at 666.

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

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

The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation." But in what the dissent calls the "key case" in this area, *Brown & Williamson*, the Court could not have been clearer: "In extraordinary cases . . . there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. 529 U.S. at 159. Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." *Utility Air*, 573 U.S. at 324. The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear congressional authorization," *ibid.*—confirms that the approach under the major questions doctrine is distinct.

As for the major questions doctrine "label[ ]," it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we. See *Utility Air*, 573 U.S. at 324 (citing *Brown & Williamson* and *MCI*); *King v. Burwell*, 576 U.S. 473, 486 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air*, 573 U.S. at 324. It located that newfound power in the vague

language of an "ancillary provision[ ]" of the Act, *Whitman*, 531 U.S. at 468, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*, 529 U.S. at 159–160; *Gonzales*, 546 U.S. at 267–268; *Alabama Assn.*, 141 S. Ct., at ___. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U.S. at 159–160.

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. . . . It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." 80 Fed. Reg. 64726. . . . And as Justice Frankfurter has noted, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Brothers*, Inc., 312 U.S. 349, 352 (1941). . . .

This consistent understanding of "system[s] of emission reduction" tracked the seemingly universal view, as stated by EPA in its inaugural Section 111(d) rulemaking, that "Congress intended a technology-based approach" to regulation in that Section. 40 Fed. Reg. 53343 (1975); see *id.*, at 53341 ("degree of control to be reflected in EPA's emission guidelines" will be based on "application of best adequately demonstrated control technology"). A technology-based standard, recall, is one that focuses on improving the emissions performance of individual sources. . . .

But, the Agency explained, in order to "control[ ] CO_2 from affected [plants] at levels . . . necessary to mitigate the dangers presented by climate change," it could not base the emissions limit on "measures that improve efficiency at the power plants." 80 Fed. Reg. at 64728. "The quantity of emissions reductions resulting from the application of these measures" would have been "too small." *Id.*, at 64727. Instead, to attain the necessary "critical CO_2 reductions," EPA adopted what it called a "broader, forward-thinking approach to the design" of Section 111 regulations. *Id.*, at 64703. Rather than focus on improving the performance of individual sources, it would "improve the *overall power system* by lowering the carbon intensity of power generation." *Ibid.* (emphasis added). And it would do that by forcing a shift throughout the power grid from one type of energy source to another. . . .

This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. *MCI*, 512 U.S. at 231. Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under that paradigm, if a source was already operating at that level, there was nothing more for EPA to do. Under its newly "discover[ed]" authority, *Utility Air*, 573 U.S. at 324, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to "shift" away virtually all of their generation—*i.e.*, to cease making power altogether. . . .

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise *not* traditionally needed in EPA regulatory development." "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2417(2019).

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal-based generation there should be over the coming decades. *MCI*, 512 U.S. at 231; see also *Brown & Williamson*, 529 U.S. at 160 ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. . . . Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d). . . .

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. *Brown & Williamson*, 529 U.S. at 144; At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. . . . "The importance of the issue," along with the fact that the same basic scheme EPA adopted "has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U.S. at 267–268.

C

Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U.S. at 324.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." 42 U.S.C. §7411(a)(1). As a matter of "definitional possibilities," *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011), generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction"—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents. . . .

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). 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, and the cases are remanded for further proceedings consistent with this opinion. . . .

■ Justice GORSUCH, with whom Justice ALITO joins, concurring.

[Under] the major questions . . . doctrine's terms, administrative agencies must be able to point to " 'clear congressional authorization' " when they claim the power to make decisions of vast " 'economic and political significance.' " . . . I . . . write to offer some additional observations about the doctrine on which it rests.

I . . .

The major questions doctrine works . . . to protect the Constitution's separation of powers. In Article I, "the People" vested "[a]ll" federal "legislative powers . . . in Congress." Preamble; Art. I, § 1. As Chief Justice Marshall put it, this means that "important subjects . . . must be entirely regulated by the legislature itself," even if Congress may leave the Executive "to act under such general provisions to fill up the details." *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825). Doubtless, what qualifies as an important subject and what constitutes a detail may be debated. But . . . 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." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

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, p. 85 (C. Rossiter ed. 1961) (A. Hamilton). . . . The Constitution, too, placed its trust not in the hands of "a few, but [in] a number of hands," *ibid.*, 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, at 327 (J. Madison). . . .

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, at 309–312 (J. Madison). 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. . . . 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, at 322–324 (J. Madison). The difficulty of legislating at the federal level aimed as well to preserve room for lawmaking [by state and local authorities], allowing States to serve as

"laborator[ies]" for "novel social and economic experiments," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Permitting Congress to divest its legislative power to the Executive Branch would "dash [this] whole scheme." *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 61 (2015) (ALITO, J., concurring). 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. See S. BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 110 (2010). 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. Stability would be lost . . . [as] 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. . . .

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." At stake . . . [are] basic questions about self-government, equality, fair notice, federalism, and the separation of powers. . . . The doctrine [ensures] 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. . . .

II

A

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

First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great "political significance," *NFIB* v. *OSHA*, 142 S. Ct., at 665, or end an "earnest and profound debate across the country," *Gonzales*, 546 U.S. at 267–268. Relatedly, this Court has found it telling when Congress has " 'considered and rejected' " bills authorizing something akin to the agency's proposed course of action. *Ante*, at ——, —— (quoting *Brown & Williamson*, 529 U.S. at 144).

Second, this Court has said that an agency must point to clear congressional authorization when it seeks to regulate " 'a significant portion of the American economy,' " *ante*, at —— (quoting *Utility Air*, 573 U.S. at 324), or require "billions of dollars in spending" by private persons or entities, *King v. Burwell*, 576 U.S. 473, 485 (2015). . . .

Third, this Court has said that the major questions doctrine may apply when an agency seeks to "intrud[e] into an area that is the particular domain of state law." *Ibid*. Of course, another longstanding clear-statement rule—the federalism canon—also applies in these situations. . . .

III . . .

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

■ Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

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

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

II . . .

The majority . . . contend[s] that in "certain extraordinary cases"—of which this is one—courts should start off with "skepticism" that a broad delegation authorizes agency action. The majority labels that view the "major questions doctrine," and claims to find support for it in our caselaw. But the relevant decisions do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation's terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked

havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly—as I've just shown—with all the Clean Air Act's provisions. 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.

A . . .

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

The majority claims it is just following precedent, but that is not so. The Court has never even used the term "major questions doctrine" before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency's view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience. In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design. . . .

The majority's claim about the Clean Power Plan's novelty—the most fleshed-out part of today's opinion is . . . exaggerated. . . .

In any event, newness might be perfectly legitimate—even required—from Congress's point of view. I do not dispute that an agency's longstanding practice may inform a court's interpretation of a statute delegating the agency power. But it is equally true, as *Brown & Williamson* recognized, that agency practices are "not carved in stone." 529 U.S. at 156–157. Congress makes broad delegations in part so that agencies can "adapt their rules and policies to the demands of changing circumstances." *Id.*, at 157. To keep faith with that congressional choice, courts must give agencies "ample latitude" to revisit, rethink, and revise their regulatory approaches. *Ibid.* So it is here. Section 111(d) was written, as I've shown, to give EPA plenty of leeway. The enacting Congress told EPA to pick the "best system of emission reduction" (taking into account various factors). In selecting those words, Congress understood—it had to—that the "best system" would change over time. Congress wanted and instructed EPA to keep up. To ensure

the statute's continued effectiveness, the "best system" should evolve as circumstances evolved—in a way Congress knew it couldn't then know. EPA followed those statutory directions to the letter when it issued the Clean Power Plan. It selected a system (as the regulated parties agree) that achieved greater emissions reductions at lower cost than any technological alternative could have, while maintaining a reliable electricity market. Even if that system was novel, it was in EPA's view better—actually, "best." So it was the system that accorded with the enacting Congress's choice. . . .

III

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

The kind of agency delegations at issue here go all the way back to this Nation's founding. "[T]he founding era," scholars have shown, "wasn't concerned about delegation." E. Posner & A. Vermeule, Interring the Nondelegation Doctrine, 69 U. CHI. L. REV. 1721, 1734 (2002). . . . The very first Congress gave sweeping authority to the Executive Branch to resolve some of the day's most pressing problems, including questions of "territorial administration," "Indian affairs," "foreign and domestic debt," "military service," and "the federal courts." J. Mortenson & N. Bagley, Delegation at the Founding, 121 COLUM. L. REV. 277, 349 (2021) (Mortenson & Bagley). . . .

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. *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). In all times, but ever more in "our increasingly complex society," the Legislature "simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). . . .

. . . 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. . . .

QUESTIONS

1. Is this case about the meaning of the statutory provision at issue or about the separation of powers? What is the relationship between the major questions doctrine and the nondelegation doctrine? What are the limits of the major questions doctrine? Does it give the Court carte blanche to veto agency regulations whenever the Court thinks the agency has gone too far?

2. Why exactly is the regulation inconsistent with the language of the statute? Didn't EPA conclude that generation shifting is a system for reducing emissions? Did the Court reject that conclusion? If not, what provision of the statute precludes EPA's actions? How did the Court respond to EPA's claim that the CPP's building blocks constitute a "system" of emission reduction?

3. The Court and the concurrence refer to the major questions doctrine as a "clear statement" rule. How does a clear statement rule work? How do clear statement rules relate to the Constitution? Does the major question doctrine represent a reinvigoration of the nondelegation doctrine by another name?

4. When does the major questions doctrine apply? Does Justice Gorsuch's concurring opinion provide guidance? In light of the factors he identified, are there meaningful limits on the use of the doctrine as a "get out of text free card" that restricts agency authority?

5. The Court accused EPA of making policy decisions that only Congress has the constitutional authority to make. Did the Court's assessment of the severity of the threats posed by climate change reflect a similar usurpation of policymaking authority by the Court itself?

p. 136, add to the first full paragraph after the sentence ending "before the rules can take effect.":

See Citizens for Constitutional Integrity v. United States, 57 F.4th 750 (10th Cir. 2023) (distinguishing the CRA from a legislative veto because CRA resolutions require compliance with Article I's bicameralism and presentment requirements).

p. 139, add at the end of the carryover paragraph: Is a strong nondelegation doctrine required as a matter of original meaning? Julian David Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), contend that "early Congresses adopted dozens of laws that broadly empowered executive and judicial actors to adopt binding rules of conduct. Many of those laws would have run roughshod over any version of the nondelegation doctrine now endorsed by originalists." As a result, "the nondelegation doctrine has nothing to do with the Constitution as it was originally understood. You can be an originalist or you can be committed to the nondelegation doctrine. But you can't be both." *Id.* at 282. *See also* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 91 (2021) (asserting that Hamilton, Madison, and Jefferson, as well as the First Congress, did not understand "the Constitution to require that Congress resolve all important policy questions in legislation. If the Supreme Court requires Congress to take on this role now, the Court will create a brand new constitutional requirement that was never imagined by the Constitution's Framers."). Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1086 (2021), argues that "the Court seems inclined toward symbolic and (at most) incremental change rather than the dramatic shock to the administrative state that some judges and commenters seem to

expect. . . . In the end, pro-nondelegation Justices might decide other existing alternatives for constraining agency power are preferable to a seemingly grand but practically limited and politically divisive constitutional gesture." Does *West Virginia v. EPA* tend to support or undermine Professor Hickman's assessment?

Lisa Heinzerling, *Nondelegation on Steroids*, 29 NYU ENVTL. L.J. 379 (2021), argues that a strong version of the nondelegation doctrine actually reduces rather than increases political accountability because it is enforced "by Article III courts, the one part of our government specially designed to be democratically unaccountable." *Id.* at 379. She charges that the version of the nondelegation doctrine supported by some conservative justices "is nothing other than a gerrymander: it precisely trims and shapes Congress's domain to ensure victory for a conservative vision of regulatory policy that has been a source of political contestation for decades." *Id.* at 382.

Jarkesy v. Securities and Exchange Comm'n, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 2023 WL 4278448 (2023), relied in part on the nondelegation doctrine to invalidate a successful SEC administrative enforcement action for securities fraud that resulted in the imposition of civil penalties, a disgorgement order, and a cease and desist order on the ground that the statutory delegation to the agency to choose between administrative and judicial enforcement of alleged violations of the securities laws lacked an intelligible principle to guide use of the delegated power. The court rejected the government's argument that the SEC's exercise of prosecutorial discretion in choosing the forum for enforcement was a core executive power. Rather, the court reasoned, the statute gave the SEC the power to decide which defendants should receive the legal processes that accompany Article III proceedings and which to relegate to agency adjudication. The court reasoned further that this choice is one only Congress can make, and which it may not delegate absent an intelligible principle. What are the implications of the case for enforcement of the securities laws? May the SEC still bring judicial enforcement actions? Note that statutes delegate to other agencies, including EPA and the FCC, the choice to pursue enforcement administratively or in court. Does *Jarkesy* mean that those statutes are also unconstitutional?

The same court applied the major questions doctrine in *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022), which concluded that the plaintiff states had demonstrated a strong likelihood of success on the merits in their attack on the constitutionality of an executive order by President Biden providing for federal procurement contracts to require federal contractors to ensure their entire workforces were fully vaccinated against COVID-19. The government argued that the major questions doctrine did not apply because the President was acting in a proprietary rather than a regulatory capacity. The court responded that this was a distinction without a difference because the mandate imposed by the order and several agency implementing actions "require immense action not just from internal contract employees but also from an all-but boundless number of employees whose employer has at least one federal contract. No matter what else is or is not regulatory, this certainly is." *Id*. at 1033. The court upheld the district court's injunction, which precluded application of the mandate to any contract between the plaintiff states and the federal government.

To what extent does the major questions doctrine operate as the functional equivalent of the nondelegation doctrine? A clear statement rule is a strong interpretive presumption against a particular outcome, but a presumption can be overcome—at least in theory—if the statutory

language is clear. In practice, however, even seemingly clear language seems insufficient to support the delegation of authority to agencies when the Court applies the major questions doctrine. In *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), for example, the Court held that the Secretary of Education lacked authority to "forgive" student loans in response to the COVID-19 pandemic under the HEROES Act, 20 U.S.C. §1098bb(a)(1). That provision authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a . . . national emergency." There was no dispute that the pandemic was a national emergency within the statute, and the loan forgiveness program would seem to fall squarely within the authority to "waive" any statutory requirement. The Court nonetheless concluded that the statutory authority to "waive or modify" any provision did not include the authority to "cancel $430 billion of student loan principal." If the statutory language in *Biden v. Nebraska* is not clear enough to authorize the agency action, what sort of language would be sufficient? *See generally* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) (arguing that the major questions doctrine effectively resurrects the nondelegation doctrine); Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1778 (2023) ("The nondelegation doctrine has surfaced, not yet in a case flatly invalidating a statute as unconstitutional, but as a constitutionally required doctrine of statutory interpretation that achieves the same goal.").

p. 141, add at the end of the carryover paragraph: One possible explanation for this alternative conception of public rights is that public rights are rights that belong to the public and that the vindication of such rights is an executive function. *See* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1151-55 (2022); Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review,* 58 ADMIN. L. REV. 499 (2006) (concluding that public rights are rights "belonging to the public" and that "enforcement by government officials of both judicial and extrajudicial remedies [for these rights] is a traditional executive function"); *see also* John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143 (2019) (arguing that the Supreme Court's endorsement of administrative adjudication of public rights is rooted in the principle that "when acting with respect to public rights and private privileges, executive officials were performing the characteristic executive function of exercising the government's own proprietary rights").

Jarkesy v. Securities and Exchange Comm'n, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 2023 WL 4278448 (2023), held that an administrative enforcement action for securities fraud initiated by the SEC violated the Seventh Amendment because it deprived the defendant of a jury trial. Although the government was a party to the adjudication, the court regarded that fact as a necessary but not sufficient basis for characterizing the rights at issue as public rights. Is that conclusion consistent with *Granfinanciera*? The rights were private rights because fraud prosecutions were regularly brought in English courts at common law, and actions seeking civil penalties are akin to special types of action in debt that sought remedies that could only be enforced at common law. The case takes the position that any statutory public right that overlaps with a private common law right requires a jury. While this reasoning might be plausible if the administrative adjudication determines the factual issues conclusively in a subsequent suit between private parties, a broader reading is arguably inconsistent with the personal nature of the jury trial right.

Unit 1.6

p. 146, add after the 1st sentence of the 1st paragraph in this unit: *See, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) ("Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.' ").

p. 150, after the carryover paragraph:

The Supreme Court reversed the First Circuit's decision in *Aurelius Inv.*, in *Financial Oversight and Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020). The Court held that the Appointments Clause restricts the appointment of all officers of the United States, including those who carry out their powers or duties in or in relation to Puerto Rico. It also held, however, that it does not restrict the appointment of local officers that Congress vests with primarily local duties under Article IV, § 3 or Article I, § 8, cl. 17 of the Constitution. Finally, the Court held that the officers of the Board in that case were officers with primarily local powers and duties because, for example, its broad investigatory powers are backed by Puerto Rican, not federal law; it may initiate bankruptcy proceedings, but only on behalf of the interests of Puerto Rico; and the government of Puerto Rico pays all of the Board's expenses, including the salaries of its employees.

p. 150, add after the carryover paragraph:

A recent decision, *United States v. Donzinger*, 38 F.4th 290 (2d Cir. 2022), elaborated on the proper test for identifying an officer of the United States. A defendant convicted of criminal contempt argued that the appointment of the special prosecutor who brought the contempt charges against him under Rule 42(a)(2) of the Federal Rules of Criminal Procedure violated the Appointments Clause. The district court had relied on a provision of Rule 42(a)(2) directing the court to "appoint another attorney to prosecute the contempt" when the government declines to prosecute. Donzinger claimed that the special prosecutor was an inferior officer who was not supervised by a principal officer and that Rule 42 does not satisfy the Appointments Clause requirement that "Congress . . . by law" vest the appointment of inferior officers in the courts.

The first issue was whether special prosecutors are officers of the United States. The court stated that to qualify as an officer of the United States, an individual must (1) exercise significant authority pursuant to the laws of the United States; and (2) occupy "a continuing position established by law." *Id*. at 296 (citing *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018)). No one disputed that special prosecutors meet the significant authority requirement. The issue was whether they also meet the second requirements. The court read Supreme Court cases, including *Morrison v. Olson*, as establishing that a continuing position need not be permanent. Thus, a temporary position, like a special prosecutor, can qualify. It also read prior cases to provide that whether the occupant of a temporary office holds a "continuing position" depends on three factors. First, the position must not be personal to a particular individual. Special prosecutors are not specific to the attorneys appointed to prosecute a particular case. Second, the position must not be transient or fleeting. In this case, the special prosecutor had already served for three years. The fact that the

prosecutor's duties terminate upon completion of his or her duties does not make the position transient or fleeting. Third, the position's duties must be more than incidental to the regular operations of government. The special prosecutor's duties are because "prosecution generally is a core power of government and prosecution of contempt specifically 'vindicates the authority of the court.' " *Id*. at 298. The special prosecutor position was thus analogous to the independent counsel position at issue in *Morrison*; both qualified as officers of the United States.

The next issue was whether the special prosecutor in *Donzinger* was properly appointed. Special prosecutors are inferior officers who may be appointed by a "court of law." Doninger claimed that court-appointed special prosecutors were not "inferior" because they were not supervised by a principal officer. The court agreed that "[i]inferior officers are 'officers whose work is supervised at some level' by principal officers." *Id*. at 300 (quoting *Edmond v. United States*). Nonetheless, this requirement was met because the Attorney General has broad statutory authority to supervise all litigation involving the United States. Accordingly, special prosecutors were supervised by a principal officer even if that supervisory authority was not exercised in this case. Donzinger also argued that *Congress* did not vest appointment power in a court because the authority to appoint special prosecutors is derived from Rule 42. The court responded that it is not clear that the Appointments Clause's reference to Congress providing the method of appointment "by Law" requires bicameral approval and presentment. At any rate, Rule 42 was enacted under the Rules Enabling Act, 28 U.S.C. § 2074, "which gives Congress an opportunity to modify or reject rules before their enactment." *Donzinger*, 38 F.4th , at 303.

p. 150, add at the end of the 2d paragraph: In *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), the Court left open the possibility that both the *Morrison* factors and the *Edmond* test remain relevant. It stated that "[w]hile '[o]ur cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers,' we have in the past examined factors such as the nature, scope, and duration of an officer's duties. *Edmond v. United States*, 520 U. S. 651, 661 (1997). More recently, we have focused on whether the officer's work is 'directed and supervised' by a principal officer. *Id*., at 663." 140 S. Ct. at 2199 n.3.

p. 150, 3d paragraph: The Supreme Court reversed the decision in *Aurelius Inv. See* the update above to pp. 149-50.

p. 151, replace the 1st full paragraph with the following:

The Supreme Court again addressed the distinction between principal and inferior officers in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (U.S. 2021), linking the distinction to a strong theory of the unitary executive. The issue was whether Administrative Patent Judges (APJs) serving on the Patent and Trademark Appeals Board were principal officers whose appointment by the Secretary of Commerce therefore violated the Appointments Clause. The Federal Circuit had determined that APJs were principal officers because they were not sufficiently controlled by a superior. Although APJs were bound by a superior in respect to policy matters, their decisions were not reviewable by a superior and they could be removed only for good cause. To cure this problem, the Federal Circuit severed the good-cause removal limitation, concluding that if APJs were removable at will by a superior they were inferior officers whose appointment by the head of a department was valid. The Supreme Court agreed with the Federal Circuit on the merits, but not

as to the remedy. Chief Justice Roberts' opinion on the merits was joined by Justices Alito, Barrett, Gorsuch, and Kavanaugh. Justice Gorsuch declined to join Chief Justice Roberts' opinion as to the remedy issue, but Justice Breyer's opinion concurring in the judgment and dissenting in part, which was joined by Justices Kagan and Sotomayor, agreed that, if the decision on the merits were correct, then so was the remedy. *See id.* at 1997 ("Under the Court's new test, the current statutory scheme is defective only because the APJ's decisions are not reviewable by the Director alone. The Court's remedy addresses that specific problem, and for that reason I agree with its remedial holding.")

On the merits, the Court focused on the APJs' authority to make a final decision that was not reviewed by any principal officer, concluding "that the unreviewable authority wielded by APJs during inter partes review [of the validity of previously issued patents] is incompatible with their appointment to an inferior officer." *Id*. at 1985. Relying heavily on *Edmond*, the majority concluded that Congress had assigned "significant authority" to the APJs "in adjudicating the public rights of private parties, while also insulating their decisions from review [by a superior officer] and their offices from removal." *Id*. Thus, although the majority disclaimed any attempt to "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes," *id*. at 1985 (quoting *Edmond*, 520 U.S. at 661), it effectively adopted a per se rule. Only "an officer properly appointed to a principal office may issue a final decision binding the Executive Branch" in proceedings to determine patent validity. *Id*. The Director of the Patent and Trademark Office's lack of authority to review individual PTAB decisions undercut the accountability provided under a hierarchy with the President at the top of the chain of command. As a result, the President could neither oversee the PTAB himself nor attribute its failings to those he can oversee. The Court summarized its decision as reaffirming "the rule from *Edmond* that the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate." *Id*. at 1988.

The next question was the proper remedy. Arthrex asked the Court to hold the entire regime of inter partes review unconstitutional. To avoid that result, the Federal Circuit had severed the good-cause removal provisions governing APJs, converting them to inferior officers who could be appointed by the Secretary. The Supreme Court chose neither of those options, instead invalidating the portion of the statute that purported to exempt APJ decisions from administrative review, such that final APJ decisions would henceforth be subject to review by the Director of the PTO. The Court also remanded to the Acting Director to decide whether to rehear the petition seeking invalidation of Arthrex's patent. In so doing, the Court noted that the appropriate remedy for "an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed official.' " *Id*. at 2055. *See, e.g.*, *Digiondomenico v. Kijakazi*, 2023 WL 2018910 (M.D. Pa. 2023) (remanding disability determination for a hearing before a properly appointed ALJ).

Justice Gorsuch joined the merits but not the remedy portion of Chief Justice's opinion. He took issue with the Court's application of severability doctrine, indicating that he would have set aside the PTAB decision in this case, given that it was rendered by invalidly appointed officers. He criticized the majority for serving as "a council of revision free to amend legislation," thereby undermining the very separation of powers it purported to validate. *Id*. at 1991 (Gorsuch, J., concurring in part and dissenting in part). Justice Breyer dissented from the decision that the

appointment of the APJs was unconstitutional, criticizing the majority's formalistic approach for resolving separation of powers questions. He urged the Court to ask why Congress enacted a particular statutory configuration and to consider the practical consequences likely to follow from Congress's chosen scheme. Finally, Justice Thomas, joined by the three liberal Justices, took issue with the conclusion that the APJs were not inferior officers, finding no precedent to support a rule limiting inferior officer status to individuals whose individual adjudicatory decisions are subject to reversal by a principal officer, regardless of whether the principal officer has other means of overseeing the actions of individuals such as APJs. In a portion of his opinion joined by no other Justice, he urged reconsideration of what he called the "functional" element of *Edmond* – the requirement that an inferior officer's work be directed and supervised at some level by others who were appointed by the President with Senate consent.

What are the implications of *Arthrex* for the internal structure of administrative agencies that engage in adjudication? Does it require that adjudicatory decisions by ALJs (who are removable only for good cause) must be subject to review by a principal officer who is removable at will? *See McIntosh v. Department of Def.*, 53 F.4th 630 (Fed. Cir. 2022) (concluding that administrative judges working for the Merit Systems Protection Board are inferior officers who can be appointed by the President alone because the MSPB, whose members are principal officers appointed by the President with Senate consent, supervises administrative judges and may review their decisions *sua sponte*). For criticism of *Arthrex*, see Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1 (2023) (arguing that review of agency adjudicatory decision by politically appointed agency heads is neither standard nor necessarily desirable, that agencies themselves are best positioned to determine when agency-head review is appropriate, and that decisions such as *Arthrex* block the political branches from creating a functioning government that best serves the public interest).

The Court's recent Appointments Clause cases continue to percolate through the lower courts. In *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093 (D.C. Cir. 2021), defendants in an administrative enforcement proceeding involving alleged violations of the Horse Protection Act alleged that the ALJs who presided over their cases were principal officers, so that ratification of their initially invalid appointments by the Secretary of Agriculture was insufficient to cure the Appointments Clause violation. The D.C. Circuit disagreed, holding that the Department's ALJs were inferior officers. Even though they were not removable at will by a principal officer, "the analysis hardly ends there." *Id*. at 1103. Other factors "point[ed] decidedly in favor of inferior-officer status," including that the ALJs were subject to substantial oversight by the Secretary, they were required to follow the Secretary's procedural and substantive regulations, and their decisions were appealable to the Department's Judicial Officer, whom the Secretary could remove at will. *Id*. The enforcement action defendants claimed that the Judicial Officer's appellate review was insufficient to demonstrate inferior officer status unless the Judicial Officer was a principal officer because an inferior officer's decisions must be subject to review by a principal officer. The court found that position to be inconsistent with its decision in *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012), which held that Copyright Royalty Judges are principal officers because no superior officer could ***either*** review their decisions or remove them at will. Are these cases consistent with *Arthrex*?

A recurrent question for the lower courts is the extent to which subsequent ratification by a properly appointed official can validate an action taken by one who has been improperly appointed. When officers have not been properly appointed, they lack any valid authority and their actions are void—unless they have been ratified by a properly appointed officer with authority to do so. In *Jooce v. Food & Drug Admin.*, 981 F.3d 26 (D.C. Cir. 2020), for example, the court declined to address an Appointments Clause challenge to an FDA regulation deeming e-cigarettes to be "tobacco products" subject to FDA regulation. The court reasoned that even if the FDA's Associate Commissioner for Policy, who approved the rule, was not validly appointed, the Commissioner's ratification cured any Appointments Clause defect. The court reached a different result in *Braidwood Mgmt. Inc. v. Becerra*, 627 F. Supp. 3d 624, 639-45 (N.D. Tex. 2023), which held that the members of the Preventive Services Task Force (PSTF), an agency affiliated with the Department of Health and Human Services which issues recommendations relating to preventive care services that health care insurers must cover under the Affordable Care Act (ACA), are principal officers whose appointment by someone other than the President violated the Appointments Clause. The court rejected the contention that the Secretary of HHS could ratify actions taken by the unlawfully appointed PSTF because the ACA provides that PSTF "shall be independent" of HHS).

p. 153, add to the 1st full paragraph after the parenthetical description of *Chamber of Commerce of U.S. v. Reich*: ; *California v. Bernhardt*, 472 F. Supp. 3d 573, 605 (N.D. Cal. 2020) quoting *In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013)) ("A president's Executive Order cannot 'impair or otherwise affect' statutory mandates imposed on [an agency] by Congress.")

p. 153, add in the fourth line from the bottom, after "authority and discretion.": Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 6 (2019), argues that the Take Care Clause imposes independent constraints on the President's administrative discretion and that "judges should use a modified version of hard-look arbitrary and capricious review of agency action . . . to thwart opportunistic presidential abuses of administrative discretion."

p. 154, add to the final, partial paragraph after "*See, e.g.*,": *California v. EPA*, 2023 WL 4280835, *7 (D.C. Cir. 2023) (stating that an executive order that does not create private rights and that is devoted solely to the internal management of the executive branch is not subject to judicial review, and that a claim that an agency's regulation is arbitrary and capricious because it violates an executive order "is nothing more than an indirect—and impermissible—attempt to enforce private rights under the order");

p. 155, add before the final period of the carryover paragraph: ; *Louisiana v. Biden*, 543 F. Supp. 3d 388, 397 (W.D. La. 2021) (stating flatly that "A court may review a Presidential Executive Order.")

p. 155, add at the end of the carryover paragraph: Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743 (2019), calls for "the development of a coherent legal framework to guide judicial review of presidential orders," and elaborates on how such a framework might address threshold justiciability issues, standards of review, and available forms of relief.

p. 155, add to the 1st full paragraph after "(Mar. 1, 2017)": (repealed by Exec. Order No. 13,992 (Jan. 20, 2021))

p. 155, add at the end of the 1st full paragraph: Before leaving office, President Trump sought to strengthen presidential control over the rulemaking process in an executive order providing that, to the extent permitted by law and with limited exceptions, agency rules adopted under § 553 of the APA be signed by a senior political appointee and allowing only such appointees to initiate the § 553 rulemaking process. Exec. Order No. 13,979, § 2(a), Ensuring Democratic Accountability in Agency Rulemaking, 86 Fed. Reg. 6813 (Jan. 22, 2021). A month later, President Biden repealed that executive order. Exec. Order No, 14,018, § 1, Revocation of Certain Presidential Actions, 86 Fed. Reg. 11855 (Feb. 24, 2021).

p. 157, add to the 1st paragraph before "In *Marbury*": Nevertheless, the Constitution says "nothing at all" about the President's removal authority, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in the judgment in part and dissenting in part), leaving it to the courts to determine the allocation of constitutional authority to remove agency officials.

p. 157 add at the end of the material in the bullet point for *Myers*: *See also Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) ("When a statute does not limit the President's power to remove an agency head, we generally presume that the officer serves at the President's pleasure.").

p. 158, replace the final paragraph with the following:

After *Morrison*, it appeared that congressional control over removal of executive officers was impermissible, but that good-cause removal requirements were valid unless the inability to remove an officer at will interfered with the President's essential functions. Under this framework, the problem with congressional consent requirements is that they prevent the President from removing an officer who does not faithfully execute the laws and thus violate the Take Care Clause. In contrast, good-cause removal requirements may prevent the President from removing an officer based on policy disagreements, but do not violate the Take Care Clause because failure to faithfully execute the laws is good-cause for removal. *See* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021) (arguing that statutory for-cause removal provisions "do not permit the President to remove agency heads for failing to follow presidential directives," but that "they do not clash with the Take Care Clause either, because even on an expansive reading of the clause, [for-cause removal] provisions authorize Presidents to remove unfaithful or incompetent officials"); Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority Over Independent Agencies*, 109 GEO. L.J. 637 (2021) (arguing that statutory provisions authorizing removal of officers in independent agencies only for inefficiency, neglect of duty, or malfeasance suggest that the President has supervisory authority over the agency to the extent needed to ensure against "neglect of duty," but not to displace the agency's policymaking discretion). Under these precedents, moreover, the Vesting Clause does not require the President to have absolute control over the policy decisions of executive officers. Instead, policy independence would violate the Vesting Clause only if the inability to remove the officer "at will"

would interfere with the President's essential functions, in light of the officer's rank, functions, and policy authority. As developed more fully in the principal cases and third related matters section, more recent decisions embrace a strong unitary executive principle under which interference with the President's "at will" removal power is unconstitutional except under narrow circumstances.

p. 172, add at the end of the citation to the principal document: (repealed by Exec. Order No. 13,992, § 2, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049 (Jan. 20, 2021))

p. 179, add after the carryover bullet point:

- *Nondelegable Duties*—Another question that arises under the FVRA is whether inferior officers within an agency may perform agency functions when the position of the head of the agency is temporarily vacant and no acting agency head has been appointed. In *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022), the Commissioner for Patents denied a request for the Director of the Patent and Trademark Office (PTO) to review the Patent and Trial Board's decision finding certain claims unpatentable. The company seeking a patent argued that this decision, which was handed down during a period between the departure of the outgoing PTO Director and the arrival of the incoming Director, was void because it was not made by an acting officer appointed pursuant to the FVRA. The Federal Circuit disagreed, concluding that only duties of an agency head that are "nondelegable" must be made by an acting agency head appointed under the FVRA. The Director had delegated responsibility to grant and or deny requests for review before the vacancy had occurred and the Commissioner could continue to exercise that delegated authority. *See also Dahle v. Kijakazi*, 62 F.4th 424 (8th Cir. 2023) (concluding that the Acting Commissioner of Social Security was properly serving under the FVRA and that she could ratify appointments of ALJs whose previous appointment by an inferior officer was invalid under *Lucia v. SEC*); *Sidney M. Kijakazi*, 630 F. Supp. 3d 1077, 1103-05 (N.D, Iowa 2022) (concluding that there is "no reason why an Acting Commissioner should not be considered a 'Head[ ] of Department' for purposes of the Appointments Clause," and therefore may properly ratify the appointment of ALJs as inferior officers); *Ortiz v. Commissioner of Social Security*, 2023 WL 2375580, *6 (E.D.N.Y. 2023) (interpreting the FVRA to allow the same official to serve as an acting officer for 210 days and during the pendency of a nomination).

- *First Assistants*—In *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1 (D.D.C. 2020), the court considered the definition of the term "first assistant" for purposes of the FVRA's default rule, declaring the appointment of Ken Cuccinelli as Acting Director of the U.S. Citizenship and Immigration Services (USCIS) to be a violation of the FVRA. It held that the "first assistant" default rule of § 3345(a) does not apply to a person appointed to an entirely new position after a vacancy arises and who then, as a result of alteration of the agency's order of succession, is treated as the "first assistant" to the vacant office but who would return to his original position after the vacancy is permanently filled. The court reasoned that under these circumstances, the officer "does not qualify as a 'first assistant' because he was assigned the role of principal on day-one and, by design, he never has

served and never will serve 'in a subordinate capacity' to any other official . . . ." *Id.* at 26. Allowing such a person to serve as the acting agency head "would decimate this carefully crafted framework. The President would be relieved of responsibility and accountability for selecting acting officials, and the universe of those eligible to serve in an acting capacity would be vastly expanded." *Id.* at 28. The court also held that a series of directives that made it more difficult for individuals from other countries to claim asylum in the United States, issued by Cuccinelli while purporting to serve as acting director, exceeded the Director's statutory authority and were therefore void.

Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020), explores a series of constitutional and statutory questions concerning the FVRA, arguing that acting officials may provide needed expertise and stability and proposing reforms to that balance accountability and workability concerns.

p. 179, add to the 1st paragraph of § 2 before "If the court": *See also Public Citizen, Inc. v. Trump*, 435 F. Supp. 3d 144 (D.D.C. 2019) (dismissing challenge to Executive Order 13,771 for lack of standing).

p. 179, add after the second paragraph of § 2:

More broadly, President Trump sought to assert greater political control over agencies' policy apparatus, issuing an executive order that created an exception from the competitive hiring rules and examinations for career position in the federal service "of a confidential, policy-determining, policy-making, or policy-advocating character." Exec. Order No. 13,957, § 1, Creating Schedule F in the Excepted Service, 85 Fed. Reg. 67631 (Oct. 26, 2020). The order also exempted these officials from the procedural protections provided by 5 U.S.C. §§ 7501-7543 if the government seeks to impose sanctions, such as furloughs, suspensions, or reductions in grade or pay. *Id*. The order sought to transform apolitical career civil service position into political appointments over which the President could exercise more significant control. President Biden revoked the Trump order, asserting that it "not only was unnecessary to the conditions of good administration, but also undermined the foundations of the civil service and its merit system principles, which were essential to the Pendleton Civil Service Reform Act of 1883's repudiation of the spoils system." Exec. Order No. 14003, § 2(a), Protecting the Federal Workforce, 86 Fed. Reg. 7231 (Jan. 22, 2021). For an empirical analysis of the effects of intra-agency ideological differences between political appointees and career officials, see Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731 (2022) (concluding that civil service employees can serve as "ballast" between the oscillating views of presidential administrations of different parties).

p. 180, add at the end of § 2:

Recent scholarship has been critical of deregulation under the Trump Administration. Jack Thorlin, *Deregulation Defanged: An Empirical Review of Federal Deregulatory Policy and Its Legal Obstacles*, 34 BYU J. PUB. L. 333, 393, 399 (2020), finds that "the cost savings from President Trump's deregulatory acts have been trivial, particularly when compared to other federal interventions in the economy," and that "the Trump administration's deregulatory strategy was

poorly conceived if the objective was maximizing savings." Professor Thorlin posits, however, that the strategy may have been designed to serve other purposes, including keeping the Republican Party unified, taking credit for economic growth that would have occurred anyway, pleasing constituencies such as regulated industries, and pursuing actions to spite opponents, such as advocates of regulation to address climate change. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021), explores how presidential control of the bureaucracy can lead to "structural deregulation," which "might include regulatory rollbacks that weaken health, safety, financial, or labor standards; shifts in an agency's enforcement priorities; or legal interpretations that shrink an agency's authority or jurisdiction." *Id*. at 588. Professors Freeman and Jacobs add that "[b]y making it harder for agencies to fulfill their statutory mandates, a campaign of structural deregulation can be seen as both an encroachment on Congress's lawmaking authority and, arguably, a dereliction of the President's constitutional duty to faithfully execute the laws." *Id*. at 589-90.

p. 182, add at the end of the 1st full paragraph: The Fifth Circuit apparently thought so. In *Jarkesy v. Securities and Exchange Comm'n*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 2023 WL 4278448 (2023), the court held that the statutory removal restrictions for SEC ALJs were unconstitutional under *Free Enterprise Fund* because they involve at least two layers of protection against removal. It rejected the contention that *Free Enterprise Fund* had distinguished ALJs from the PCAOB for purposes of the constitutional prohibition on two layers of good-cause protection because of ALJs' adjudicatory functions. The *Jarkesy* court concluded instead that "the Court merely identified that its decision does not resolve the issue presented here." *Id.* at 12. It then reasoned that, even if the SEC ALJs' functions are more adjudicative than those exercised by PCAOB members, "the fact remains that two layers of insulation impedes the President's power to remove ALJs based on their exercise of the discretion granted to them" *Id*.

The Ninth Circuit reached a different result in *Decker Coal Co. v. Pehringer*, 8 F.4th 1123 (9th Cir. 2022). The issue was whether the statutory provisions governing removal of ALJs who worked for the Department of Labor's Benefits Review Board violated the prohibition against two levels of good-cause protection. The ALJs, like all federal ALJs, may be removed only for good cause established and determined by the Merit Systems Protection Board. 5 U.S.C. § 7521(a). MSPB members, in turn, may only be removed by the President for good cause. 5 U.S.C. § 1202(d). The court rejected Decker's claim that this dual for-cause removal provision is unconstitutional. It noted that the Supreme Court had left precisely this question open in *Free Enterprise Fund*. It upheld § 7521(a)'s imposition of for- cause removal protections for ALJs for several reasons. First, ALJs perform purely adjudicatory functions and have no policymaking or enforcement functions. Second, the Department of Labor is free to resolve black lung benefit cases like the one involved in *Decker* through the use of adjudicators who are not ALJs, as long as they are "qualified individuals appointed by the Secretary of Labor." Third, the President has meaningful control over the Benefits Review Board, including non-deferential review of ALJ decisions by the Board, whose members are not subject to an explicit for-cause removal provision. Thus, the President is free to order the Secretary of Labor to fire Board members. Fourth, the reasons that trigger the MSPB's removal authority are much more expansive than those that authorized removal of Public Company Accounting Board members in *Free Enterprise Fund*. Does *Decker* imply that *Free Enterprise Fund* is inapplicable to ALJs who serve in independent agencies like the SEC, or that the DOL's Benefits Review Board is not an independent agency?

p. 183, replace the 1st paragraph with the following:

The Supreme Court's recent decision in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), discussed above in connection with the Appointments Clause, raises additional concerns for ALJ independence. The underlying question in *Arthrex* was whether Administrative Patent Judges (APJs), who resolve inter partes challenges to existing patents were properly appointed as inferior officers. The Court's conclusion that they were instead improperly appointed superior officers embraces a strong unitary executive theory with potentially profound implications for agency adjudicators in general, including ALJs. Critically, the Court indicated broadly that only "an officer properly appointed to a principal office may issue a final decision binding the Executive Branch" in inter partes review proceedings. *Id.*at 1985. That rule would appear to be equally applicable to any other form of administrative adjudication. If so, then it would be constitutionally impermissible to limit agency review of ALJ decisions. More fundamentally, either ALJs must be removable at will or their decisions must be subject to review and revision by officers removable at will. Currently, § 557(b) indicates that ALJ adjudications under the APA are subject to de novo review by the agencies for whom they serve, but not all of those principal officers are removable at will. If *Arthrex*'s analysis applies to ALJs, then either the appointment and removal requirements for ALJs are invalid (because they are principal officers who must be appointed by the President with Senate consent and removable "at will") or the good-cause removal provisions for their superiors are invalid.

p. 183, add after the last sentence on the page: *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 112 ("[F]or the first time in decades, the constitutional status of the independent agencies has become insecure.").

pp. 184-186, replace the material from the paragraph beginning at the bottom of p. 184 through the first full paragraph on p. 186 with the following:

In *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), the Supreme Court engaged in a fundamental restructuring of its removal power jurisprudence, continuing a transformation that began with *Free Enterprise Fund*. By a 5-4 majority, the Court embraced a strong unitary executive principle that includes a broad presidential removal power, although it stopped short of invalidating all independent agencies. *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP CT. REV. 83, 117 ("In *Seila Law*, the Court wholeheartedly accepted the strongly unitary position, in an opinion that appeared to accept *Humphrey's Executor* but that read the case so narrowly that it left a great deal of room for constitutional challenges to many independent regulatory commissions in their present form."). The decision addressed an issue that had divided the lower courts: whether Congress could create an independent agency headed by a single individual by imposing good-cause requirements for the removal of the agency head.

The Court began its analysis by interpreting *Myers v. United States* as recognizing a general rule that the President has unrestricted removal power under Article II. It acknowledged only two exceptions, which it defined narrowly. First, *Humphrey's Ex'r* recognized the validity of statutory for-cause removal restrictions on "a multimember body of experts, balanced along partisan lines,

that performed legislative and judicial functions and was said not to exercise *any* executive power." *Id*. at 2199 (emphasis added). Second, *Morrison v. Olson* recognized an exception for "inferior officers with limited duties and *no* policymaking or administrative authority." *Id*. at 2200. The Court reasoned that the CFPB's Director fit neither of the two exceptions and it refused to recognize any additional exceptions. *Humphrey's Ex'r* was distinguishable because the CFPB was led by a single Director who qualified neither as a "body of experts" nor as non-partisan. The Director's five-year term guaranteed abrupt shifts in agency leadership and with it the loss of accumulated expertise. In addition, the Director was not a mere legislative or judicial aid. Instead, the Director possessed the authority to promulgate binding rules on a major segment of the U.S. economy, to unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications, and to exercise significant enforcement authority (a quintessentially executive power not considered in *Humphrey's Ex'r*). *Morrison v. Olson* was distinguishable because the CFPB Director is not an inferior officer with limited duties. The Court noted that, "[w]hile we do not revisit *Humphrey's Executor* or any other precedent today, we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President's removal authority." *Id*. at 2206.

The Court characterized the CFPB's structure as "almost wholly unprecedented," *id*. at 2201, dismissing the Comptroller of the Currency, the Office of Special Counsel, and the SSA (all of which are agencies headed by a single individual subject to good-cause removal requirements) as inconsequential precedents. The Court observed that the SSA's structure as an agency headed by a single individual is "comparatively recent and controversial," but also noted that "unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits." *Id*. at 2202. The fourth analog is the Federal Housing Finance Agency, which the Court called "essentially a companion of the CFPB," foreshadowing its subsequent decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), discussed below. The Court found the CFPB's single-Director configuration to be "incompatible with our constitutional structure," which "scrupulously avoids concentrating power in the hands of any single individual" (other than concentrating executive power in the President). *Id*. The Court found the Director to be "accountable to no one" in that he is neither elected nor meaningfully controlled by someone who is.

Having declared the agency's current structure to be unconstitutional, the Court then addressed what the appropriate remedy should be. The Court concluded that the provisions governing the CFPB's structure and operations remained fully operative even without the offending removal restrictions. Nothing in the text or history of the statute creating the CFPB supported the conclusion that Congress would have preferred no CFPB to a CFPB supervised by the President. "We think it clear that Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today." *Id*. at 2211-12. Finding, therefore, that the invalid for-cause removal restrictions were severable from the rest of the statute, the Court allowed the agency to continue to exist, with a Director who is now removable at will by the President. The Court remanded the case to the Ninth Circuit to determine whether the actions taken by the CFPB against Seila Law while the for-cause removal restrictions had been in effect had been ratified by an Acting Director who was removable by the President at will. The Court suggested in dictum that "there may be means of remedying the defect in the CFPB's structure that

the Court lacks the authority to provide," such as converting the CFPB into a multimember agency. *Id*.

Justice Thomas, joined by Justice Gorsuch, dissented from Chief Justice Roberts' severability analysis, urging a complete revamping of the manner in which that analysis is conducted. In addition, Justice Thomas stated that "in the future, we should reconsider *Humphrey's Executor in toto*, and I hope that we will have the will to do so." *Id*. at 2219 (Thomas, J., concurring in part and dissenting in part). He stated that "[c]ontinued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design. Leaving these unconstitutional agencies in place does not enhance this Court's legitimacy; it subverts political accountability and threatens individual liberty." *Id*. at 2218-19.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, concurred in the judgment with respect to severability but otherwise dissented. She rejected the majority's view that there is a general rule of unrestricted removal power subject to narrow exceptions that do not include the CFPB:

> 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. That means the constitutional concern is, if anything, ameliorated when the agency has a single head.

Id. at 2225. She further asserted that

> [t]he text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion. They point not to the majority's "general rule" of "unrestricted removal power" with two grudgingly applied "exceptions." Rather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And most relevant here, they give Congress wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies like the CFPB.

Id. at 2226. Justice Kagan charged the majority with "failing to recognize that the separation of powers is by design, neither rigid nor complete," *id*., and that the Constitution gives Congress broad authority to establish and organize the Executive Branch.

Justice Kagan criticized the majority for its narrow reading of subsequent decisions that limit the presidential removal power recognized in *Myers*. She found the statute upheld in *Humphrey's Ex'r* to be identical to the one struck down in *Seila Law*, and denied that *Morrison v. Olson* is limited to inferior officers. "[I]n spurning a "pragmatic, flexible approach to American

governance" in favor of a dogmatic, inflexible one, she argued, "the majority makes a serious error." *Id*. at 2237-38. Perhaps anticipating further challenges to the constitutionality of independent agencies writ large, Justice Kagan concluded by asserting that "Article II does not generally prohibit independent agencies. Nor do any supposed structural principles. Nor do any odors wafting from the document. Save for when those agencies impede the President's performance of his own constitutional duties, the matter is left up to Congress." *Id*. at 2245. Ganesh Sitaram, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352 (2020), calls *Seila Law* a "deeply 'political' " decision.

As it had signaled in *Seila Law*, in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Court invalidated the good-cause removal provision for the single agency head of the Federal Housing Finance Agency (FHFA). Declaring *Seila Law* to be "all but dispositive," the court held that the for-cause removal restrictions for the Director of the FHFA violated the separation of powers. *Id*. at 1783. The Court rejected several grounds for distinguishing *Seila Law*. First, responding to claims that the FHFA's authority was much more circumscribed than that of the CFPB, the Court stated that "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." *Id*. at 1784. Second, it concluded that *Seila Law* was not distinguishable on the ground that when the FHFA steps into the shoes of a regulated entity as its conservator or receiver, it takes on the status of a private party and therefore does not wield executive power. Likewise, it was not significant that FHFA regulated only government sponsored entities with federal charters, because "the President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives." *Id.*at 1786. Finally, it did not matter that the restrictions in *Collins* appeared to give the President more removal authority than in past cases in which the Court invalidated removal restrictions. "The Constitution," the Court reasoned, "prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." *Id*. at 1787. It is worth noting that Justice Barrett joined the majority in *Collins*, cementing a solid 6-3 conservative majority in favor of the Court's new removal power jurisprudence.

Justices Kagan, Sotomayor, and Breyer agreed that the proper remedy for any constitutional violation was to sever the good-cause requirement, but they took issue with the majority's extension of *Seila Law*. Justice Kagan acknowledged that *Seila Law* was indistinguishable on the facts, but she objected to the majority's broad pronouncement that the "nature and breadth of an agency's authority" was irrelevant. *Id.* at 1801 (Kagan, J., joined by Breyer and Sotomayor, JJ., concurring in part and concurring in the judgment in part) ("Without even mentioning *Seila Law*'s 'significant executive power' framing, the majority announces that, actually, 'the constitutionality of removal restrictions' does not 'hinge[ ]' on 'the nature and breadth of an agency's authority.' "). Justices Breyer and Sotomayor, however, thought *Seila Law* was distinguishable, emphasizing that the Court in *Seila Law* had relied heavily on factors which the *Collins* Court now said were irrelevant. In particular, *Seila Law* "expressly distinguished" the FHFA on the grounds that it "does not possess 'regulatory or enforcement authority remotely comparable to that exercised by the CFPB'" and it "regulates primarily Government-sponsored enterprises, not purely private actors." *Collins*, 141 S. Ct. at 1802-1803 (Sotomayor, J., joined by Breyer, J., concurring in part and dissenting in part) (quoting *Seila Law*, 140 S. Ct., at 2202). Now, however, "all that matters is that '[t]he FHFA (like the CFPB) is an agency led by a single

Director.' " *Id*. at 1808. The dissenting Justices concluded that the majority's decision "unduly encroaches on Congress' judgments about which executive officers can and should enjoy a degree of independence from Presidential removal, and it cannot be squared with *Seila Law*, which relied extensively on such agency comparisons." *Id*.

In the wake of *Seila Law* and *Collins*, what is the proper remedy for an unconstitutional good-cause removal provision? *Community Financial Servs. Ass'n of Am. v. Consumer Financial Prot. Bureau*, 51 F.4th 616 (5th Cir. 2022), interpreted those cases as establishing that to obtain a remedy the challenging party must demonstrate not only that a removal provision violates the Constitution, but also that the unconstitutional removal provision inflicted (or would inflict) harm on it. The Fifth Circuit identified "three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor." *Id*. at 632. In other words, "to demonstrate harm, the Plaintiffs must show a connection between the President's frustrated desire to remove the actor and the agency action complained of." *Id*. The Second Circuit imposed a tougher burden on a litigant seeking to invalidate an agency decision on the ground that the officer who made it was subject to an invalid statutory removal provision. It held that "to avoid an agency action due to an unconstitutional removal protection, a party must show that the agency action would not have been taken *but for* the President's inability to remove the agency head." *Consumer Financial Prot. Bureau v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 180 (2d Cir. 2023). It also ruled that this test applies whether the relief sought by the agency in the challenged action is retrospective or prospective. Why do improper removal provisions require such a showing to invalidate an agency decisions, when improper appointment provisions mean that agency decisions are automatically void?

Relatedly, the actions of an agency official subject to an improper good-cause removal provisions may be subsequently ratified by a properly appointed official removable at will by the President. In *Consumer Financial Prot. Bureau v. Seila Law LLC*, 984 F.3d 715 (9th Cir. 2020), *reh'g en banc denied*, 997 F.3d 837 (9th Cir. 2021), for example, the court upheld an investigatory order issued by a previous Director who was subject to invalid for-cause removal restrictions because the order had been ratified by the CFPB's current Director, who was subject to removal without cause after *Seila Law*).

Both *Seila Law* and *Collins* distinguish between agencies headed by a single individual and those headed by multimember bodies. The premise (as more fully articulated by then-Judge Kavanaugh's original *Seila Law* opinion), appears to be that single member agencies represent a greater encroachment on Presidential power. Is that premise warranted? *See* Ganesh Sitamaran & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 710, 725 (2019) (arguing that single director agencies are preferable for various policy reasons and concluding that "multimember commissions should be presumptively disfavored vis-à-vis single-director agencies."). What are the implications of these cases for removal of individual members of a multimember body?

In *Severino v. Biden*, 2023 WL 4188973 (D.C. Cir. 2023), an individual appointed by President Trump as a private, nongovernmental member of the Administrative Conference of the

United States (ACUS), challenged his removal by President Biden. The court upheld the removal on the ground that ACUS's organic statute does not impose any restrictions on presidential removal power even though it creates three-year terms for ACUS members. Further, ACUS's structure and functions did not reflect Congress's intent to limit presidential removal power because ACUS was created to provide advice to the Executive Branch and it does not exercise quasi-judicial functions. *Severino* therefore did not consider or resolve the validity of good-cause removal requirements for removing a member of a multimember body.

In *Consumers' Research v. Consumer Prod. Safety Comm'n*, 592 F. Supp. 3d 568 (E.D. Tex. 2022), however, the court invalidated for-cause removal restrictions on individual members of CPSC, an independent agency headed by a multi-member body whose members must include individuals of different political parties. The court concluded that the exception from the default rule of unrestricted presidential removal authority reflected in *Humphrey's Executor* did not apply because CPSC wields substantial executive power in the form of authority to issue legislative regulations and binding adjudicatory decisions and to file enforcement actions in federal court. *Seila Law* and *Collins* did not dictate a different result, even though both case involved independent agencies headed by a single individual because in neither case did the Court hold that Congress could create multimember agencies wielding substantial executive power and then restrict presidential removal power. The court held that the restrictions in this cases violated Article II. Is *Consumers' Research* consistent with *Humphrey's Executor*? Doesn't the FTC wield the same types of executive powers as those listed by the court in *Consumer's Research*? Is *Humphrey's Executor* reconcilable with *Seila Law* and *Collins*?

In view of the Constitution's silence on the removal of officers (other than through impeachment), is it reasonable to infer a rule requiring that the President must have power to remove officers at will? *Free Enterprise Fund*, *Seila Law*, and *Collins* all rely on early practice to support the conclusion that the President had inherent and implied power to remove officers "at will," often citing to statements by Madison referencing the political accountability of the President for the actions of executive officers. The historical evidence, however, is contestable. *See* Jed Handelsman Sugerman, *Presidential Removal: The* Marbury P*roblem and the Madison Solution*, 89 FORDHAM L. REV. 2085 (2021) (arguing that the first Congress's use of a fixed term of years for officers of the United States meant either that the officer could not be removed by the President during that term or that removal could be limited by conditions similar to the circumstances justifying impeachment (high crimes and misdemeanors)). Similarly, Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022), argues that the executive branch has not always interpreted Article II in a unitary fashion. He provides a doctrinal justification for a competing school of Article II jurisprudence, the tradition of the internal separation of powers, and offers an alternative account of presidential administration whose roots lay in efforts during the New Deal to combat fascism. On a somewhat different note, Blake Emerson, *The Binary Executive*, 132 YALE L.J. FORUM 756 (2022-2023), asserts that although the unitary executive theory presumes that the President alone may exercise executive power, the Supreme Court is doing so by wresting policymaking discretion from agencies, creating "two Chief Executives," the President and the Supreme Court.

p. 186, replace the first bullet point with the following:

- *For-cause Removal of SSA Commissioner*—On Friday, July 9, 2021, President Biden removed Social Security Commissioner Andrew Saul (a Trump appointee) from office after he refused to resign. *See* Darlene Superville, *Biden fires Trump-appointed head of Social Security agency* (Associated Press, July 9, 2021), https://apnews.com/article/joe-biden-business-government-and-politics-b31675f4c5c286d08bc52466a2fc0165. Can he do that? President Biden relied on an opinion from the Office of Legal Counsel concluding that, in light of *Seila Law* and *Collins v. Yellen*, the good-cause removal provision limiting the President's authority to remove the Commissioner is invalid. Constitutionality of the Commissioner of Social Security's Tenure Protection (July 8, 2021), https://www.justice.gov/olc/file/1410736/download. Commissioner Saul contested the legality of the removal, however, stating that he considered himself "the term-protected commissioner of Social Security." Who is right? The Court in *Seila Law* distinguished the SSA from the CFPB, on the ground that the SSA is an adjudicatory agency that does not bring enforcement actions against private parties. *See Bellamy v. Commissioner of Social Security*, 2020 WL 7698952, at *2 (S.D. Fla. 2020) (concluding that leave to amend complaint in Social Security case would be "futile" because language in *Seila Law* "suggests that the Supreme Court distinguished the CFPB from the SSA and that the rulings in *Seila* do not apply to the SSA"). The Court in *Seila Law* also distinguished the FHFA from the CFPB, but those differences did not matter in *Collins v. Yellen*. *See* 141 S. Ct. at 1802 (Kagan, J., concurring) ("The SSA has a single head with for-cause removal protection; so a betting person might wager that the agency's removal provision is next on the chopping block.").

CHAPTER 2

Unit 2.1

p. 197, add after the indented bullet point material:

Although some courts have allowed introduction of extra-record material in cases alleging unlawful withholding or unreasonable delay under § 706(1) of the APA, *Dallas Safari Club v. Bernhardt*, 518 F. Supp. 3d 535, 539 (D.D.C. 2021), refused to do so, reasoning that "nowhere does the text [of § 706] even hint at extra-record review when agency action is alleged to be 'unlawfully withheld or unreasonably delayed'".

p. 199, add at the end of the carryover paragraph:

See, *e.g.*, *Calcutt v. Federal Deposit Ins. Corp.*, 143 S. Ct. 1317 (2023) (per curiam) (concluding that, after finding legal errors in an agency decision, the court of appeals had improperly conducted its own review of the record to uphold the agency decision rather than remanding to the agency for application of the proper standards).

p. 214, add after the 1st sentence of the 1st bullet point: According to one court, an agency proceeding is an "adversary adjudication" for purposes of EAJA "only if it is actually governed by the APA's formal adjudication requirements, as opposed to, for example, the similar requirements of another statute or regulation." *2-Bar Ranch, Ltd. P'ship v. U.S. Forest Serv.*, 996 F.3d 984, 993-94 (9th Cir. 2021).

p. 217, add before "FOIA is intended": For discussion of the political controversy that surrounded adoption of FOIA, see *Veto Battle 30 Years Ago Set Freedom of Information Norms: Scalia, Rumsfeld, Cheney Opposed Open Government Bill*, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/index.htm.

p. 218, add to the material in the last bullet point before *Sierra Club*: *Natural Res. Def. Council v. EPA*, 19 F.4th 177 (2d Cir. 2021) (holding that records reflecting agency deliberations relating to and preceding decisions about how to communicate agency policy to the public are covered by the deliberative process exemption);

pp. 218-19: Add, at the end of the carryover bullet point: The Supreme Court reversed and remanded the 9th Circuit's decision in *U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021). The Court held that a draft biological opinion prepared by the Fish and Wildlife Service under the Endangered Species Act on a proposed EPA rule concerning cooling water intake structures was protected from disclosure under § 552(b)(5) because it was both predecisional and deliberative. The deliberative process privilege applied because the opinion reflected the Service's preliminary view, even though the agency never issued the opinion in final form.

Unit 2.2

p. 226, add at the end of the carryover paragraph: One commentator has described *Biestek* as "a potentially infamous opinion that encourages agencies to rely on junk science." Richard J. Pierce, Jr., *Has the Supreme Court Endorsed the Use of Junk Science in the Administrative State?*, THE REGULATORY REVIEW, Apr. 29, 2019. As you read the case, see if you agree.

p. 227, add at the end of the 2d full paragraph: *Cf. Denton County Elec. Coop., Inc. v. NLRB*, 962 F.3d 161, 167 (5th Cir. 2020) (quoting *Valmont Ind., Inc. v. NLRB*, 244 F.3d 454, 463-64 5th Cir. 2001)) ("We are 'bound by the credibility choices of the ALJ, unless: (1) the choice is unreasonable; (2) the choice contradicts other findings of fact; (3) the choice is based on inadequate reasons or no reasons; or (4) the ALJ failed to justify the choice.' "); *Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 484 (D.C. Cir. 2020) (explaining that a court may reject an ALJ's credibility decisions as unreasonable if they reflect a "lack of evenhandedness," rest "explicitly on a mistaken notion," or fail to "draw all those inferences that the evidence fairly demands").

p. 247, add at the end of the 1st paragraph of § 2: The D.C. Circuit pointed out one context in which the choice between the substantial evidence and arbitrary and capricious tests matters:

> To be sure, the arbitrary and capricious standard does not substantively differ from the substantial evidence test when "performing [the] function of assuring factual support." *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984). But the standards do differ as to the allowable origins of factual support and, as a consequence, how those facts are assessed. It is therefore permissible . . . for common sense and predictive judgments to be attributed to the expertise of an agency in an informal proceeding, even if not explicitly backed by information in the record. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 521 (2009). But formal adjudications (which more typically involve historical facts) require substantial evidence to be found based on the closed record before the agency. *See Data Processing*, 745 F.2d at 684. This subtle difference, as we have previously said, "should not be underestimated."

Phoenix Herpetological Soc'y, Inc. v. U.S. Fish & Wildlife Serv., 998 F.3d 999, 1005-06 (D.C. Cir. 2021).

Unit 2.3

p. 253, add at the end of the carryover paragraph: In view of *Chevron's* delegation and expertise rationales, courts do not afford *Chevron* deference to agency interpretations of statutes they do not administer. *See, e.g.*, *Delta Sandblasting Co. v. NLRB*, 969 F.3d 957, 965-66 & n.17 (9th Cir. 2020) (refusing to defer to an NLRB interpretation of the Labor Management Relations Act, which the NLRB does not administer). *Cf. Pacific Maritime Ass'n v. NLRB*, 967 F.3d 878, 884-85 (D.C. Cir. 2020) (noting that de novo review is appropriate for the Board's legal conclusions that rest on its interpretations of contracts between unions and employers).

p. 255, add at the end of section 1:

In the short time since the publication of the Third Edition of this book, *Chevron* has all but disappeared from the Supreme Court's decisions reviewing agency interpretations of their organic statutes. In the most recent term, for example, the Court handed down two major decisions reviewing agency statutory interpretations, both of which reversed agency interpretations without even citing *Chevron*. First, in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), the Court held that the Department of Education could not forgive student loan repayment under a statutory provision authorizing the Secretary to "waive or modify" any provision relating to student loans during a national emergency. Even if this language did not clearly authorize the student loan forgiveness program, it would appear—at a minimum—to have created the sort of ambiguity that would ordinarily imply delegated discretion under *Chevron*. While it was unclear whether the program would have been entitled to *Chevron* deference because the program was not adopted as a legislative rule, the Court did not cite *Chevron* or mention deference. Similarly, in *Sackett v. EPA*, 143 S. Ct. 1322 (2023), the Court rejected EPA's interpretation of the CWA's application to wetlands. The statutory text prohibits the discharge of pollutants into "navigable waters," defined as "the waters of the United States, including the territorial seas," 33 U.S.C. §§ 1311(a), 1362(7), (12)(A). Other statutory provisions make clear that these waters include at least some wetlands, and the EPA has by regulation included wetlands that are "adjacent" to navigable waters. Rejecting EPA's more expansive interpretation, the Court concluded that wetlands come within the scope of the CWA only if they are "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." It is perhaps especially telling that the dissenting justices in both cases did not cite *Chevron*.

Nonetheless, lower courts continue to cite and rely on *Chevron* in at least some cases, albeit with decreasing frequency. *See*, *e.g.*, *GMS Mine Repair v. Federal Mine Safety and Health Rev. Comm'n*, 2023 WL 4377573 (D.C. Cir. 2023) (applying *Chevron* deference to uphold agency's reasonable interpretation of ambiguous statute); *Myrick v. City of Hoover, Alabama*, 69 F.4th 1309 (4th Cir. 2023) (same); *see also Muñoz v. Garland*, 2023 WL 4168884 (applying *Chevron* but concluding that the agency construction was unreasonable).

p. 256, add to the text below the bullet points before "Second,": *Cf. Loper Bright Enter., Inc. v. Raimondo*, 45 F.4th 359, 374 (D.C. Cir. 2022) (Walker, J., dissenting), *cert. granted*, 143 S. Ct. 2429 (2023) ("Only if the statute is ambiguous, and only if 'Congress either explicitly or implicitly delegated authority to cure that ambiguity,' do we proceed to Chevron's second step and defer to the agency's reasonable interpretation of the ambiguity.").

p. 260, delete everything in the carryover paragraph beginning with "*See*" and substitute the following: *See Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890 (6th Cir. 2021) (holding that *Chevron* applies to agency interpretations of criminal statutes and finding ATF's interpretation of the statutory definition of a "machinegun" to include bump stocks to be reasonable); *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives (Guedes I)*, 920 F.3d 1 (D.C. Cir. 2019) (denying preliminary injunction and deferring to the ATF's interpretation under step two of *Chevron*). *See also Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives (Guedes II)*, 45 F.4th 306, 313 (D.C. Cir. 2022), (treating the case as one of "pure statutory interpretation" and "dispens[ing] with the *Chevron* framework but agreeing with agency construction). *But see Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) (applying the rule of lenity in holding that bump stocks are not machine guns); *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 66 F.4th

1018, 1023-31 (D.C. Cir. 2023) (Walker, J., dissenting on denial of rehearing en banc in *Guedes II* and arguing that agency construction was inconsistent with statute).

p. 262, add to the 1st new paragraph after "*see also*": *Suncor Energy (U.S.A.) v. EPA*, 50 F.4th 1339, 1354-55 (10th Cir. 2022) (refusing to apply *Auer* deference to EPA regulation under its Renewable Fuel Standard Program for various reasons); *Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020) (refusing to defer to agency interpretation of unambiguous CAA regulation);

p. 289, add before "Daniel J. Hemel": *Prill* also established that a "regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it 'was not based on the agency's own judgment but rather on the unjustified assumption that it was Congress' judgment that such a regulation is desirable" or required. *Id*. at 948 (quoting *FCC v. RCA Commc'ns*, 346 U.S. 86, 96 (1953).

p. 292, add after the carryover paragraph:

What are the implications of the textualism-intentionalism debate for consideration of a statute's purposes? Traditionally, construction of a statute so as to further its purposes was a central feature of the intentionalist approach to interpretation, which often equated legislative purposes and legislative intent. Textualist judges often treated the interpretive canon that statutes should be construed to further their purposes as weak and unreliable. *See, e.g.*, *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122 (1995) (referring to the rule of purposive construction as the "last redoubt of losing causes" and declining to apply it). Nonetheless, a statement of purposes is often included as part of a statute's text and purposes may also be inferred from the language and structure of a statute. *See King v. Burwell*, 576 U.S. 473, 493 (2015) (quoting *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 419 420 (1973)) ("We cannot interpret statutes to negate their own stated purposes."); Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283 (2019); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2011). Can the conflict between an agency's interpretation and statutory purposes ever be sufficient to make the statute clear and unambiguous at *Chevron* step one or to make an agency's adoption of that interpretation unreasonable or impermissible at *Chevron* step two? For discussion of competing methodologies for interpreting the APA, see Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963 (2023).

Unit 2.4

p. 301, add to the carryover paragraph after "*See*": *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 45 F.4th 306, 313 (D.C. Cir. 2022) (concluding that *Chevron* was inapplicable because the question of whether "bump stocks" met statutory definition of machine gun involved "pure statutory interpretation," but agreeing with agency interpretation);

p. 317, add to the carryover paragraph before "*Sierra Club v. Trump*": *Bittner v. United States*, 143 S. Ct. 713, 722 (2023) (refusing to afford *Skidmore* deference to the government's interpretation of the Bank Secrecy Act because the IRS had repeatedly issued guidance documents at odds with the interpretation advanced in the case); *Suncor Energy (U.S.A.) v. EPA*, 50 F.4th

1339, 1355-58 (10th Cir. 2022) (lack of earlier or later pronouncements on issue undermined EPA decision's "power to persuade");

p. 318, add at the end of the 1st full paragraph: For criticism of the major questions doctrine on the grounds that it threatens to weaken administrative governance and politicize the Supreme Court's decisionmaking, see Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304404.

p. 319, add to carryover paragraph before "The full implications: *See also Alabama Ass'n of Realtors v. Department of Health and Human Servs.*, 141 S. Ct. 2485 (2021) (holding that an eviction moratorium on residential properties during the COVID-19 pandemic exceeded the authority of the Centers for Disease Control under the Public Health Services Act because a contrary conclusion "would give the CDC a breathtaking amount of authority" that would be "unprecedented")

p. 319, add at the end of the 1st full paragraph: For scholarly criticism of the major questions doctrine, see, e.g., Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.J. & PUB. POL'Y 463 (2021) (arguing that the major questions doctrine is inconsistent with textualist modes of statutory interpretation because neither congressional nor judicial resolution of whether a question is major is consistent with textualism); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1077 (2019) (arguing that "the major questions doctrine acts more as a façade for the Court's separation of power effort to diminish administrative power").

Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021), identifies weak and strong versions of the doctrine. The "weak" version is a "*Chevron* carve-out" that precludes judicial deference to agency interpretations that implicate especially important questions. The "strong" version goes further by flatly prohibiting an agency from asserting broad new authority over the private sector in the absence of clear statement vesting it with that authority. Recent Supreme Court decisions, such as *West Virginia v. EPA* (excepted as a principal case in Unit 1.5), endorse and apply the strong version of the major questions doctrine to limit agency regulatory authority.

First, in *National Fed'n of Indep. Bus. v. Department of Labor*, 142 U.S. 661 (2022), the Court upheld a stay blocking an emergency temporary standard issued by the Occupational Safety and Health Administration in response to the COVID-19 pandemic. The standard required businesses that employed at least 100 workers to require their employees to either be vaccinated against COVID-19 or take a weekly COVID-19 test and wear a mask at work. The Court concluded that the parties challenging the standard were likely to prevail on their claim that OSHA lacked the authority to issue the standard. It reasoned that because OSHA sought "to exercise powers of vast economic and political significance," it lacked authority unless the statute "plainly authorized" the mandate. *Id*. at 665. Although the Occupational Safety and Health Act's language seemed to do exactly that, the Court refused to construe it as doing so. In a concurring opinion, Justice Gorsuch tied the strong version of the major questions doctrine to separation of powers principles, and in particular to the nondelegation doctrine. He identified "at least one firm rule" that ensures that the federal government must exercise its limited powers in a manner consistent with the

Constitution's separation of powers—the major questions doctrine, which requires Congress to " 'speak clearly' if it wishes to assign to an executive agency decisions of 'vast economic and political significance.' " *Id*. at 667 (Gorsuch, J., concurring).

Second, in *Biden v. Missouri*, 142 S. Ct. 647 (2022), however, the Court upheld a Department of Health and Human Services regulation that conditioned continued receipt of Medicare and Medicaid funding by healthcare providers on ensuring that their covered staff are vaccinated against COVID-19. Justice Thomas, joined by three other justices, would have applied the major questions doctrine to conclude that HHS lacks the power to allow healthcare providers to "coerce" their employees into getting vaccinated.

The Court removed any doubts about the status and operation of the major questions doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). The Court explicitly invoked the doctrine to conclude that EPA exceeded its authority under § 111(d) of the CAA by seeking to force existing electric power plants to shift from coal and natural gas to produce the electricity they distribute to cleaner generation sources such as solar and wind power. In doing so, the Court made clear that the doctrine does more than simply negate the applicability of *Chevron*. As an exception to *Chevron*, the major question doctrine would direct courts to review agency actions without deference, but from a neutral posture that neither favored nor disfavored agency authority. The court would simply decide which reading of the statute is more consistent with the statute, the agency's or the challenger's. In *West Virginia*, the Court transformed the major questions doctrine into a strong clear statement rule. Under that decision, if an agency's interpretation qualifies as a major question, a reviewing court begins its analysis with a strong presumption that Congress did *not* want the agency to have the authority it claims. The agency may not rebut that presumption simply by providing a "plausible textual basis" for its assertion of authority. Rather, "both separation of powers principles and a practical understanding of legislative intent" require that the agency "point to 'clear congressional authorization' for the power it claims." *Id*. at 2609. The Court held that EPA failed to demonstrate that Congress had clearly authorized it to force a transformation in the electric utility industry by requiring generation-shifting. *But cf*. Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENVTL. L. & POL'Y REV. 47 (2022) (arguing that, after *West Virginia*, the major questions doctrine is not a clear statement rule and that its application requires answering only two questions: whether the agency action (a) is "unheralded" and (b) represents a "transformative" change in the agency's authority).

In a concurring opinion, Justice Gorsuch sought to provide guidance on the scope and application of this powerful new version of the major questions doctrine. He derived several relevant considerations from past cases. These include whether the agency claims the power to resolve "a matter of great 'political significance' or end an 'earnest and profound debate across the country"; whether Congress has considered and refused to grant the agency the authority it claims; whether there is clear congressional authorization when it seeks to regulate "a significant portion of the American economy"; and whether exercise of the regulatory power claimed seeks to "intrude into an area that is the particular domain of state law." *Id*. at 2620-21 (Gorsuch, J., concurring). Gorsuch also derived "telling clues" from past cases on what qualifies as a clear congressional statement sufficient to justify agency regulation in response to a major question. *Id*. at 2622. Courts must assess the legislative provisions on which the agency relies with a view to their place in the

overall statutory scheme. They may examine "the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address." *Id*. They may also examine the agency's past interpretations of the relevant statute, for "[w]hen an agency claims to have found a previously 'unheralded power,' it's assertion generally warrants 'a measure of skepticism.' " *Id*. Finally, "skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise." *Id*. at 2623.

Finally, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), is another recent decision applying the major questions doctrine to reject an agency's broad interpretation of its statutory authority. The Court invalidated the Biden Administration's student loan forgiveness program because the Secretary of Education lacked the requisite statutory authority to adopt it. The relevant statute, 20 U.S.C. §1098bb(a)(1), authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a . . . national emergency." This language would appear to authorize loan forgiveness, which is the waiver of a statutory requirement that borrowers must repay their loans. Nonetheless, the Court reasoned that the statute was not intended to authorize such a large-scale program affecting rough $450 billion in student debt. Although the majority purported to reach this conclusion on the basis of ordinary statutory construction, it also invoked the major questions doctrine.

What exactly constitutes a major question for purposes of this exception to *Chevron*? *See Loper Bright Enter., Inc. v. Raimondo*, 45 F.4th 359, 364-65 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023) (holding that the major questions doctrine was inapplicable to question of whether the Magnuson-Stevens Fishery Conservation and Management Act of 1976 authorizes the National Marine Fisheries Service to adopt a rule requiring commercial fishing entities to bear the costs of monitoring fish populations because the agency had expertise and the rule did not purport to regulate the national economy).

We might expect that agencies would be more likely to disclaim authority when they are intent on deregulating rather than regulating. Should the fact that the agency is narrowing the scope of its own powers counsel in favor of greater deference because there is not concern about "leaving the fox in charge of the henhouse?" *City of Arlington v. FCC*, 569 U.S. at 307. Conversely, once an agency has disclaimed authority, should courts be less deferential to later efforts to reclaim it? *See* William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1542 (2019) ("The fact of past abnegation and, it appears, sometimes simple past declinations to act, can together be part of the rationale for later skeptical and undeferential judicial scrutiny."). Jonathan S. Masur, *Regulatory Oscillation*, 39 YALE L. ON REG. 744 (2022), reviews efforts by the Trump Administration to deploy *Chevron* deference to support deregulatory interpretations. The article examines how *Chevron* deference facilitates sequential reversals of regulatory policy by presidential administrations of different parties and argues that the use of cost-benefit analysis can serve to constrain such policy reversals. Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217 (2022), reviews (and criticizes) the Trump Administration's persistent efforts to invoke the major questions doctrine to advance its deregulatory agenda.

The clear statement rule version of the doctrine is strongly anti-regulatory in nature because agency failures to regulate are unlikely to have any of the consequences that trigger the doctrine's application. Some have described it as a one-way, anti-regulatory ratchet. *See*, *e.g.*, Heinzerling, *The Supreme Court Is Making America Ungovernable*, THE ATLANTIC (July 26, 2022) (characterizing *West Virginia* as the Court's "latest obstacle to effective regulation," which makes EPA's job of addressing any serious environmental problem "much harder, if not altogether impossible"). Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022), analyzes how the Supreme Court's development of the major questions doctrine fits into a longer pattern of using interpretive methodologies to promote, and more recently, to curtail administrative governance. The article also argues that the doctrine effectively resurrects the nondelegation doctrine, though less visibly than if the Court had declared statutes to be unconstitutional as violative of the nondelegation doctrine. *Cf*. Harold J. Krent, *The Roberts Court and the Resurgence in Process Review of Administrative Action*, 26 TEX. REV. L. & POL'Y 269, 272 (2021) ("In lieu of judicial minimalism, the Roberts Court has, through process review, scaled back agency power and flexibility, with the goal of protecting the regulated public."). Under the Court's most recent cases, has the major questions doctrine become a kind of reverse *Chevron* under which any statutory ambiguity is to be resolved against the agency's assertion of authority?

p. 321, add to the 1st full paragraph before "*see also*": *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 45 F.4th 306, 322 (D.C. Cir. 2022), (finding absence of the type of "grievous ambiguity" that would require application of the rule of lenity); *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 901 (6th Cir. 2021) (stating that "the rule of lenity does not displace *Chevron* simply because an agency has interpreted a statute carrying criminal penalties");

p. 321, add at the end of the 1st full paragraph: *But see Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023) (applying the rule of lenity in holding that bump stocks are not machine guns); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 66 F.4th 1018, 1023-31 (D.C. Cir. 2023) (Walker, J., dissenting on denial of rehearing en banc in *Guedes* and arguing, inter alia, for application of the rule of lenity.); *Texas v. EPA*, 2023 WL 2574591, at *7 (S.D. Tex. 2023) ("*Chevron* does not apply because the [Clean Water Act] implicates criminal penalties."). In *Pugin v. Garland*, 19 F.4th 437, 441-42 (6th Cir. 2021), the court referred to "a thoughtful and ongoing debate about whether *Chevron* can apply to interpretations of criminal law, which implicates serious questions about expertise, delegation, flexibility, notice, due process, separation of powers, and more." *Pugin* rejected the argument that *Chevron* does not apply to an agency's interpretation in a civil proceeding that might impact a future criminal prosecution.

p. 324, add to the 1st full paragraph before "*NLRB v. U.S. Postal Serv.*": *United Nurses & Allied Professionals v. NLRB*, 975 F.3d 34, 36 (1st Cir. 2020) (none);

p. 324, add after the 1st full paragraph:

Justice Thomas has called for the overruling of *Brand X*, claiming that it has taken the Court "to the precipice of administrative absolutism." *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting from the denial of certiorari). He explained his objections:

> Under its rule of deference, agencies are free to invent new (purported) interpretations of statutes and then require courts to reject their own prior interpretations. *Brand X* may well follow from *Chevron*, but in so doing, it poignantly lays bare the flaws of our entire executive-deference jurisprudence. Even if the Court is not willing to question *Chevron* itself, at the very least, we should consider taking a step away from the abyss by revisiting *Brand X*. [*Id*.]

p. 325, add to the 1st full paragraph after "waivable": *See* Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611 (2020) (arguing that *Chevron* is a standard of review, not a rule of decision or a canon of construction, and is therefore not waivable).

p. 326, add at the end of the carryover paragraph: In *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021), Justice Gorsuch, writing for a six-Justice majority that included Justices Breyer, Kagan, and Sotomayor, framed the statutory analysis in that case as follows:

> When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them. *See, e.g.*, *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067 (2018). The people who come before us are entitled, as well, to have independent judges exhaust "all the textual and structural clues" bearing on that meaning. Id., at 2074. When exhausting those clues enables us to resolve the interpretive question put to us, our "sole function" is to apply the law as we find it, *Lamie v. United States Trustee*, 540 U. S. 526, 534 (2004), not defer to some conflicting reading the government might advance.

What impact, if any, does this discussion have on the status of *Chevron*? Is there a difference between saying that a statute is "clear and unambiguous" (step one of *Chevron*) and saying that "textual and structural clues . . . enable[]" a court "to resolve the interpretive question"?

Justice Gorsuch continued to express his opposition to *Chevron* deference in a dissent from a denial of certiorari in *Buffington v. McDonough*, 143 S. Ct. 14 (2022). He charged that *Chevron* "pose[s] a serious threat to some of our most fundamental commitments as judges and courts." *Id*. at 18. He elaborated as follows:

> Rather than provide individuals with the best understanding of their rights and duties under law a neutral magistrate can muster, we outsource our interpretive responsibilities. Rather than say what the law is, we tell those who come before us to go ask a bureaucrat. In the process, we introduce into judicial proceedings a "systematic bias toward one of the parties." P. Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016). Nor do we exhibit bias in favor of just any party. We place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else. In these ways, a maximalist account of *Chevron* risks turning *Marbury* on its head.

Id. at 18-19. *Chevron* deference, he added, "encourages executive officials to write ever more ambitious rules on the strength of ever thinner statutory terms, all in the hope that some later court will find their work to be at least marginally reasonable. . . . In the process, we encourage executive agents not to aspire to fidelity to the statutes Congress has adopted, but to do what they might

while they can." *Id*. at 20. *Chevron*, he concluded, "deserves a tombstone no one can miss." *Id*. at 22.

p. 326, replace the first full paragraph with the following two paragraphs:

The current level of support on the Court for *Chevron* is unclear. Although the Court has yet to repudiate or overrule it, the doctrine is increasingly disfavored and often ignored. *See*, *e.g.*, *Buffington v. McDonough*, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (claiming that "the aggressive reading of *Chevron* has more or less fallen into desuetude—the government rarely invokes it, and courts even more rarely rely upon it"); Kristin E. Hickman & Aaron L. Nielson, *The Future of Chevron Deference*, 70 DUKE L.J. 1015, 1015-1017 (2021) (describing *Chevron's* disfavored status and concluding that the future of *Chevron* "may be the most significant question right now in all of administrative law"). In its 2020 term, the Court referenced *Chevron* deference in only three cases, and in all three cases declined to apply it. *See HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021) (declining to apply *Chevron* because the government did not rely on it); *Salinas v. U.S. RR. Retirement Bd.*, 141 S. Ct. 691 (2021) (declining to apply *Chevron* deference to agency interpretation of the scope of judicial review because Congress would not implicitly delegate that question to agency discretion); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 n.9 (2021) (declining to give deference under *Chevron* because the statute was clear). In other cases, the Court did not reference *Chevron* at all, even if it might arguably have applied. *See AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341 (2021) (not referencing *Chevron* when reversing the Federal Trade Commission's interpretation of § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b)); *see also Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (observing that "the Court's decision implicates the status of an important, frequently invoked, once celebrated, and now increasingly maligned precedent" and concluding that "the Court, for whatever reason, is simply ignoring *Chevron*"). Likewise, the Court did not apply *Chevron* deference in any decision during the 2021 or 2022 terms. *See*, *e.g.*, *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (ignoring *Chevron* and rejecting EPA's interpretation of its authority under the Clean Water Act to regulate wetlands adjacent to waters of the United States); *Babcock v. Kijakazi*, 142 U.S. 641 (2022) (holding, based on statutory plain meaning and without citing *Chevron* or any other deference doctrine, that "dual-service military technicians" do not qualify for exception under the Social Security Act from required benefit reductions for retirees receiving payments from separate pensions based on employment not subject to Social Security taxes). The Supreme Court recently granted review in a case for the sole purpose of determining whether *Chevron* should be overruled. *See Loper Bright Enter., Inc. v. Raimondo*, 45 F.4th 359 (D.C. Circ. 2022), *cert. granted*, 143 S. Ct. 2429 (2023) (applying *Chevron* deference to uphold agency regulation requiring commercial fishing companies to fund at-sea monitoring programs). Even if the Court does not reject *Chevron* altogether in *Loper Bright*, *Chevron* has certainly lost its status as the dominant approach to judicial review of agency statutory interpretation.

Many commentators have been critical of the assault on *Chevron* deference. Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125 (2021), takes on Justice Gorsuch's contention that *Chevron* violates § 706's mandate that "the reviewing court shall decide all relevant questions of law." Levin argues that the text of § 706, surrounding statutory provisions, the APA's legislative history, the case law background, and post-APA reactions all fail to support

Justice Gorsuch's attack on *Chevron*'s legality. Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1076 (2019), contends that "Justice Gorsuch is not engaging simply in a formalistic interpretation of the Constitution in advocating for the overturn of *Chevron*. His argument has its own policy orientation and goals—it serves to reject the growth of the administrative state." Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020), argues that "*Chevron*'s modern critics risk [an] ill-advised adventure in judicial activism, seeking to permanently destroy policy instruments of the national government based on vague and historically incomplete ideas about lawful administration," and that "eliminating administrative deference as a matter of constitutional law would contradict established precedents, long traditions, and basic governmental stability. From that perspective, reliance on newfangled visions of constitutional 'theory' or 'structure' would not only transform the operation of administrative government, it would also change the fundamental nature of constitutional law itself." *See also* Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619 (2021) (describing the "deeply uncertain and potentially massive" adverse implications of overruling *Chevron* for governmental power and American democracy); Cass R. Sunstein, *Zombie* Chevron: *A Celebration*, 82 OHIO ST. L.J. 565, 573 (2021) (arguing that "overruling *Chevron* would create an upheaval—a large shock to the legal system, producing confusion, more conflicts in the courts of appeals, and far greater politicization of administrative law"). Kent Barnett, *How Chevron Deference Fits into Article III*, 89 GEO. WASH. L. REV. 1143, 1146 (2021), argues that "a contextual inquiry of Article III doctrine forecloses a wholesale Article III attack on *Chevron*. *Chevron* is potentially troubling in only a small set of agency constructions where it appears with relative infrequency. *Chevron* is, at most, problematic within the context of agency regulations that serve as the basis for criminal liability and for agency statutory interpretations related to private rights that Congress has created. Ultimately, *Chevron* is a relatively minor Article III issue within the whole of Article III jurisprudence."

p. 328, add at the end of § 4:

The future of *Chevron* has received much attention in the scholarly literature. *See* Cass R. Sunstein, Chevron *Without* Chevron, 2018 SUP. CT. REV. 59 (2018) (arguing that judicial review of agency statutory interpretations if *Chevron* were abandoned might not differ that much from *Chevron* review, but that abandonment would introduce high levels of confusion in the lower courts, and that alternative frameworks based on textualism, purposivism, canons of construction, *Skidmore* deference, and validation would often fail to give concrete answers to difficult statutory questions). Professor Sunstein also argues that even those who reject the validity of *Chevron* as a tool for ascertaining the meaning of a statute should accept the case as a method of developing implementing principles or specifying a statutory term. Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465 (2020); *see also* Lisa Schulz Bressman & Kevin M. Stack, Chevron *Is a Phoenix*, 74 VAND. L. REV. 465, 466 (2021) (arguing that "judicial deference has the resilience of any foundational principle of law in this area, whether administrative or constitutional. Judicial deference will find its way back. The only question is how. The Court can try to kill *Chevron*, but it will rise from the ashes like a phoenix."); Thomas W. Merrill, *Re-Reading* Chevron, 70 DUKE L.J. 1153 (2021) (offering a way to narrow *Chevron* deference that is consistent with rule of law, constitutional, accountability, and process values).

State Court Treatment of Agency Statutory Interpretations. Some state supreme courts have rejected *Chevron* deference. In *TWISM Enter., L.L.C. v. State Bd of Registration for Professional Eng'rs and Surveyors*, 2022 WL 17981386 (Ohio 2022), for example, the court ruled that mandatory deference to an agency statutory interpretation is never appropriate because it is inconsistent with separation of powers principles derived from the Ohio Constitution and raises questions of judicial independence. Rather, deference is permissive, but only if the statute in question is ambiguous. Even then, courts considering whether to defer should apply a test similar to *Skidmore*'s inquiry into whether the interpretation has the power to persuade. Other state courts review agency statutory interpretations de novo. *See, e.g.*, *Hanson v. Kansas Corp. Comm'n*, 490 P.3d 1216 (Kan. 2021); *Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 379 P.3d 1270 (Utah 2016); *Tetra Tech EC, Inc. v. Wisconsin Revenue Dep't*, 914 N.W.2d 21 (Wis. 2018).

Unit 2.5

p. 332, add to the 1st full paragraph before "Mexichem": *Ridgewood Health Care Ctr., Inc. v. NLRB*, 8 F.4th 1263, 1276 (11th Cir. 2021) ("Under the requirements of reasoned decisionmaking, the Board's decision can stand only if we are able to 'examine carefully both the Board's findings and reasoning, to assure [ourselves] that the Board has considered the factors which are relevant.' "); *Fisher v. Pension Benefit Guar. Corp.*, 994 F.3d 664, 671 (D.C. Cir. 2021) ("To survive [the] "fundamentally deferential" review [afforded under the arbitrary and capricious test], an agency action must be the product of reasoned decisionmaking.");

p. 332, add at the end of the 1st full paragraph: *Compare FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021) (upholding the FCC's decision to repeal or modify rules limiting the number of radio stations, television stations, and newspapers that a single entity could own in a given market because the Court was unable to conclude that the revisions "fell outside the zone of reasonableness for purposes of the APA").

p. 333, add at the end of the last paragraph before the period: ; *National Urban League v. Ross*, 489 F. Supp. 3d 939 (N.D. Cal. 2020), *stay pending appeal denied*, 977 F.3d 698 (9th Cir. 2020) , *stay granted*, 141 S. Ct. 18 (2020) (concluding that the Commerce Department acted arbitrarily in reducing the time for collection of data for the decennial census because it failed to consider an important aspect of the problem — how accelerating the census data collection process would affect the Department's ability to fulfill its statutory and constitutional duties to accomplish an accurate count on such an abbreviated timeline).

p. 333, add after the last paragraph:

The Court reached a similar conclusion in *Department of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020), which held that DHS's rescission of the Deferred Action for Childhood Arrivals program for deferring action to deport qualified undocumented aliens was arbitrary and capricious because DHS failed to comply with "the procedural requirement that it provide a reasoned explanation for its action." *Id.*at 1916. In particular, DHS failed to address an important aspect of the problem, as required by *State Farm* (discussed in the next basic doctrine section). DHS relied on the Attorney General's conclusion that it was illegal

to extend work authorization and other government benefits to DACA recipients to justify rescission of deportation forbearance without considering whether to halt those components of DACA while continuing to decline to remove undocumented aliens covered by DACA. In addition, DHS failed to consider the effect of rescission on the reliance interests that DACA had engendered and to assess whether those interests outweighed competing policy concerns. It is noteworthy that the Court described the requirement of a reasoned explanation as a "procedural" requirement, as opposed to a substantive ground for setting aside the agency action under the arbitrary and capricious test. Under notice and comment procedures, the procedural requirement of a concise statement of basis and purpose, § 553(c) overlaps with arbitrary and capricious review. *See* Unit 3.4, *infra*. But neither DACA nor its rescission were adopted using notice and comment procedures and § 553(c) did not apply. Under this circumstance, is it accurate to characterize the arbitrary and capricious standard of review as a procedural requirement?

Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2010), characterizes *Department of Commerce* and *Department of Homeland Security* as cases that reflect an emerging use of arbitrary and capricious review as a tool for enhancing robust political accountability, as opposed to its more traditional use as a mechanism for ensuring the substantive soundness or political neutrality of agency decisions. Eidelson claims that this "accountability-forcing" form of arbitrary and capricious review "takes the political nature of many significant executive-branch decisions entirely for granted, then uses the main lever at the courts' disposal—the power to invalidate agency actions as inadequately reasoned—to try to ensure that those political choices are justified in a manner that facilitates political accountability for them." *Id*. at 1757.

p. 336, add after the 1st block quote as part of the carryover paragraph: For a particularly egregious example of the absence of reasoned decisionmaking, see *New York v. EPA*, 964 F.3d 1214, 1225 (D.C. Cir. 2020) ("At bottom, the EPA's Delphic explanation of New York's purported failure to carry its burden of proof—and of even what that burden of proof is—falls far short of reasoned decisionmaking.").

p. 354, add at the end of the carryover paragraph: Similarly, in *Association of Irritated Residents v. EPA*, 10 F.4th 937, 945 (D.C. Cir. 2021), the court explained that "there is considerable overlap between a challenge at *Chevron* step two and an argument that an agency action is arbitrary and capricious." The court added that "[w]e think [the petitioner's] challenge is most appropriately evaluated under the arbitrary-and-capricious framework, and we agree with [petitioner] that even assuming that the EPA's interpretation of the statute is permissible, its action cannot survive judicial review." Does that kind of analysis clarify the relationship between step two and arbitrary and capricious review?

p. 357, add to the 1st full paragraph before "*see generally*": *see also International Org. of Masters, Mates & Pilots, ILA, AFL-CIO v. NLRB*, 61 F.4th 169 (D. C. Cir. 2023) (invalidating order of the Board as arbitrary and capricious because it conflicted with Board precedent and did not consider the parties' reliance interests);

CHAPTER 3

Unit 3.1

p. 367, add to the carryover paragraph after "*See also*": *Heating, Air Conditioning & Refrigeration Distributors Int'l v. EPA*, 71 F.4th 59, 66-68 (D.C. Cir. 2023) (interpreting CAA provision authorizing EPA's Administrator to "promulgate such regulations as are necessary to carry out the functions of the Administrator under this section" as "a source of procedural not substantive authority—it lets the agency pass rules to carry out powers granted by other provisions of the statute," and holding that EPA lacked authority to mandate refillable cylinders to transport hydrofluorocarbons); *National Ass'n of Broadcasters v. FCC*, 39 F.4th 817, 820 (D.C. Cir. 2022) (holding that the Federal Communications Act provision delegating to the FCC the power to "prescribe appropriate rules and regulations to carry out the [Act's] provisions" did not authorize the FCC to adopt a rule mandating that radio broadcasters check two federal sources to verify a sponsor's identity because "A generic grant of rulemaking authority to fill gaps, however, does not allow the FCC to alter the specific choices Congress made.");

p. 368, add after the end of the carryover paragraph:

The advent of the major questions doctrine has significant implications for agency rulemaking authority, as it requires a clear statement of statutory authority to support agency rules addressing issues of substantial political and economic significance. Thus, for example, in *West Virginia v. EPA*, excerpted as a principal case in Unit 1.4, the Court held that EPA lacked authority to promulgate a rule requiring public utilities to reduce carbon emissions by shifting their electricity production away from fossil fuels. Even when the Court does not invoke the major questions doctrine, its decisions reflect an increasing tendency to construe agency rulemaking authority narrowly. *See Sackett v. EPA*, 143 S. Ct. 1322 (2023). Given this new reality, cases like *Chamber of Commerce* may provide a more accurate representation of agency rulemaking authority than *National Petrochemical Manufacturers*, and instructors might consider assigning *West Virginia v. EPA* as a principal case in this unit, rather than in Unit 1.5.

p. 368, add before the final sentence on the page: *See also Board of County Cmm'rs v. EPA*, 2023 WL 4280131, *9 (D.C. Cir. 2023) (holding that an EPA rule designating a county as a nonattainment area under the CAA was impermissible because, by making the designation after the statutory deadline had already passed, EPA "retroactively adjusted Texas's legal rights by increasing the State's exposure to the harsh consequences that follow from failing to meet an already past deadline").

p. 390, add to the 1st paragraph of § 4 before "When an agency report": In *Safari Club Int'l v. Haaland*, 31 F.4th 1157 (9th Cir. 2022), the court considered the effect of a joint resolution under the Congressional Review Act (CRA) on an earlier regulation addressing a similar subject. In 2017, Congress adopted a joint resolution canceling a Fish and Wildlife Service regulation (the so-called Refuge Rule) that banned brown bear baiting in all Alaskan wildlife refuges and restricted state-authorized hunting for predator control. An earlier regulation prohibited bear baiting in the Kenai refuge (the Kenai Rule). Opponents of the Kenai Rule argued, among other things, that the resolution canceling the Refuge Rule also cancelled the Kenai Rule, but the court

disagreed. The court reasoned that the joint resolution cancelling the Refuge Rule did not mention the Kenai Rule and that the two rules were not "substantively identical" because the Refuge Rule was much broader in scope than the Kenai Rule, which only applied in one Alaskan refuge. Does the "substantially identical" analysis in *Safari Club* interpret § 801(b)(2) so that the Fish and Wildlife Service could adopt a rule prohibiting bear baiting in a specific refuge notwithstanding the cancellation of the Refuge Rule under the CRA? If so, could the agency adopt a series of specific rules that covered all Alaskan refuges? For further discussion of the scope of § 801(b)(2)'s restrictions, see Cary Coglianese, *Solving the Congressional Review Act's Conundrum*, 75 ADMIN. L. REV. 79 (2023) (arguing that an agency seeking to regulate after a CRA resolution of disapproval only needs to ensure that its readopted regulation is not "substantially the same" with respect to the portions of the regulation over which the agency had statutory discretion).

p. 391, add at the end of the 1st full paragraph: In 2021, Congress disapproved of a rule issued by EPA during the Trump Administration that had rescinded regulations limiting emissions of methane and volatile organic compounds from oil and natural gas industry facilities. Pub. L. No. 117-23, 135 Stat. 295 (S.J. Res. 14; H.J. Res. 34) (2021). It also disapproved a rule adopted by the Office of the Comptroller of Currency governing whether a bank may receive a fee for "renting" its charter to a third party. Pub. L. No. 117-24, 135 Stat. 296 (S.J. Res. 15; H.J. Res. 35) (2021), and a rule adopted by the Equal Employment Opportunity Commission concerning its conciliation process Pub. L. No. 117-22, 135 Stat. 295 (S. J. Res. 13). The conditions for use of the CRA in the early days of the Biden Administration mirrored the conditions that fostered the use of the Act in the early days of the Trump Administration. As a result of the then recent elections, the presidency and both chambers of Congress were controlled by a different party than that of the outgoing President.

p. 391, in the last line on the page, add after "*See*": *Kansas Natural Res. Coal. v. United States*, 971 F.3d 1222, 1234-38 (10th Cir. 2020) (concluding that § 805 barred judicial review of a claim that the Department of the Interior violated the CRA by failing to submit a rule to Congress before it took effect); *Foster v. U.S. Dep't of Interior*, 68 F.4th 372 (8th Cir. 2023) (finding the analysis in *Kansas Natural Res. Coal.* to be persuasive);

p. 392, add at the end of the carryover paragraph: *Center for Biological Diversity v. Bernhardt*, 946 F.3d 553 (9th Cir. 2019), held that § 805 barred a claim that Congress did not validly enact a joint resolution disapproving a Department of Interior regulation that prohibited application of Alaska's predator control methods in national wildlife refuges. In contrast, *Alaska Wildlife Alliance v. Haaland*, 632 F. Supp. 3d 974 (D. Alaska 2022), held that § 805's jurisdiction-stripping provision does not apply to judicial review of agency actions taken under the APA rather than the CRA. The court then considered the impact of § 801(g) of the CRA, which provides that if Congress does not enact a joint resolution of disapproval under § 802, "no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule . . . or joint resolution of disapproval." The court held that the National Park Service did not violate this prohibition when it modified a 2015 rule concerning hunting in the national parks based on its view that the adoption of a subsequent joint resolution of disapproval of a different Park Service rule (the "Refuges Rule") reflected disapproval of the underlying policy reflected in the 2015 rule. The court declared that "NPS is required to give effect to the intent of Congress when it [passes a resolution of disapproval], and therefore properly considered the joint resolution of

disapproval of the Refuges Rule in the 2020 rulemaking." *Id*. at ___. Does § 805 bar judicial review of constitutional challenges to the CRA? *Citizens for Constitutional Integrity v. United States*, 57 F.4th 750 (10th Cir. 2023), held that it does not, concluding that Section 805 does not reflect the requisite clear intent to preclude judicial review of such challenges. *See* Unit 8.1 (discussing preclusion of review).

p. 392, in the 1st full paragraph, replace the citation and parenthetical description of the *Center for Biological Diversity* case with the following: *Center for Biological Diversity v. Bernhardt*, 946 F.3d 553 (9th Cir. 2019) (holding that plaintiffs lacked standing to challenge § 801(b)(2) of the CRA as a violation of the nondelegation doctrine, that § 805 did not bar review of claim that a congressional joint resolution of disapproval adopted under the Act violated the Take Care Clause, and that the resolution did not violate the Take Care Clause). Likewise, *Citizens for Constitutional Integrity v. United States*, 57 F.4th 750 (10th Cir. 2023), addressed constitutional challenges to the CRA on the merits, concluding that it did not violate the Equal Protection Clause, substantive due process, or the separation of powers. In particular, the court reasoned that the CRA is distinguishable from the legislative veto because a CRA resolution becomes effective only after compliance with Article I's bicameralism and presentment requirements, even if such a resolution is enacted using expedited parliamentary procedures.

Unit 3.2

p. 396, add to the 1st paragraph of § 3 before "Maggie McKinley": Congressional Research Serv., Petitions for Rulemaking: An Overview, R46190 (Jan. 23, 2020), https://www.legistorm.com/reports/view/crs/311982/Petitions_for_Rulemaking_An_Overview.html;

p. 398, add to the 1st full paragraph before "If, on the other hand,": What if an agency grants a petition for rulemaking but the petitioner is dissatisfied with the terms of the grant, claiming that it is tantamount to a denial. May it seek judicial review of the grant? *See Center for Envtl. Health v. Regan*, 2023 WL 3192322 (E.D.N.C. 2023) (interpreting the petition provision of the Toxic Substances Control Act, 15 U.S.C. § 2620(b)(4)(A), as limiting judicial review to petition denials, and concluding that EPA granted the petition in question both in form and substance).

p. 399, add to the last partial paragraph after "*See, e.g.*,": *Flyer Rights Educ. Fund, Inc. v. U.S. Dep't of Transp.*, 957 F.3d 1359, 1363 (D.C. Cir. 2020) (quoting *Massachusetts v. EPA*) (upholding DOT's denial of petition for rulemaking to require airlines to give passengers sufficient notice of their right to compensation for flight delays because the agency found insufficient evidence of consumer confusion to warrant a rulemaking, and the agency has "broad discretion to choose how best to marshal its limited resources and personnel");

p. 408, add after the third question following *Massachusetts v. EPA* and before the related matters section:

4. Is *Massachusetts v. EPA* consistent with the major question doctrine as articulated and applied in *West Virginia v. EPA* (excerpted in Unit 1.5)? Wouldn't the claim that CO_2 is a pollutant represent a novel assertion of authority with profound political, economic, and federalism

implications? Is the statutory authorization in this case any more explicit than the directive to adopt the best system of emissions reduction in *West Virginia*?

p. 411, add at the end of the carryover paragraph: At least one appellate court has called the first *TRAC* factor the most important. *In re NRDC*, 956 F.3d 1134, 1139 (9th Cir. 2020).

p. 411, add to the 1st full paragraph after "*But see*": *Center for Biological Diversity v. EPA*, 53 F.4th 665 (D.C. Cir. 2022) (granting a writ of mandamus requiring EPA to assess whether registering a new pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act would have adverse effects on endangered species because the *TRAC* factors favored such relief); *In re NRDC*, 956 F.3d 1134 (9th Cir. 2020) (granting mandamus petition upon finding, after applying the *TRAC* factors, that EPA had "unreasonably and egregiously" delayed in responding to petition to end use of a dangerous pesticide in household pet products);

Unit 3.3

p. 419, add to the 1st paragraph of § 2 before "The second category": The foreign affairs exception applies only if public rulemaking procedures " 'should provoke definitely undesirable international consequences.' " *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 676 (9th Cir. 2021) (quoting *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)).

p. 420, add to the 1st full paragraph before "For further discussion": President Biden revoked both Executive Order 13,891 and Executive Order 13,892 on his first day in office. Exec. Order 13992, Revocation of Certain Executive Orders Concerning Federal Regulation, § 2, 86 Fed. Reg. 7049 (Jan. 20, 2021).

p. 436, add before the final period of the carryover paragraph: ; *Environmental Def. Fund v. EPA*, 515 F. Supp. 3d 1135, 1150-51 (D. Mont. 2021) (rejecting EPA's reliance on the good cause exception to avoid APA § 553(d)'s 30-day waiting period in making a rule that restricted the kinds of scientific information EPA could use to support its regulations because the agency failed to show how delayed implementation "would cause real harm to life, property, or public safety")

p. 436, add at the end of the first full paragraph: Suppose a court declares an agency regulation to be invalid because it exceeds the scope of the agency's delegated statutory authority. Must the agency provide notice and comment before it may repeal the rule? *See Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1206 (D.C. Cir. 2020) ("[A]lthough there is never much to be gained from comment—as opposed to a simple notice 'for good cause,' 5 U.S.C. § 553(b)(B)—where a rule has been declared substantively illegal, it is not necessary to decide that issue now.").

p. 438, add at the end of § 2:

For years, Presidents of both parties have withdrawn regulations approved by agencies and sent to the *Federal Register* for publication at the end of the preceding administration but not yet published. *Humane Soc'y v. U.S. Dep't of Agric.*, 41 F.4th 564 (D.C. Cir. 2022), held that an agency must provide notice and an opportunity to comment when it withdraws a rule that has been filed

for public inspection but not yet published in the *Federal Register* because such a withdrawal constitutes the repeal of a previously adopted rule. The court rejected the government's argument that only publication of a rule in the Federal Register signifies its adoption and triggers notice and comment rulemaking requirements for its repeal. Relying on the Federal Register Act, 43 U.S.C. §§ 1501-1511, the court reasoned that making a rule available for public inspection carries legal consequences, while publication in the *Federal Register* serves an essentially evidentiary function rather than a legal function.

Unit 3.4

p. 446, add after the carryover paragraph:

Do agencies actually pay attention to comments submitted to them in response to notices of proposed rulemaking? Wendy Wagner et al., *Deliberative Rulemaking: An Empirical Study of Participation in Three Agency Programs*, 73 ADMIN. L. REV. 609 (2021), examined rulemakings conducted over a thirty-year period by EPA, OSHA, and the FCC. The authors found a good deal of impactful stakeholder participation, but concluded that the three agencies engaged with affected interests in dramatically different ways. They found that participation in EPA's development of regulations under the Toxic Substances Control Act suffered from a lack of inclusiveness and transparency, while participation in OSHA rulemakings was so extensive that it resulted in paralysis. The FCC, by way of contrast, often approached rulemaking as an iterative process by raising open-ended questions that it could address in subsequent rules, tracked *ex parte* communications in ways that promote transparency, and allowed stakeholders to respond to one another. The authors also suggested that the FCC's approach might be usefully adopted by other agencies. *See also Biden v. Texas*, 142 S. Ct. 2528, 2547 (2022) (rejecting notion that an agency has closed its mind to comments just because of an identity between the proposed and final rules).

p. 446, add, in the 1st full paragraph, after ". . . statement of their basis and purpose.": In *Cigar Ass'n of Am. v. U.S. Food and Drug Admin.*, 964 F.3d 56 (D.C. Cir. 2020), the court refused to uphold a final rule based on reasoning that appeared only in the notice of proposed rulemaking. The court reasoned that § 553(c) requires a statement of basis and purpose, which "must come 'after' consideration of comments and thus also 'after notice required by' section 553(b)." *Id*. at 64 (quoting § 553(c)).

p. 447, add after the 1st full paragraph:

When is a comment "significant" enough to require an agency to respond to it in its statement of basis and purpose? *Oakbrook Land Holdings, LLC v. Commissioner of Internal Revenue*, 28 F.4th 700 (6th Cir. 2022), explained that "assessing significance is context dependent and requires reading the comment in light of both the rulemaking of which it was part and the statutory ends that the proposed rule is meant to serve." *Id*. at 714. It added that an agency must respond to comments "that can be thought to challenge a fundamental premise' underlying the proposed agency decision," and that a comment "must provide enough facts and reasoning to show the agency what the issue is and how it is relevant to the agency's aims." *Id*. *See also Hewitt v.*

Commissioner of IRS, 21 F.4th 1336, 1343 (11th Cir. 2022) (stating that comments are significant if they "cast doubt on the reasonableness of the rule the agency adopts").

p. 449, add to the text below the block quote after "*See also*": *Chesapeake Climate Action Network v. EPA*, 952 F.3d 310 (D.C. Cir. 2020) (holding that EPA's use of a list of best performing power plants to justify exempting startup operations from emission limits for hazardous air pollutants was not a logical outgrowth of its proposed rule);

p. 449, add to the text below the block quote after nation's regulatory scheme"): ; *Center for Biological Diversity v. National Marine Fisheries Serv.*, 2022 WL 4235013, at *16-17 (D.D.C. 2022) (holding that final rule requiring only certain classes of shrimp trawlers to use turtle excluder devices, rather than all trawlers as in the proposed rule, did not require an additional round of notice and comment because the final rule was not "surprisingly distant" from the proposed rule and did not present unfair surprise to the environmental group plaintiffs or to the general public)

p. 449, add before the period at the end of the last full paragraph: ; *California v. Bernhardt*, 472 F. Supp. 3d 573, 607 (N.D. Cal. 2020) (stating that an agency "cannot propose a rule based on a factual conclusion, provide no evidence for the same, and then, when confronted with the glaring inadequacy [in public comments], attempt to backfill the record without [further] public comment")

p. 470, add to the last partial paragraph before "*East Bay Sanctuary*": *O.A. v. Trump*, 404 F. Supp. 3d 109, 152-53 (D.D.C. 2019) (describing itself as "at a loss to understand what it would mean to vacate a regulation, but only as applied to the parties before the Court");

p. 471, add after the carryover paragraph:

To what extent does the issue of nationwide injunctions depend on the meaning of the term "set aside" in § 706(2)? In other words, if the court "sets aside" a rule under § 706(2), is the rule completely invalid or simply inapplicable to the parties in the case? Justice Gorsuch raised the issue in his concurrence in *United States v. Texas*, 143 S. Ct. 1964 (2023). Based on its finding of APA violations, the district court in that case, relying on § 706(2), vacated guidelines from the Department of Homeland Security that established immigration enforcement priorities concerning removal from the United States of noncitizens, making them "inoperable with respect to any person anywhere." *Id*. at 1981 (Gorsuch, J., concurring in the judgment). Justice Gorsuch responded that § 706(2)

> does not say anything about "vacating" agency action ("wholesale" or otherwise). Instead, it authorizes a reviewing court to 'set aside' agency action. Still, from those two words alone, the district court thought the power to nullify the Guidelines with respect to anyone anywhere surely follows. . . . Color me skeptical. If the Congress that unanimously passed the APA in 1946 meant to overthrow the "bedrock practice of case-by-case judgments with respect to the parties in each case" and vest courts with a "new and far-reaching" remedial power, it surely chose an obscure way to do it. Arizona v. Biden, 40 F.4th 375, 396 (CA6 2022) (Sutton, C. J., concurring). At the very least, it is worth a closer look.

Id. *See also Mann Constr., Inc. v. United States*, 2023 WL 3175426, at *3 (E.D. Mich. 2023) (quoting the government's brief, which stated that "the meaning of 'set aside' is unsettled"). *Cf*. John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REG. BULL. 119 (2023) (claiming that vacatur of rules so as to render them legally inoperable was an unknown remedy at the time of the APA's adoption, but suggesting that vacatur may still be an appropriate remedy under §703 of the APA, not § 706(2)). If Justice Gorsuch is correct, can a government agency disregard a judicial decision invalidating its rule in other case arising in the same district or circuit as the prior decision? *See* Unit 5.5C4 (discussing intra-circuit nonacquiescence).

p. 472, add after § 1:

1A. INTERIM FINAL RULES

Agencies sometimes issue what they call "interim final rules" (IFRs). One administrative law authority described them as follows:

> Interim-final rules are rules adopted by federal agencies that become effective without prior notice and public comment and that invite post-effective public comment. The adopting agency dispenses with pre-effective notice and comment in reliance on an exception to the Administrative Procedure Act's (APA's) normal rulemaking requirements. Often, but not always, the agency relies on the APA provision excusing prior notice and comment on the basis that there is good cause to believe that such procedures would be impracticable or contrary to the public's interest. The adopting agency declares that it will consider post-effective public comments, will modify the rule in light of those comments, and will then adopt a final rule. Thus an interim-final rule is an example of making haste slowly; the rule is effective immediately but it also serves as a notice of proposed rulemaking for the final rule that will supplant it. Interim-final rules have the same legal effect and are judicially reviewed in the same manner as any other final rules.

Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999). In *Little Sisters of the Poor Saints Peters and Paul Home*, 140 S. Ct. 2367 (2020), the Departments of Labor, Treasury, and Health and Human Resources adopted interim final rules exempting employers who have religious and conscientious objections from a requirement adopted under the Affordable Care Act to provide contraceptive care to their employees through their group health plans. The state of Pennsylvania challenged the IFRs, claiming that the agencies adopted them in violation of APA § 553 notice and comment procedures. The agencies published a document called "Interim Final Rules with Request for Comments" instead of a notice of proposed rulemaking, soliciting comments after the IFRs became effective. The agencies later "finalized" the IFRs without significant change.

The Court rejected the state's procedural challenge, finding that "[f]ormal labels aside, the rules contained all of the elements of a notice of proposed rulemaking as required by the APA," including a reference to the legal authority for the rules and the terms or substance of the subjects and issued involved. *Id*. at 2384. The IFRs did not fail "to air the relevant issues with sufficient detail for [interested parties such as the state] to understand the Department's position." *Id*. Further,

even assuming the APA requires an agency to publish a document that is called a notice of proposed rulemaking when it moves from an IFR to a final rule, there was no prejudicial error because the IFR explained the agencies' position in detail and provided the public with an opportunity to comment on whether to make the IFRs final. Because the Court found no violation of APA notice and comment procedures, it declined to address the state's claim that the Departments lacked good cause to issue IFRs. *Id*. at 2386 n.14.

What incentives does this decision create for agencies? Is there any reason for an agency not to issue an IFR that becomes effective immediately upon publication and requests public comment instead of issuing a notice of a proposed rule that does not become effective until the adoption, if ever, of a final rule? Could an agency impose sanctions for violation of an interim final rule before it had considered comments and finalized the rule? Note that the answers to these questions may depend on whether the interim rule falls within an exception to the notice and comment requirements that applies to the adoption of legislative (i.e., binding) rules.

The state in *Little Sisters* also argued that the final rules were procedurally invalid because the agencies failed to "maintain an open mind" during the period between issuance of the IFRs and the final rules. It pointed out that the final rules made "only minor alterations to the IFRs, leaving their substance unchanged." *Id*. at 2385. The Court refused to evaluate the final rules under an "open-mindedness" test. It reasoned that the APA specifies the "maximum procedural requirements" that agencies must follow in adopting rules under and, citing *Vermont Yankee*, stated that courts are not free to impose on agencies procedural requirements that have no basis in the APA. *Id*. The Court's discussion of § 553(c), however, conveniently omitted the full language of the relevant sentence, which reads: "***After consideration of the relevant matter presented***, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." The highlighted language would seem to provide strong textual support for an open-mindedness requirement, insofar as an agency with a closed mind does not really "consider" the relevant matter presented. *Cf. Cigar Ass'n of Am. v. U.S. Food and Drug Admin.*, 964 F.3d 56 (D.C. Cir. 2020) (relying on this language to reject an agency's reliance on statements in its notice of proposed rulemaking to satisfy the statement of basis and purpose requirement). More broadly, doesn't an agency undercut the entire purpose of notice and comment procedural requirements by not taking public comments seriously and considering them before adopting final rules? Is the decision consistent with prior decisions that treated that requirement as part of the "paper hearing" requirements that are implicit in the text of § 553, rather than as judicially created supplemental requirements?

As discussed in connection with *Northeast Maryland*, the procedural requirement of a concise statement of basis and purpose overlaps with the substantive requirement of an explanation for an agency decision under the arbitrary and capricious standard of review. Could the state have presented its argument in substantive instead of procedural terms, arguing that the agencies' failure to treat its comments seriously rendered the final rules arbitrary and capricious due to failure to engage in reasoned decisionmaking or to consider an important aspect of the problem under *State Farm*? Would the state have had a better chance of prevailing? Do such substantive arguments remain available in future cases after *Little Sisters*? *Cf. California v. Bernhardt*, 472 F. Supp. 3d 573, 614 (N.D. Cal. 2020) ("An agency simply cannot construct a model that confirms a preordained outcome while ignoring a model that reflects the best available science."); *id*. at 632

("[I]n its zeal [to deregulate], BLM simply engineered a process to ensure a preordained conclusion. Neither the APA [nor] *Chevron* tolerate such fickle actions.").

Unit 3.6

p. 499, add before the final paragraph:

President Biden issued an executive order in 2023 that revised prior regulatory review orders. Exec. Order 14,094, Modernizing Regulatory Review, 88 Fed. Reg. 21,879 (Apr. 11, 2023). The new order changed the definition of the "significant regulatory actions" that trigger its analytical requirements to those that:

(1) may have an annual effect on the economy of $200 million or more (adjusted periodically for changes in the gross domestic product) or that adversely affect the economy or components of the economy, the environment, public health and safety, or state, local, or tribal governments;
(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
(3) materially alter the budgetary impact of entitlements and related program or the rights and obligations of recipients under those programs; or
(4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the order as specifically authorized in a timely manner by OIRA's Administrator. § 1(b) (amending § 3(f) of the Reagan order).

The order requires that regulatory actions be informed by input from affected stakeholders, those with relevant expertise, and the public as a whole. It urges agencies to clarify opportunities for interested person to file rulemaking petitions under § 553(e) of the APA and to respond to those petitions efficiently. It also requires agencies to proactively engage with underserved communities, consumers, labor organizations, program beneficiaries, and regulated entities in developing regulatory agendas and plans. § 2(c). In addition, it requires OIRA to take steps to reduce the risk or appearance of disparate and undue influence over the regulatory process in several ways, including making efforts to ensure access for meeting requesters who have not historically requested such meetings. § 2(e). Finally, the order directs OIRA to revise the OMB Budget Circular that provides guidance on how to conduct cost-benefit analyses. § 3. Do these changes to the OIRA review process adequately respond to the arguments against OIRA review based on lack of transparency, interference with agency expertise, or unequal access? *See* Unit 1.6A3.

p. 502, add to the carryover paragraph before "The second issue": Notwithstanding its earlier ruling, the court later dismissed the suit, holding that the plaintiffs lacked standing. *Public Citizen, Inc. v. Trump*, 435 F. Supp. 3d 144 (D.D.C. 2019).

p. 502, add at the end of the carryover paragraph:

President Biden revoked Executive Order 13,771 on his first day in office. Exec. Order No. 13,992, § 2, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049 (Jan. 20, 2021).

In the midst of the Covid-19 pandemic, President Trump issued an executive order that addressed the impact of the pandemic on the economy. Exec. Order No. 13,924, Executive Order on Regulatory Relief to Support Economic Recovery, 85 Fed. Reg. 31353 (May 19, 2020). The Order declared a policy of combating the economic consequences of Covid-19 "by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility." *Id*. § 1. The Order directed the heads of all agencies, consistent with the law, to "identify regulatory standards that may inhibit economic recovery" and consider temporarily or permanently rescinding, modifying, or exempting persons or entities from those requirements. It also required agencies and to consider refraining from regulatory enforcement "for the purpose of promoting job creation and economic growth." *Id*. § 4. It also mandated that agencies accelerate procedures specified in Executive Order 13892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, 84 Fed. Reg. 55,239 (Oct. 15, 2020), to provide "pre-enforcement rulings" upon request by regulated entities on whether their proposed conduct in response to the Covid-19 outbreak is consistent with statutes and regulations administered by the agency. Exec. Order No. 13,924, § 5(a). Finally, the Order directed agency heads to consider "principles of fairness in administrative enforcement and adjudication," including that administrative enforcement should be prompt, fair, and "free of unfair surprise"; administrative adjudicators should be independent of enforcement staff; penalties should be proportionate, transparent and imposed consistently and "only as authorized by law;" and agencies "must be accountable for their administrative enforcement decisions." *Id*. § 6.

Is it appropriate to use a public health crisis to mandate that agencies accelerate the pace of deregulation? The Order provided that it shall be implemented consistent with applicable law." As Unit 8.3 indicates, agencies enjoy broad discretion not to pursue enforcement action for violations of statutes or regulations. Agency decisions not to enforce pursuant to the Order were therefore difficult to contest. President Biden revoked Executive Order 13,924. Exec. Order No. 14018, Revocation of Certain Presidential Actions, 86 Fed. Reg. 11855 (Mar. 1, 2021). What does the fact that the Order was only in effect for a few months before its repeal imply about the wisdom of governance by executive order?

p. 503, add at the end of the bullet point on Environmental justice: *See also* Exec. Order 14,096, 88 Fed. Reg. 25,251 (Apr. 21, 2023) (Revitalizing Our Nation's Commitment to Environmental Justice for All).

p. 504, add at the end of § 3:

Upon taking office, President Biden directed OMB, in consultation with the heads of executive departments and agencies, "to begin a process of with the goal of producing a set of recommendations for improving and modernizing regulatory review." The recommendations were to provide "concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations. The recommendations should also include proposals that would ensure that regulatory review serves as a tool to affirmatively promote

regulations that advance these values." Modernizing Regulatory Review, § 2(a), 86 Fed. Reg. 7223 (Jan. 20, 2021). Unlike most previous presidential directives concerning the regulatory review process, which tended to focus on constraining agency regulation, the Biden memorandum staked out a role for OMB in promoting regulations that advance important social values, including but not limited to economic growth. Sidney A. Shapiro, Law, *Expertise and Rulemaking Legitimacy: Revisiting the Reformation*, 49 ENVTL. L. 661 (2019), argues that administrative law must extend beyond constraining and limiting agency activities and embrace the capacity of public administration to act on behalf of regulatory beneficiaries.

p. 504, add to the 2d paragraph of § 4 after the 1st reference "Executive Order 13,371":
(since repealed)

p. 504, add at the end of the 2d paragraph of § 4: President Biden repealed both Executive Orders 13,891 and 13,892. *See* Exec. Order No. 13,992, § 2, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049 (Jan. 20, 2021).

p. 518, add after the last full paragraph: President Trump sought to vest in the President greater control over the rulemaking process by precluding anyone other than a senior presidential appointee from initiating the § 553 rulemaking process, but President Biden swiftly repealed that executive order. Exec. Order No, 14,018, Revocation of Certain Presidential Actions, § 1, 86 Fed. Reg. 11,855 (Feb. 24, 2021) (revoking, *inter alia*, Exec. Order 13979, Ensuring Democratic Accountability in Agency Rulemaking, 86 Fed. Reg. 6813 (Jan. 18, 2021). *See also* Unit 1.6.

p. 520, add to the 1st full paragraph before "For a variety": As noted above, President Biden revoked Executive Order 13,771. Exec. Order No. 13,992, § 2, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049 (Jan. 20, 2021).

CHAPTER 4

Unit 4.1

p. 526, add at the end of the 1st full paragraph after the bullet point: *Cf. Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 476 (D.C. Cir. 2020 (discussing the Board's preference for making policy through adjudication and observing that "[n]ew rules set through adjudication must meet the same standard of reasonableness as notice and comment rulemaking.").

p. 526, add to the final partial paragraph before "As discussed in the Problem": *See also American Fed'n of Labor and Congress of Indus. Orgs. v. NLRB*, 466 F. Supp. 3d 68, 76 (D.D.C. 2020) (stating that although "the Board has seldom acted through notice-and-comment rulemaking on any subject, . . . over the last decade, the Board has opted to regulate the procedures that relate to the election of union representatives through a series of rulemakings").

p. 527, add at the end of the carryover paragraph: Conversely, after *Chamber of Commerce*, if the Board lacks the authority to promulgate substantive rules defining unfair labor practices, is criticism of its reluctance to do so justified?

p. 527, add to the last paragraph before "Conversely": Agencies can solicit input beyond that provided by the parties to an adjudication through mechanisms such as amicus briefs. EPA, however, has proposed barring participation by amicus curiae in permit adjudications before the Environmental Appeals Board. Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084 (Dec. 3, 2019). It explained that "[b]y eliminating amicus briefs, EPA proposes to hasten the resolution of permit appeals by 15 days . . . and to simplify the process. All members of the public are encouraged to submit comments on draft EPA permits, and the Regions consider those comments when making permit decisions." Id. at 66,088. Are these constraints problematic? Does it depend on whether permit adjudications have precedential value and so have rule-like effects beyond the particular case? Even if permits lack precedential value, is acceleration of permit issuance a persuasive ground for prohibiting amicus submissions?

p. 529, add at the end of the carryover paragraph and before the period: ; *see also* Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495 (2021) (urging greater use of adjudications by agencies to formulate policy and arguing that adjudicatory policymaking should trigger *Chevron* deference).

p. 552, add at the end of the 1st paragraph of §2: One court, in a case invalidating the Bureau of Immigration Appeals (BIA)'s retroactive application of an expanded definition of crimes of moral turpitude, characterized the reliance factor as particularly important in immigration adjudications given the high stakes involved for the alien—potential deportation. *See Francisco-Lopez v. Attorney General United States*, 970 F.3d 431, 439 (3d Cir. 2020) (referring to the third *Retail, Wholesale* factor and holding that "in immigration cases, the third factor will favor the party challenging retroactivity if it would have been reasonable for the alien to have relied on the BIA's prior precedent," regardless of whether there is evidence that the alien actually did so). *Compare Sanitary Truck Drivers*

and Helpers Local 350, Int'l Brotherhood of Teamsters v. NLRB, 45 F.4th 38 (D.C. Cir. 2022) (vacating the NLRB's decision *not* to apply rule governing definition of a joint employer retroactively because the rule did not represent a clear departure from longstanding and settled law and the Board provided no explanation of how the employer relied on the previous approach for determining qualification as a joint employer who is obliged to engage in collective bargaining).

Unit 4.2

p. 559, add at the end of § 1:

Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, PRECEDENTIAL DECISION MAKING IN AGENCY ADJUDICATION (Dec. 6, 2022), https://www.acus.gov/report/precedential-decision-making-agency-adjudication-draft-report-101722, is a draft report to the Administrative Conference of the United States that urges ACUS to recommend best practices concerning precedential decision-making systems to comport with administrative law norms of regularity, consistency, and transparency. ACUS adopted the report. Adoption of Recommendations, 88 Fed. Reg. 2312 (Jan. 13, 2023).

p. 560, add to the text after the block quote after "Battista)": ; *see also Sierra Club v. EPA*, 955 F.3d 56, 66 (D.C. Cir. 2020) (Wilkins, J., concurring) ("Although administrative law in the adjudicative context softens the formalism of strict *stare decisis*, an agency's adjudicative body engaged in policymaking must still adhere to its precedent in deciding cases.")

p. 561, add to the 1st paragraph of § 3 after "*See, e.g.*": *International Org. of Masters, Mates & Pilots, ILA, AFL-CIO v. NLRB*, 61 F.4th 169 (D. C. Cir. 2023) (finding that the Board's efforts to distinguish its own precedents were "specious" and declaring its order to be arbitrary and capricious); *NLRB v. Wang Theatre, Inc.*, 981 F.3d 108 (1st Cir. 2020) (finding unexplained departure from Board precedents for determining membership of a bargaining unit);

p. 562, add to the carryover paragraph after "*See also*": *Communications Workers of Am., AFL-CIO v. NLRB*, 994 F.3d 653, 658 (D.C. Cir. 2021) ("A Board decision does not rest on reasoned decisionmaking if 'it fails to offer a coherent explanation of agency precedent' "); *Davidson Hotel Co., LLC v. NLRB*, 977 F.3d 1289, 1294 (D.C. Cir. 2020) ("We simply reiterate that when faced with contrary precedent directly on point, the Board must distinguish it."); *International Longshore & Warehouse Union v. NLRB*, 971 F.3d 356, 360 (D.C. Cir. 2020) ("[A]n agency's unexplained departure from precedent is arbitrary and capricious. So too is an order resting on 'clearly distinguishable precedent.' ");

p. 562, add to the carryover paragraph after "*Cf.*": *Constellium Rolled Prod. Ravenswood, LLC v. NLRB*, 945 F.3d 546 (D.C. Cir. 2019) (holding that the Board adequately distinguished its own precedents concerning preclusion of discipline for workers' statements made in the course of protected activity);

p. 564, add to the 1st paragraph of § 4 before "Indeed": *Cf. District 4, Commc'ns Workers of Am. AFL-CIO v. NLRB*, 59 F.4th 1302 (D.C. Cir. 2023) (holding that the Board properly followed its own precedents concerning when a collective bargaining agreement is formed).

p. 581, add at the end of the page:

In *Leggett & Platt, Inc. v. NLRB*, 988 F.3d 487 (D.C. Cir. 2021), the Board issued an order finding that an employer (L&P) had committed an unfair labor practice by withdrawing recognition from its employees' union based on a petition signed by a majority of the bargaining unit members seeking a withdrawal of recognition. The Board found the withdrawal to be unfair because of a later petition circulated by the union showing continued majority support, which the union had not disclosed to the employer at the time of the withdrawal of recognition. While L&P's petition for judicial review was pending, the Board issued a decision in another case, *Johnson Controls*, finding that withdrawal of recognition was not an unfair labor practice, despite a union's counterpetition showing majority support for the union, if the union gathered signatures on the counterpetition secretly. Further, the Board announced in *Johnson Controls* that its new rule would apply retroactively "to all pending cases in whatever stage," unless retroactive application would cause manifest injustice. In an earlier ruling in the case, the D.C. Circuit had remanded the *L&P* case in light of *Johnson Controls*.

On remand, the Board again found that L&P had committed an unfair labor practice. It refused to apply the *Johnson Controls* rule. It reasoned that its initial decision imposing the bargaining order in *L&P* had been in effect for over six months before the decision in *Johnson Controls*, so that the parties should have been negotiating for a new collective-bargaining agreement during the intervening period. In addition, the Board concluded that reversing the bargaining order would disrupt the bargaining relationship of these parties and incentivize parties in future cases to delay compliance with bargaining orders in the hope or expectation of a change in the law. Finally, the Board declared that it has declined to apply *Johnson Controls* retroactively for "institutional reasons." The D.C. Circuit invalidated the unfair labor practice order on the ground that the Board's departure from the *Johnson Controls* pronouncement that the new rule *would* apply retroactively was arbitrary and capricious. The court concluded that it "was not clear how an agency departing from its controlling precedent escapes the bonds of the arbitrary and capricious standard by reciting a conclusion without explanation. To say that this was an adequate explanation would gut that standard of all meaning." *Id*. at 497.

Unit 4.4

p. 623, add to the last partial paragraph before "The order also provides": *See also* 5 C.F.R. § 6.2 (listing ALJs appointed under 5 U.S.C. § 3105 as excepted from the competitive civil service). As discussed in Unit 1.6, President Biden has revoked the executive order creating a new Schedule F so as to implement this order, although he has not revoked the order itself or amended 5 C.F.R. § 6.2.

p. 624, add the following new paragraph after the carryover paragraph:

The Trump Administration's Solicitor General issued a Guidance Memorandum that set forth the Justice Department's expansive position on what qualifies as good cause to remove ALJs. Memorandum from the Solicitor General to Agency General Counsels on Guidance on Administrative Law Judges After Lucia v. SEC (S. Ct.) 9 (July 2018), https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf. It stated that the standard for good cause set forth in 5 U.S.C. § 7521 "is properly read to allow removal of an ALJ who fails to perform adequately or to follow agency policies, procedures, or instructions." The Memorandum does not distinguish between ALJs employed by executive and independent agencies, and it purports to allow the firing of ALJs who fail to follow informal agency policies and instructions even if they appear to conflict with statutes or legislative regulations. Finally, the Memorandum provides that MSPB review of an ALJ's removal be "suitably deferential" to the agency's good cause determination, thereby undermining the MSPB's role as an independent check on the removal of ALJs. As we have pointed out elsewhere, "the Guidance Memorandum represents an especially strong assertion of the unitary executive principle in which Article II's demands for presidential control of executive officers outweigh the need to protect the procedural due process rights of parties to administrative adjudications by ensuring the impartiality and independence of adjudicatory officials." Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 83 (2020). Note that a somewhat different way to assert greater control over agency adjudicators is to assign cases to decisionmakers who are not ALJs, as in the case a recent Social Security regulation authorizing the use of "administrative appeals judges" from the Appeals Council to adjudicate disability claims. *See* 20 C.F.R. § 404.956(a) ("The Appeals Council may assume responsibility for a hearing request(s) pending at the hearing level of the administrative review process.") (OASDI); § 416.1456 (same) (SSI).

p. 624, add to the carryover paragraph before "Michael Sant'Ambroglio": Levy & Glicksman, *supra*, at 54 (arguing that, as a result of Executive Order 13843, "the traditional safeguards intended to ensure ALJ competence and prevent cronyism and patronage are no longer in place");

p. 624, add after the carryover paragraph:

What steps are available to restore ALJ independence in the wake of threats to it resulting from the Supreme Court's recent removal decisions, the exemption of ALJs from the competitive civil service, and the Guidance Memorandum's expansive interpretation of what qualifies as good cause to remove an ALJ? *See* Levy & Glicksman, *supra* (urging the statutory adoption of an independent corps of federal ALJs, who would no longer be officers of the agencies that employ them). Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695 (2020), "proposes an executive-branch solution that avoids constitutional fisticuffs" between the Take Care and Due Process Clauses – "the White House and agencies should use executive orders and regulations to mimic and improve administrative adjudicators' existing statutory protections" relating to hiring, removal, and other indicia of impartiality for agency adjudicators.

p. 662, add at the end of § 1: *See also Stewart v. Commissioner of Internal Revenue*, 999 F.3d 1150 (8th Cir. 2021) (rejecting taxpayers' claim that they were entitled to a new collection due process hearing due to *ex parte* communications because the IRS was entitled to allow such communications in settlement conferences).

CHAPTER 5

Unit 5.1

p. 677, add the following new paragraph after the carryover paragraph:

In 2020, toward the end of the Trump Administration, the SSA promulgated a rule providing for administrative appeals judges (AAJs)—rather than ALJs— to conduct hearings and issues decisions in disability cases. *See* 85 Fed. Reg. 73,138 (Nov. 30, 2020). AAJs, who serve on the SSA's Appeals Council, lack the statutory protections for independence that apply to ALJs, such as good-cause removal requirements. Under 20 C.F.R. § 404.956(a), applicable to OASDI hearings, "[t]he Appeals Council may assume responsibility for a hearing request(s) pending at the hearing level of the administrative review process." *Accord* § 416.1456 (adopting identical language for SSI hearings). Although the regulation itself does not specify any reasons or standards to govern this action, the SSA explained in the regulatory preamble that "this rule will increase our adjudicative capacity when needed, and allow us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reaches the hearing level. Our ability to use our limited resources more effectively will help us quickly optimize our hearings capacity, which in turn will allow us to issue accurate, timely, high-quality decisions." 85 Fed. Reg. at 73,138. Although many commenters argued that the rule was contrary to the APA and the longstanding view that disability hearings must be conducted by ALJs, the SSA disagreed, concluding that the SSA does not trigger §§ 554, 556 and 557 of the APA because past practice and the legislative history of the APA reflect the understanding that non-adversarial benefit hearings are informal and not subject to the APA's requirements. *See id.* at 73,138-41. The SSA also rejected the related argument that using AAJs would compromise the independence of agency adjudicators. Do you agree that this regulation is justified and consistent with the applicable statutes? To this point we have found no decisions addressing the validity of using AAJs to conduct disability hearings, perhaps because the SSA (which has undergone a change of leadership, *see supra* Unit 1.6) has not made use of the new regulatory flexibility.

p. 678, add at the end of § 3: *See generally* Nicholas M. Ohanesian, *Administrative Deference and the Social Security Administration: Survey and Analysis*, 30 J. L. & POL'Y 337 (2022) (empirical study finding that "SSA prevails under administrative deference at approximately the same rates, no matter whether *Chevron*, *Skidmore*, *Auer/Seminole Rock*, or *State Farm* deference applies. Across all forms of deference, the SSA does its best when it is resolving issues of eligibility for disability and benefit determinations").

p. 679, add to the 1st paragraph before "Likewise": Not all courts have been receptive to the SSA's rule. *See, e.g.*, *Kraus v. Saul*, 988 F.3d 1019, 1025 (8th Cir. 2021) ("Generally, treating physicians' opinions 'should be given greater weight' than opinions from consultants 'who ha[ve] never met the claimant and base[ ] [their] opinion[s] solely on the record.' "); *Coleman v. Saul*, 979 F.3d 751, 756 (9th Cir. 2020) ("A treating physicians opinion . . . is entitled to greater weight than the opinions of nontreating physicians.").

Unit 5.2

p. 693, add at the end of the carryover paragraph: Is administrative summary judgment problematic? *See* Alexander I. Platt, *Is Administrative Summary Judgment Unlawful?*, 44 HARV. J. L. & PUB. POL'Y 239 (2021) (questioning its legality and policy legitimacy).

Unit 5.3

p. 720, add at the end of the bullet point on Licenses and permits: *Cf. Foster v. U.S. Dep't of Interior*, 609 F. Supp. 3d 769, 783-85 (D.S.D. 2022), *aff'd on other grounds*, 68 F.4th 372 (8th Cir. 2023) (holding that "no law or independent source of authority" created a property right to demand a review of an agency's determination that the applicant's property contains wetlands for purposes of the Swampbuster Act).

p. 722, add at the end of the carryover paragraph: Some commentators have argued that separation of powers formalists, including some Supreme Court justices, have begun to draw a distinction between "old" and "new" liberty rights. Under this reasoning, "only 'old' liberty rights require due process. Any 'New' liberty rights—roughly, any due-process-protected interest recognized after the birth of the modern administrative state—can be relegated to agency adjudication." Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1804 (2023). Is this distinction constitutionally sustainable? Does it resurrect the right-privilege distinction by another name?

p. 725, add after the 1st full paragraph:

Castanon v. Cathey, 976 F.3d 1136 (10th Cir. 2020), rejected a due process challenge to state racing officials' decision to scratch a horse from a race. Although the horse had no reported drug violations, another of the owners' horses was disqualified because of a positive urine test, after which racing officials suspended the license of the trainer responsible for both horses. The plaintiffs asserted three different constitutionally protected liberty or property interests: (1) a property or liberty interest in a government-sponsored program; (2) a liberty interest in using property to pursue business or leisure; and (3) a property interest in a state cause of action for judicial review. The first claim failed because the owners failed to show any limits on state official's discretion to disqualify the horse. The second claim failed because the owners were free to pursue the business of racing horses; they were prohibited from participating in only one race while their trainer was suspended. Although the availability of a statutory cause of action can create a property interest, there was no deprivation just because statute deferred review until after state officials rendered an adverse decision. Why does the availability of a statutory cause of action create a protected property interest? Doesn't an opportunity to be heard relate to the "process due" and arise only after it is determined that a person has been deprived of a protected interest in life, liberty, or property, rather than to the threshold question of whether a protected interest exists in the first place? Conversely, would the claim in *Castanon* have been more successful if the owners argued they had been denied their fundamental right of access to court? *See Tennessee v. Lane*, 541 U.S. 509 (2004).

Unit 5.4

p. 753, in the 1st full paragraph, replace the citation sentence beginning with "*Compare*" through "(en banc) (same)." with the following: *See Collins v. Yellen*, 141 S. Ct. 1761 (2021) (invalidating for-cause removal restrictions on the Director of the Federal Housing Finance Authority); *Seila Law LLC v. Consumer Financial Prot. Bureau*, 140 S. Ct. 2183 (2020) (invalidating for-cause removal restrictions on the Director of the Consumer Financial Protection Bureau).

p. 780, add at the end of the carryover paragraph: *Cf. Kirk v. Commissioner of SSA*, 987 F.3d 314, 323 (4th Cir. 2021) ("We easily conclude that an individual's private interest in retaining disability benefits is substantial.").

Unit 5.5

p. 788, add at the end of the 1st full paragraph: *See generally* Brian Gumz, *Administrative Nonacquiescence and EPA*, 10 GEO. WASH. J. ENERGY & ENVTL. L. 1 (2019).

p. 805, add at the end of section 1:

What are the implications of this background for the SSA's recent regulations providing that the SSA may use AAJs rather than ALJs to conduct hearings? *See* 20 CFR §§ 404.956; 416.1456. Unlike ALJs, AAJs receive performance evaluations, are eligible for bonuses, and are not subject to good-cause removal requirements. Accordingly, the SSA has many more tools at its disposal to influence outcomes when AAJs preside. In its response to comments objecting to the agency rule on this ground, the SSA insisted that "[w]e take seriously, and always have taken seriously, our responsibility to ensure that claimants receive accurate decisions from an impartial decisionmaker, arrived at through a fair process that provides each claimant with the full measure of due process protections." 85 Fed. Reg. at 73145. It also emphasized that "any AAJ who holds hearings and issues decisions on any case pending at the hearing level . . . would be required to follow the same rules as ALJs including exercising independent judgment and discretion in individual cases." *Id.* Are these assurances a sufficient response? In the event of a conflict between judicial decisions and directives from the SSA, how likely is it that an AAJ, as opposed to an ALJ, would follow the judicial decisions?

CHAPTER 6

Unit 6.1

p. 819, add at the end of § 3: Leslie Book, *Collection Due Process at Twenty-Five: A Still Important and Needed Check on IRS Collection Power*, 20 PITT. TAX REV. 145 (2022), praises but suggests reforms to the CDP process, including ensuring improved communication with taxpayers and providing for targeted judicial review.

p. 830, add at the end of § 2:

What are the implications of informal guidance for the equal application of the nation's tax laws? Some critics have argued that "the two tiers of formal and informal tax law systematically disadvantage taxpayers who lack access to sophisticated advisors." Joshua D. Blank & Leigh Osofsky, *The Inequity of Informal Guidance*, 75 VAND. L. REV. 1093, 1097 (2022). The authors explain that the formal sources of tax law are largely inaccessible to ordinary taxpayers, who must therefore rely on IRS guidance. In contrast, "[w]hen the formal tax law does not make clear what the tax outcome is, taxpayers who can access these formal sources of tax law, usually with the assistance of advisors, can at least attempt to claim the most advantageous position (within reason) that these formal sources of law permit. These taxpayers often have a good shot at winning, or at least avoiding penalties for trying, even if the position they claim is contrary to a taxpayer-unfavorable approach in the IRS's tax guidance." *Id.* Do you agree with this assessment? Is the same argument applicable to other agencies?

Unit 6.2

p. 839, add at the end of the carryover paragraph: May a guidance document that narrows or removes the leeway afforded to regulated parties under a prior legislative rule nevertheless qualify as an interpretive rule? *See POET Biorefining, LLC v. EPA*, 970 F.3d 392, 408-09 (D.C. Cir. 2020) (yes, although it may not repudiate or be inconsistent with the legislative rule).

p. 840, add to the carryover paragraph after "*see also*": *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143 (6th Cir. 2022) ("When rulemaking carries out an express delegation of authority from Congress to an agency, it usually leads to legislative rules; interpretive rules merely clarify the requirements that Congress has already put in place.");

p. 845, add after the carryover paragraph:

More recently, the D.C. Circuit has attempted to synthesize its decisions in this area, articulating the following test(s):

> We treat rules as procedural if they are primarily directed toward improving the efficient and effective operations of an agency. The critical feature of a rule that satisfies the so-called procedural exception is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.

> Where a rule imposes substantive burdens, encodes a substantive value judgment, trenches on substantial private rights or interests, or otherwise alters the rights or interests of parties, it is not procedural for purposes of the section 553 exemption. At bottom, the exception for internal house-keeping measures must be narrowly construed.

American Fed'n of Labor & Cong. of Indus. Orgs. (AFL-CIO) v. NLRB, 57 F.4th 1023, 1034-35 (D.C. Cir. 2023) (internal quotations, alterations, and citations omitted). The court described this statement as "represent[ing] this court's current and consistent approach." *Id.* Do you agree that the court's approach has been consistent? Is this agglomeration of tests internally consistent? Is it helpful? What happens if different components of the court's recitation point in different directions? Has the court reinvigorated *Bowen*'s encoded value judgment test? Applying these tests in *AFL-CIO*, the court concluded that some of the challenged NLRB rules were procedural, but others were subject to notice and comment requirements.

Environmental Def. Fund v. EPA, 515 F. Supp. 3d 1135 (D. Mont. 2021), highlighted another aspect of *Batterton* in concluding that an EPA regulation limiting the kinds of scientific evidence the agency could use to support its pollution control regulations was a substantive rule that must be published at least thirty days before its effective date under § 553(d) of the APA. The court construed *Batterton* as establishing that a rule that leaves no room for further exercise of administrative discretion is a substantive, not a procedural rule. The challenged EPA regulation was "no mere 'internal house-keeping measure[].'" Rather it made a substantive determination concerning how EPA should weigh particular scientific information in future rulemakings. "The Final Rule determines outcomes rather than process." *Id*. at 1149. Note that although this case involved § 553(d) rather than § 553(b)(A), the court did not distinguish between the two provisions. This makes sense if the term "substantive rule" rule is used to characterize rules that are not rules of agency organization, procedure, or practice. It is worth emphasizing, however, that rules exempt from notice and comment under § 553(b)(A) & (B) are not automatically exempt from the requirements of § 553(d), even if there is substantial overlap between the exceptions in subsection (b) and (d).

A district court judge interpreted D.C. Circuit precedent on the procedural rules exception as suggesting "that procedural rules primarily concern the agency's internal operations, even if such rules also occasionally create expectations for regulated entities with respect to the timeframe, means, and methods by which those entities assert their substantive rights vis-à-vis the agency." *See American Fed'n of Labor and Congress of Indus. Orgs. v. NLRB*, 466 F. Supp. 3d 68, 90 (D.D.C. 2020). Applying that test, the court held that the Board violated § 553 of the APA by adopting rules in 2019, without complying with notice and comment requirements, that essentially rescinded regulations adopted during the Obama Administration to ensure that union representation cases be resolved quickly and fairly because the 2019 rules did not qualify as rules of agency procedure.

p. 859, add to the 1st full paragraph before "Although the IRS": *See* Internal Revenue Manual § 32.1.5.4.7.4.1 (Aug. 21, 2018).

p. 863, add to the last line on the page before "Would it make sense": Jonathan Choi, *Legal Analysis, Policy Analysis, and The Price of Deference: An Empirical Study of* Mayo *and Chevron*, 38 YALE J. ON REG. 818 (2021), argues that, "counterintuitively, *Chevron* should encourage agencies to exert more effort in complying with rulemaking procedures, rather than less. This is because agencies will view procedural effort as essentially the 'price' of judicial deference—even if *Chevron* and rulemaking requirements are theoretically separate, investment in procedural compliance is more worthwhile if the resulting regulation will receive more deferential review." Professor Choi also finds that *Chevron* shifts agency preambular discussion of regulations away from interpretive analysis and toward policy analysis, and that IRS rulemakings in the wake of *Mayo Foundation* reflect exactly that shift.

p. 864, add after the 2d full paragraph:

EPA issued rules to implement Executive Order 13,891. EPA Guidance; Administrative Procedures for Issuance and Public Petitions, 85 Fed. Reg. 66,230 (Oct. 19, 2020). EPA chose to use an online portal to identify its guidance documents, enable the public to comment on proposed significant guidance documents, and allow the public to submit petitions requesting that an active guidance document be modified or withdrawn. But President Biden revoked Executive Order 13,891. Exec. Order No. 13,992, § 2, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 13,992 (Jan. 20, 2021). Subsequently, some agencies rescinded regulations they had issued to implement the Trump order. *See, e.g.*, EPA Guidance; Administrative Procedures for Issuance and Public Petitions; Rescission, 86 Fed. Reg. 26,842 (May 18, 2021); Guidance Document Procedures Rescission, 86 Fed. Reg. 19,149 (Apr. 13, 2021) (rescission of Council on Environmental Quality regulations based on the agency's conclusion that the rescinded rule deprives CEQ of necessary flexibility in determining when and how best to issue guidance based on particular facts and circumstances"); Procedures for Issuing Guidance Documents, 86 Fed. Reg. 19,786 (Apr. 15, 2021) (rescinding Interior Department regulations because they unduly restrict[ed] the Department's ability to provide timely guidance on which the public can confidently rely"). EPA's initial rules explicitly stated that they would remain in effect even if Executive Order 13,891 were rescinded. 40 C.F.R. § 1.502(d). That provision should not preclude EPA from choosing to repeal its regulations specifying procedures for the issuance of guidance documents, as agencies such as CEQ have done. Under the Biden Administration, what sort of reasons does the EPA have to provide for rescinding the Trump Administration's rules? Is it sufficient to point to the repeal of Executive Order 13,891? Is it significant that EPA treated both the adoption and rescission of the rules as exempt from notice and comment under the § 553(b)(A) exception for rules of agency organization, procedure, and practice?

Unit 6.3

p. 869, add at the end of § 2:

Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749 (2020), argues that, as a result of the APA's sparse provisions governing informal adjudication, "adjudication is ruled by a norm of exceptionalism: a presumption in favor of procedural specialization and against uniform, cross-cutting procedural requirements." *Id*. at 1752. She adds that "adjudication's exceptionalism norm should be rejected because it insufficiently protects

individual interests and undermines the institutional integrity of the administrative state. By definition, the norm rejects uniformity, even with respect to the most fundamental of procedures. The result is that programs often lack basic procedural protections, with potentially severe consequences for affected individuals." *Id*. at 1754. She urges a regime similar to the one that applies to rulemaking under the APA that involves uniform application of minimum procedural safeguards.

CHAPTER 7

Unit 7.2

p. 990, add after the carryover paragraph:

The Office of Management and Budget in 2020 issued a "request for information" in which it expressed concern that "[t]he growth of administrative enforcement and adjudication over the last several decades has not always been accompanied by commensurate growth of protections to ensure just and reasonable process." Improving and Reforming Regulatory Enforcement and Adjudication, 85 Fed. Reg. 5483, 5483 (Jan. 30, 2020). OMB invited feedback on the following queries:

- Prior to the initiation of an adjudication, what would ensure a speedy and/or fair investigation? What reform(s) would avoid a prolonged investigation? Should investigated parties have an opportunity to require an agency to "show cause" to continue an investigation?
- When do multiple agencies investigate the same (or related) conduct and then force Americans to contest liability in different proceedings across multiple agencies? What reforms would encourage agencies to adjudicate related conduct in a single proceeding before a single adjudicator?
- Would applying the principle of res judicata in the regulatory context reduce duplicative proceedings? How would agencies effectively apply res judicata?
- In the regulatory/civil context, when does an American have to prove an absence of legal liability? Put differently, need an American prove innocence in regulatory proceeding(s)? What reform(s) would ensure an American never has to prove the absence of liability? To the extent permissible, should the Administration address burdens of persuasion and/or production in regulatory proceedings? Or should the scope of this reform focus strictly on an initial presumption of innocence?
- What evidentiary rules apply in regulatory proceedings to guard against hearsay and/or weigh reliability and relevance? Would the application of some of the Federal Rules of Evidence create a fairer evidentiary framework, and if so, which Rules?
- Should agencies be required to produce all evidence favorable to the respondent? What rules and/or procedures would ensure the expedient production of all exculpatory evidence?
- Do adjudicators sometimes lack independence from the enforcement arm of the agency? What reform(s) would adequately separate functions and guarantee an adjudicator's independence?
- Do agencies provide enough transparency regarding penalties and fines? Are penalties generally fair and proportionate to the infractions for which they are assessed? What reform(s) would ensure consistency and transparency regarding regulatory penalties for a particular agency or the federal government as a whole?
- When do regulatory investigations and/or adjudications coerce Americans into resolutions/settlements? What safeguards would systemically prevent unfair and/or coercive resolutions?

- Are agencies and agency staff accountable to the public in the context of enforcement and adjudications? If not, how can agencies create greater accountability?
- Are there certain types of proceedings that, due to exigency or other causes, warrant fewer procedural protections than others?

Id. at 5484. How many of these queries reflect legitimate concern for procedural fairness? Who would you expect to respond to these queries and what sort of comments would you expect OMB to receive? What kinds of reforms might OMB consider to address the concerns that underlie the request for information? How would such changes affect agencies' ability to enforce their statutory mandates?

p. 993, add after the first full paragraph (and before "B. PRINCIPAL CASES":

In the absence of provisions in the organic statute imposing fines or forfeitures for violation of an agency order, agencies may seek sanctions against regulated parties by petitioning a court for a finding of civil contempt. In *NLRB v. Neises Constr. Corp.*, 62 F.4th 1040 (7th Cir. 2023), for example, the NLRB filed a petition for civil contempt against an employer that repeatedly refused to bargain with the union that represented its employees, in violation of court orders to do so. Reviewing the decision of the Special Master to whom it assigned the case, the court found the employer to be in civil contempt. It ordered the employer to bargain in good faith, imposed a monetary penalty, required it to compensate the union for costs and expenses it incurred as a result of the employer's violation of its duty to bargain with the union, ordered the employer to pay the NLRB's attorneys fees, and imposed a temporary prohibition on decertification of the union. But it refused to require prior court approval before the employer could implement any proposal after reaching a legitimate bargaining impasse; to require that the employer provide advance notice to the Board, the union, and the court before seeking outside help to resolve bargaining disputes with the union; or to require that the employer provide such notice at least 14 days in advance of any expenditure that would exceed $5000.

Other agencies, like the FTC, also implement their organic statutes through complex enforcement regimes. *See AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341 (2021). Under the Federal Trade Commission Act as originally adopted, the FTC operated exclusively by means of cease-and-desist orders, the violation of which did not provide the basis for civil penalties until they became final as the result of judicial approval or the failure of affected parties to appeal. Over time, however, Congress expanded the FTC's power to enforce the statute's prohibition on unfair and deceptive trade practices that harm consumers, authorizing the FTC to adopt legislative rules and impose penalties for violation of the rules and expanding remedies for violations of final cease-and-desist orders. In addition, § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), authorized the FTC to seek a preliminary injunction to prevent ongoing violations pending resolution of a cease-and-desist order proceeding. This provision also allows the agency to seek a permanent injunction without filing a cease-and-desist order. The issue in *AMG Capital Management* was whether the agency could also seek restitution or disgorgement as part of an action for a permanent injunction. For decades, the lower courts had held that such remedies were proper, relying on older Supreme Court decisions that had interpreted statutes granting jurisdiction to issue injunctions as implicitly conferring on the courts the full range of remedies traditionally encompassed within the courts' equitable jurisdiction. In *AMG*, the court unanimously concluded

that § 13(b) does not authorize monetary relief in the form of restitution or disgorgement, relying on the plain language of the provision and contrasting that language with other provisions of the FTC Act that explicitly reference broader equitable relief. More fundamentally, in the Court's view, the statutory remedies available to the FTC were carefully crafted so as to limit the FTC's authority to seek or impose monetary penalties, which were only available after a cease-and-desist order or rule had more specifically defined a violation of the statute's general prohibition of unfair and deceptive trade practices. Does the Court's analysis have any implications for the FCC's freedom to choose among various civil remedies?

CHAPTER 8

Unit 8.1

p. 1118, add at the end of the carryover paragraph: More recently, however, in *Salinas v. U.S. RR. Retirement Bd*., 141 S. Ct. 691, 698 (2021), the Court referred to the "strong presumption favoring judicial review of administrative action" as a well-settled default rule, and stated that "Congress is presumed to legislate with it in mind"). Are these descriptions of the presumption in favor of review consistent?

p. 1119, add to the 2d line of the last partial paragraph before "*Immigration*": *Collins v. Yellen*, 141 S. Ct. 1761, 1776 (2021) (construing anti-injunction provision of the Housing and Economic Recovery Act of 2008 to bar any action to restrain the Federal Housing Finance Agency's functions as a conservator or receiver only when the FHFA action fell within the scope of its authority); *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020) (holding that statutory bar on review of factual determinations by immigration judges in final orders of removal for noncitizens who committed specified crimes does not apply to factual findings made by such judges in a so-called CAT order prohibiting removal of a noncitizen to a country where the noncitizen might be tortured);

p. 1120, add at the end of the last paragraph in § 2: *See also Thryv, Inc. v. Click-to-Call Tech., L.P.*, 140 S. Ct. 1367 (2020) (holding that § 314(d) also barred appeal of Patent Office's determination that a request for inter partes review was untimely)).

p. 1123, add before the final period of the carryover paragraph: ; *Association of Administrative Law Judges v. Federal Serv. Impasses Panel*, 2021 WL 1999547 (D.D.C. 2021) (dismissing suit alleging that panel created to resolve labor impasses involving federal employees violated the Appointments Clause)

p. 1123, add after the carryover paragraph:

The jurisdiction of courts to block enforcement proceedings based on constitutional challenges to the agencies adjudicating them may depend on whether the particular statute in question precludes such review. *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890 (2023), resolved two consolidated cases. In one, the Fifth Circuit held that § 78y of the Securities and Exchange Act of 1934 did not strip the federal district courts of jurisdiction to hear structural constitutional claims, such as a suit to enjoin SEC administrative enforcement proceedings based on a claim that the ALJ was improperly protected by double for-cause removal restrictions. In the other, the Ninth Circuit held that Congress impliedly stripped the federal district courts of jurisdiction over claims that FTC enforcement proceedings violated due process and separation of powers by protecting ALJs with two layers of for-cause removal restrictions and combining prosecutorial and adjudicative functions. The Supreme Court held that both suits could proceed in federal district court and that the plaintiffs need not wait until the completion of the administrative enforcement proceedings to pursue their constitutional challenges in the Courts of Appeals under the judicial review provisions of the Securities and Exchange Act of 1934 and the Federal Trade Commission Act.

The Court applied *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), which stated that the creation of a comprehensive statutory review process that funnels challenges to agency actions into the courts of appeals normally divests the district courts of jurisdiction. *Thunder Basin* nonetheless recognized that three considerations may lead to a different result: (1) whether precluding jurisdiction would foreclose all meaningful judicial review of the relevant claims; (2) whether a claim is wholly collateral to the statutory review provisions; and (3) whether the claims is outside the agency's expertise. Applying that framework to the consolidated cases, the Court concluded that all three factors supported allowing the agency defendants to bypass the statutory review scheme and to seek immediate review of their structural constitutional challenges in federal district court. Justice Thomas concurred, arguing that agency adjudication of "core private rights, followed by judicial review under the "appellate review model" reflected in the SEC and FTC organic statutes "likely" violated separation of powers, Article III, due process, and the Seventh Amendment. Justice Gorsuch concurred separately, contending that the agency defendants have a right of immediate access to the federal district courts under a straightforward reading of the federal question statute and urging the Court to overrule *Thunder Basin*.

The *Thunder Basin* test was also involved in *Feds for Medical Freedom v. Biden*, 63 F.4th 366 (5th Cir. 2023). In that case, non-profit groups representing federal employees and the employees of federal contractors challenged an executive order issued by President Biden requiring them to be vaccinated against COVID-19 or be fired (subject to limited exceptions). The issue was whether the district court had subject matter jurisdiction over the dispute, which the plaintiffs brought under the federal question statute, 28 U.S.C. § 1331. The Civil Service Reform Act of 1978 (CSRA) provides "exclusive" review mechanisms for challenges to CSRA-covered personnel actions and those mechanisms do not include suits in which subject matter jurisdiction is based on the federal question statute. The Fifth Circuit, sitting en banc, held that the challenge was properly filed under the federal question statute because the vaccination order did not qualify as a CRSA-covered personnel action. Thus, there was not a "fairly discernable" intent to support the government's implicit jurisdiction-stripping argument. Because the CSRA's text, structure, and purpose foreclosed that argument, the court stated that it need not analyze the challenge under *Thunder Basin*. It did so anyway, however, finding that all of the *Thunder Basin* factors supported its conclusion that the CSRA's "exclusive" jurisdictional provisions did not strip the district court of federal question jurisdiction. *Contra Payne v. Biden*, 62 F.4th 598 (D.C. Cir. 2023) (finding that all three *Thunder Basin* factors supported the conclusion that constitutional challenge to executive order requiring that all federal employees be vaccinated against COVID-19 must be brought in the Federal Circuit, not in federal district court); *Federal Law Enforcement Officers Ass'n v. Ahuja*, 62 F.4th 551 (D.C. Cir. 2023) (applying *Thunder Basin* factors and concluding that district court lacked jurisdiction to review substantive and procedural challenges to the Office of Personnel Management's method of apportioning retirement benefits for federal employees).

p. 1141, add at the end of the carryover paragraph: *Compare Citizens for Constitutional Integrity v. United States*, 70 F.4th 1289, 1311-14 (10th Cir. 2023) (holding that plaintiffs did not have a cause of action under the APA to challenge agency's decision to grant permit allowing expansion of coal mine because the Surface Mining Control and Reclamation Act provided an adequate alternative remedy by permitting parties to participate in a formal adjudication before the agency, followed by an opportunity for review in federal district court).

p. 1141, add to the 1st full paragraph after the parenthetical description of *Japan Whaling*: ; *Fort Bend Cnty. v. U.S. Army Corps of Eng'rs*, 59 F.4th 180, 192 (5th Cir. 2023) (explaining that § 704's adequate remedy limitation on judicial review of final agency applies "only if there is clear and convincing evidence of legislative intent to create a special, alternative remedy and thereby bar APA review")

Unit 8.2

p. 1145, add to the 1st full paragraph before *Steenholdt*: *Trout Unlimited v. Pirzadeh*, 1 F.4th 738, 753-60 (9th Cir. 2021) (holding that EPA regulations under the CWA governing designation of areas as unsuitable for discharges of dredged or fill material provided a meaningful standard to permit review of EPA's withdrawal of an unsuitability determination);

p. 1148, add to the carryover paragraph before "One court construed": The consistency of an agency's practice in implementing a statutory provision also may be relevant to whether the provision vests unreviewable discretion in the agency. *See Trout Unlimited v. Pirzadeh*, 1 F.4th 738, 756-57 (9th Cir. 2021).

Unit 8.3

p. 1178, in the carryover paragraph, replace the material beginning with "In *Regents of the Univ."* to the end of the paragraph with the following: *See also Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc.* v. *Federal Labor Relations Auth*., 898 F.2d 753, 756 (9th Cir. 1990) (concluding that the presumption against review did not apply because the agency's decision not to act was based solely on its belief that it lacked jurisdiction or authority and because it incorporated a new interpretation of the statute). In *Department of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020), the Court concluded that DHS's recission of the Deferred Action for Childhood Arrivals (DACA) program was subject to judicial review, distinguishing *Heckler*. The government claimed that rescission of a general non-enforcement policy, like adoption of such a policy, is unreviewable. The Court, however, contested the government's characterization of DACA as "simply a non-enforcement policy." *Id*. at 1906. It concluded instead that DACA was the opposite of a refusal to act; it was an affirmative act of approval. Instead of being a passive non-enforcement policy, DACA created a program for conferring affirmative immigration relief. The Court held that "[b]ecause the DACA program is more than a non-enforcement policy, its rescission is subject to review under the APA." *Id*. at 1907. Should the justiciability of programmatic executive nonenforcement be governed by the same principles applicable to case-by-case nonenforcement decisions? *See* Peter M. Shane, *Faithful Nonexecution*, 29 CORNELL J.L. & PUB. POL'Y 405 (2019 (distinguishing between prosecutorial discretion and programmatic nonenforcement and proposing special rules for review of different types of programmatic nonenforcement decisions).

p. 1180, add at the end of the last paragraph: *See NAACP v. Bureau of the Census*, 945 F.3d 183, 189 (4th Cir. 2019) (observing that "final agency action" is a prerequisite to APA review, whether a plaintiff seeks to "compel agency action" under Section 706(1) or to "set aside agency action" under Section 706(2).").

Unit 8.4

p. 1201, add after the carryover paragraph:

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021), the Court stated that "[c]entral to concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm." The Court added that this "inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. *Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." Does the Court's reference to a "traditional" harm signal a return to a legal rights approach which limits cognizable injuries in fact to harms that provide the basis for common law claims? Does it exclude injuries recognized by statute if they were not remediable in common law actions such as contract or tort? *See id*. at 2205 (stating that "even though Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is") (some internal quotations omitted). After *TransUnion*, what other kinds of statutory rights would be insufficiently concrete to provide a basis for standing? Insofar as the defendant in *TransUnion* was a private entity, does the case apply to suits against agencies? Does Article II add force to the *TransUnion* rule?

p. 1202, add at the end of the last paragraph: One potential issue for redressability that arises for regulated entities is when the action being challenged has ceased. In such a case, even if the agency action caused the injury, setting aside the agency action would not remedy the harm. This issue overlaps with the mootness doctrine. Redressability is not a problem, however, if a damages remedy is available. In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), the Court held that "a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right."

p. 1203, add to the only full paragraph on the page before "In *NRDC*": *Cf. Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (concluding that plaintiffs' claim that the federal government's failure to effectively respond to climate change violated their due process rights did not meet the redressability requirement because the court lacks the power to order, design, supervise, or implement the plaintiffs' requested remedial plan to reduce fossil fuel GHG emissions); *Clean Air Council v. United States*, 362 F. Supp. 3d 237 (E.D. Pa. 2019) (dismissing suit claiming that the Trump Administration's rollback of environmental regulations violated the plaintiffs' due process and Ninth Amendment rights, as well as the government's duty to act as a trustee of the nation's public natural resources, because declaration that those violations have occurred would not redress injuries the plaintiffs had allegedly already suffered).

p. 1203, add after the end of the full paragraph:

In *Public Citizen, Inc. v. Trump*, 361 F. Supp. 3d 60 (D.D.C. 2019), the court denied the government's motion to dismiss a suit challenging President Trump's "2-for-1" executive order

for lack of standing. It also denied the plaintiffs' motion for summary judgment because the plaintiffs had sufficiently alleged facts that would establish standing, allowing limited discovery to determine whether the order had delayed or prevented the issuance of a rule or caused the withdrawal of a rule. After limited discovery, the court dismissed the challenge to the order because the plaintiffs, who had focused on two regulations, were unable to establish that the delays in finalizing those regulations were caused by the 2-for-1 order, as opposed to other factors. *Public Citizen, Inc. v. Trump*, 435 F. Supp. 3d 144 (D.D.C. 2019). In a similar suit attacking the validity of the same order, the court granted the government's motion for summary judgment and dismissed for lack of standing, even though the plaintiffs were states and the states alleged procedural injuries. *California v. Trump*, 613 F. Supp. 3d 231 (D.D.C. 2020). The court found that the states failed to show that either the 2-for-1 requirement or the annual cap on regulatory costs it imposed caused the relevant agency to act or to decline to act in connection with four specific rulemaking proceedings.

p. 1227, add to the second paragraph after "*See also*": *California v. Trump*, 963 F.3d 926, 935-40 (9th Cir. 2020) (holding that states had Article III standing to challenge allegedly unauthorized diversion of appropriated funds to finance construction of a southern border wall based on alleged injuries to their environments, their ability to protect wildlife within their borders, and their sovereign interests in enforcing their environmental laws; and that the diversion caused those injuries and that enjoining the diversion would be likely to redress them);

p. 1228, add at the beginning of the 1st line of the carryover paragraph before *Delaware Dep't*: *California v. Texas*, 141 S. Ct. 2104 (2021) (holding that states lacked standing to challenge the constitutionality of the Affordable Care Act's individual mandate because the repeal of the tax penalty for those failing to purchase health insurance prevented the states from showing that alleged injuries in the form of their own increased administrative costs were fairly traceable to any unlawful congressional conduct);

p. 1228, add before the period at the end of the carryover paragraph: ; *see also California v. Trump*, 963 F.3d 926, 942 (9th Cir. 2020) (concluding that states had standing to challenge diversion of funds designated for military purposes to construction of border wall and reasoning in part that "[t]he field of suitable challengers must be construed broadly in this context because, although Section 8005's obligations were intended to protect Congress, restrictions on congressional standing make it difficult for Congress to enforce these obligations itself")

p. 1228, add at the end of § 2:

For additional cases upholding congressional standing, see *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1 (D.C. Cir. 2020), *vacated and remanded with instructions to vacate as moot*, 142 S. Ct. 332 (2021) (holding that the House of Representatives had standing to allege violations by various Department heads of the Appropriations Clause by transferring funds appropriated for other uses to finance construction of a border wall along the Mexican-U.S. border); *U.S. House of Representatives v. McGahn*, 969 F.3d 353 (D.C. Cir. 2020) (holding that the House Judiciary Committee had standing to seek judicial enforcement of a subpoena to a former White House Counsel to elicit information into the White House's alleged obstruction of a Special Counsel investigation into obstruction of justice). *But cf. Committee on Judiciary of the U.S. House of*

Representatives v. McGahn, 973 F.3d 121 (D.C. Cir. 2020), *reh'g en banc granted and judgment vacated* (D.C. Cir. Oct. 15, 2020) (holding that the Committee did not have an implied cause of action under Article I's power of inquiry to seek equitable relief to enforce the subpoena, that a federal court could not exercise its traditional equitable powers to enforce the subpoena, and that the Declaratory Judgment Act did not create a cause of action to enforce the subpoena). What are the implications of congressional standing for separation of powers? Are congressional suits to challenge the President's oversight of agencies consistent with Article II? Does the denial of congressional standing place the executive branch above the law?

When, if ever, do individual legislators have standing to challenge statutory violations? Courts have generally held that individual members of Congress lack standing to assert the institutional interests of Congress, but can base standing on personal injuries related to their office. *See*, *e.g.*, *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (holding that individual members of Congress lacked standing to challenge the Line Item Veto Act). In *Maloney v. Murphy*, 984 F.3d 50 (D.C. Cir. 2020), the Ranking Member and seven other members of the House Committee on Oversight and Reform sent a request to the General Services Administration (GSA) for information relating to the GSA's agreement to lease the Old Post Office building in Washington to a business owned by President Trump and his family. The Committee members alleged that the terms of the GSA's own lease with the federal government prohibited any federal elected official from sharing in the lease. The members filed their information request under 5 U.S.C. § 2954, which provides that "An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, . . . shall submit any information requested of it relating to any matter within the jurisdiction of the committee." The GSA contested the members' standing to sue, but the court held that they had alleged sufficient informational injury. It reasoned that "[a] rebuffed request for information to which the requester is statutorily entitled is a concrete, particularized, and individual injury, within the meaning of Article III." *Id*. at 54; *see also id*. at 59 ("The agency's failure to provide information to which the Requesters are statutorily entitled is a quintessential form of concrete and particularized injury within the meaning of Article III."). The alleged injury in this case – the denial of information to which they as individual legislators were entitled under § 2954 – "befell them and only them," and therefore qualified as cognizable personal injuries. *Id*. at 64. Responding to the GSA's claim that allowing the suit to proceed would violate the separation of powers, the court stated that the separation of powers "is not a one-way street that runs to the aggrandizement of the Executive Branch. When the Political Branches duly enact a statute that confers a right, the impairment of which courts have long recognized to be an Article III injury, proper adherence to the limited constitutional role of the federal courts favors judicial respect for and recognition of that injury." *Id*. at 70.

Would individual members of the House have standing to challenge the House's adoption of a resolution allowing members to designate proxies to cast votes on their behalf during the Covid-19 pandemic on the ground that the resolution violated the nondelegation doctrine and the quorum requirement under House rules, if the injury they alleged is dilution of their voting power? *McCarthy v. Pelosi*, 480 F. Supp. 3d 28 (D.D.C. 2020), raised but did not resolve the question.

p. 1227, add at the end of the page after "*But cf.*": *Louisiana v. Biden*, 64 F.4th 674 (5th Cir. 2023) (holding that a state lacked standing to challenge validity of executive order reestablishing an

interagency working group to formulate the "social cost of greenhouse gases" because the alleged social and economic harms they would suffer involved "a highly attenuated chain of possibilities");

p. 1228, add after the end of the carryover paragraph:

The Supreme Court's decisions concerning state standing continue to bring mixed results. In *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), the Court concluded that Missouri had standing to challenge the Biden Administration's student loan forgiveness program. The Court reasoned that the Missouri Higher Education Loan Authority (MOHELA) would lose processing fees as a result of the program, which constituted a cognizable injury. This injury conferred standing even though MOHELA was created as a separate entity (not a state agency) and even though MOHELA itself had disclaimed any interest in the suit. In contrast, *United States v. Texas*, 143 S. Ct. 1964 (2023), held that Texas and Louisiana lacked standing to challenge the Biden Administration's alleged failure to enforce the immigration laws. The states asserted that lax enforcement imposed added costs in providing social services to immigrants or incarcerating criminals who should have been arrested or deported by the federal government. The Court, however, concluded that these injuries were neither judicially cognizable nor redressable by the courts, emphasizing the lack of historical precedents for this sort of challenge and the President's prosecutorial discretion under Article II. Are these decisions consistent? Can *Biden v,. Nebraska* be explained by special solicitude for the standing of states? Why were the added costs to the states sufficient to confer standing in *Massachusetts v. EPA* but not in *United States v. Texas*?

Unit 8.5

p. 1232, add at the end of the carryover paragraph: *See also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)) ("The 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.' ").

p. 1235, add at the end of the carryover bullet point: The Supreme Court has also refused to recognize informational injury as injury in fact for standing purposes in the absence of "downstream consequences" of the failure to receive information to which the plaintiff is legally entitled. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021).

p. 1235, add to the 1st full paragraph after the carryover bullet point before "The problem is illustrated": *Compare New Jersey v. EPA*, 989 F.3d 1038, 1047 (D.C. Cir. 2021) ("A petitioner alleging future injuries can establish standing by satisfying either the 'certainly impending' test or the 'substantial risk' test.").

p. 1236, add after the 1st full paragraph:

Whether a risk of future injury can qualify as injury in fact may depend on the nature of the relief sought. The Court has indicated that "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial. . . . [But] a plaintiff 's standing to seek injunctive relief does not necessarily mean that the plaintiffs has standing to seek retrospective damages." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 (2021). The plaintiff apparently

needs to show that the risk of future harm has materialized or that it was independently harmed by exposure to the risk itself (such as an emotional injury from the risk that the plaintiff's credit reports would be provided to third parties). As you read *Friends of the Earth v. Laidlaw*, the first principal case in this unit, consider whether these statements are consistent with the holding in that case.

p. 1237, add at the end of the carryover paragraph: Lower courts have also found sufficient probabilistic injury to satisfy Article III in other contexts. *See, e.g.*, *Sierra Club v. Trump*, 963 F.3d 874, 885-86 (9th Cir. 2020), *judgment vacated*, 142 S. Ct. 46 (2021) (finding standing based on a threat that the Trump Administration would unlawfully divert funds appropriated for Defense Department purposes to build a border barrier wall).

p. 1239, add to the text below the block quote after the citation to *Bakke*: ; *Planned Parenthood of Greater Washington and N. Idaho v U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100 (9th Cir. 2020) (holding that funding applicant had standing to challenge allegedly erroneous preference to abstinence-only teen pregnancy prevention programs in bid criteria for agency funding)

p. 1252, add after the carryover paragraph:

The courts' treatment of public interest regulatory beneficiaries may be contrasted with their treatment of businesses that seek to challenge lax regulation of competitors. Thus, for example, in *Humane Soc'y v. U.S. Dep't of Agric.*, 41 F.4th 564, 568 (D.C. Cir. 2022), the court proclaimed: "We repeatedly have held that parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition." If, as *Lujan* stated, it is harder to establish standing when a party is not itself the target of agency regulation, why is it so easy for businesses to challenge the failure to regulate their competitors? Isn't this sort of competitive injury speculative (as opposed to actual or imminent)? Are causation and redressability any clearer for competitors than for other regulatory beneficiaries? As discussed in Unit 8.6, moreover, competitors also typically benefit from a particularly favorable reading of the "zone of interest" requirement. Does this pattern suggest that courts may manipulate standing requirements so as to favor business interests?

p. 1252, add at the end of section 1:

In the 2022-2023 term, the Court addressed standing issues in three major administrative law decisions. Two of those cases involved President Biden's student loan forgiveness program. In *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (discussed in Unit 8.4C2 in connection with state standing), the Court held that the state of Missouri had standing to challenge President Biden's student loan forgiveness program based the projected loss of processing fees by a public corporation that was created as an entity separate from the state. Is this result consistent with the rule against third party standing? The Court went on to invalidate the program on the merits, concluding that the program exceeded the Department of Education's statutory authority to waive or modify student loan requirements in response to a national emergency. In contrast, *Department of Educ. v. Brown*, 143 S. Ct. 2343 (2023), held that students whose loans had not been forgiven lacked standing to challenge the procedural validity of the program as a violation of notice and comment rulemaking requirements. The plaintiffs could not demonstrate that the alleged

procedural violations caused them to be excluded from the program or that requiring notice and comment procedures would redress their injuries. Is this result consistent with the principle that a party has standing to allege a procedural violation if it would have standing to challenge the agency's final decision? The result in *Brown*, of course, made no difference to the fate of the program, given that the Court invalidated it in *Missouri v. Biden*.

In the third case, *United States v. Texas*, 143 S. Ct. 1964 (2023) (discussed in Unit 8.4C2 in connection with state standing), the Court held that Texas and Louisiana lacked standing to challenge the Biden Administration's enforcement priorities in relation to undocumented immigrants. Although the states alleged injury in the form of costs to provide services to undocumented immigrants, the Court concluded that these injuries were not cognizable, emphasizing prosecutorial discretion and the lack of historical precedents for such a challenge. In so doing, the Court emphasized that the result might be different if, among other things, the executive branch "wholly abandoned" its enforcement obligations or adopted a policy that combined enforcement priorities with changes in legal status or benefits. *Id.* at 1973-74. *See also Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (stating that the presumption of nonreviewability might not apply if an agency "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities").The Court's analysis in *United States v. Texas* was somewhat unusual in that it did not apply the usual standing framework. Thus, for example, monetary costs would ordinarily be a concrete injury in fact, although the states' alleged costs might be considered too speculative. But the Court instead ruled that these injuries were not cognizable, relying largely on the lack of historical precedents for this sort of lawsuit. Similarly, the Court did not address other potential barriers to standing, such as whether the states' alleged injuries were fairly traceable to the Biden Administration's enforcement priorities and whether a judicial order to revise the federal governments enforcement policies would redress the injuries. Does *United States v. Texas* suggest that the Supreme Court might be moving toward a historical approach to standing?

What do these decisions tell us, if anything, about the Court's propensity to manipulate standing doctrine? After reading Unit 8.6, consider whether the Court should have ruled that the states in *Biden v. Nebraska* lacked standing under the zone of interest test.

p. 1255, add at the end of the carryover paragraph: *See also Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020) (stating that a "cause of action does not affect the Article III standing analysis" because " 'Article III standing requires a concrete injury even in the context of a statutory violation' ") (quoting *Spokeo*, 136 S. Ct. at 1549).

The Court addressed the extent to which statutory violations may give rise to injuries in fact in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). It explained that

> Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court. As then-Judge Barrett succinctly summarized, "Article III grants federal courts the power to redress harms that defendants

cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions."

Id. at 2205 (quoting *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019)). The Court refused to "ditch" the concrete harm requirement, as some suggested, based on the theory that "it would be more efficient or convenient to simply say that a statutory violation and a cause of action suffice to afford a plaintiff standing." *Id*. at 2207.

Unit 8.6

p. 1262, add in the last partial paragraph after "*See, e.g.*,": *Sierra Club v. Trump*, 963 F.3d 874, 893-94 (9th Cir. 2020) (construing *Lexmark* as clarifying that the zone of interest test applies only to statutory and APA causes of action and concluding that the test did not apply to a claim that the Trump Administration violated the Appropriations Clause by diverting funds appropriated for military purposes to construction of a southern border wall, and reasoning that even if the zone of interest test applies to constitutional causes of action, the "test is nearly superfluous: so long as a litigant is asserting an injury in fact to his or her constitutional rights, he has a cause of action");

p. 1264, add after the carryover paragraph:

In *California v. Trump*, 963 F.3d 926 (9th Cir. 2020), the court held that the state plaintiffs met the zone of interest test in challenging the Trump Administration's allegedly unlawful diversion of funds appropriated for unrelated military purposes to finance construction of a southern border wall. The court identified § 8005 of the Department of Defense Appropriations Act of 2019 as the relevant statute. That provision authorizes the Department of Defense (DoD) to transfer up to $4 million of DoD funds for military purposes upon a finding that the transfer is necessary in the national interest, is based on unforeseen military requirements, and the funding has not previously been denied by Congress. The court stated that in enacting § 8005, "Congress primarily intended to benefit itself and its constitutional power to manage appropriations." *Id*. at 942. California and New Mexico were suitable challengers because their interests were congruent with those of Congress and were not inconsistent with the purposes implicit in the statutes. The states' challenge actively furthered Congress's intent to tighten congressional control of the appropriations transfer process. In addition, the states sought to reinforce the same structural constitutional principle that Congress aimed to protect through the limitations reflected in § 8005 – congressional power over appropriations. The states' interest in reinforcing structural separation of powers principles was distinct, but aligned with that of Congress because the structure of congressional representation is designed in part to preserve the integrity, dignity, and residual sovereignty of the states. Thus, the states "easily fall within the zone of interests of Section 8005 and are suitable challengers to enforce its obligations." *Id*. at 944. On the merits, the court held that the transfer was unlawful because the Executive Branch lacked independent constitutional authority to transfer the funds and the transfer exceeded the scope of authority delegated by § 8005.

p. 1264, add to the 1st full paragraph before "Conversely": *See also Viasat, Inc. v. FCC*, 47 F.4th 769 (D.C. Cir. 2022) (holding that the competitor of an internet service provider lacked standing to bring a NEPA challenge to the FCC's modification of the provider's license to operate its satellites at a lower altitude because concern that the licensee's satellites would collide with its

own were too speculative, and the competitor's alleged economic injuries were outside NEPA's zone of interests).

p. 1266, add at the end of the 2d paragraph of §4: In *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020), a plurality of the Court (including all four of the Court's "liberal" Justices) continued to describe third party standing restrictions as "prudential" limitations that do "not involve the Constitution's 'case-or-controversy requirement,' " so that a defendant can forfeit or waive the right to challenge standing on those grounds.

p. 1266 add to the 2d line of the last partial paragraph after "*See also*": *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020) (concluding that individuals covered by a bank's defined-retirement benefit plan who had received all their monthly benefit payments, and whose future benefit payments would not change even if they prevailed, lacked standing to file class action suit as representatives of the plan against the bank for alleged mismanagement of the plan because they suffered and would suffer no injury);

p. 1267, add to the 1st full paragraph before *Hodel*: *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (plurality opinion) (stating that the Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations);

p. 1267, add to the last partial paragraph before "As one court put it": *See also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118-19 (2020) (plurality opinion) ("[W]e have generally permitted plaintiffs to assert third-party rights in cases where the enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.") (internal quotation marks and citations omitted).

p. 1268, add at the end of § 4:

Suppose that an agency has a single Director who is subject to statutory for-cause removal restrictions and that it issues an order demanding that a company provide information to assist the agency's inquiry into whether the company has violated agency regulations. The company refuses to comply, and before the agency seeks to enforce its order, the company brings suit to invalidate it. Even though the President has never sought to fire the Director, the company claims that the demand for information is invalid because the restrictions on the President's authority to remove the Director violate the separation of powers. Should the court dismiss the suit on the ground that the company is seeking to protect not its own interests, but instead the interests of the President in being able to fire the Director at will, and that as a result the suit is not justiciable under principles of third party standing? *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2195-97 (2020) (concluding that regulated entity had standing to challenge constitutionality of good-cause removal requirement for head of the CFPB). *See also Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (stating that it is sufficient that a challenger sustains injury from an executive act that allegedly exceeds the official's authority, and that, "for purposes of traceability, the relevant inquiry is whether the plaintiff's injury can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of law that is challenged'). The Court also stated in *Collins* that because "the separation of powers is designed to preserve the liberty of all of the people . . .

whenever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge." *Id*. at 1780.The Court nonetheless remanded with instructions to the lower court to provide the plaintiffs a remedy only if it could find a causal connection between a violation of their rights and some agency action that caused them to be injured.

Unit 8.7

p. 1297, add to the last partial paragraph on p. 1297 before "In light of *Sims*": The Court relied on the same reasoning in holding that issue exhaustion does not preclude an unsuccessful disability benefits claimant from challenging in court the constitutionality of the appointment of the ALJ who denied benefits. *Carr v. Saul*, 141 S. Ct. 1352 (2021), reproduced as a new principal case below.

p. 1297, add to the 1st full paragraph before "*See Sims*" (which should be changed to "*See also Sims*"): The NLRB, for example, has adopted a rule that prevents parties who fail to request that the Board review a Regional Director's decision in a representation proceeding from relitigating "any issue which was, or could have been, raised" in that proceeding in "any related subsequent unfair labor practice proceeding." 29 C.F.R. § 102.67(g); *see Bannum Place of Saginaw, LLC v. NLRB*, 41 F.4th 518, 523-26 (6th Sir. 2022) (approving application of the rule).

p. 1298, add at the end of the carryover paragraph: *Cirko v. Commissioner of Social Security*, 948 F.3d 148 (3d Cir. 2020), relied on *Sims* to hold that the issue exhaustion doctrine did not require a disability claimant to assert a violation of the Appointments Clause before the very ALJ who denied his claim. *See also Carr v. Saul*, the new principal case in this unit, excerpted below.

p. 1298, add to the 1st full paragraph before *Benoit*: *Heating, Air Conditioning & Refrigeration Distributors Int'l v. EPA*, 71 F.4th 59 (D.C. Cir. 2023) (holding that industry litigants forfeited ability to argue that CAA provision authorizing EPA to regulate hydrofluorocarbons violated the nondelegation doctrine and that the CAA's exhaustion rule has no exception for futile challenges); *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1098 (D.C. Cir. 2021) (citing *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016)) (stating that "[a]lthough judge-made exceptions . . . are available in the case of a judge-made exhaustion obligation, when an exhaustion requirement is imposed by statute, the only question is whether *Congress* intended any 'limits on a [litigant's] obligation to exhaust,'" and that "*Ross* clarified that even nonjurisdictional exhaustion requirements . . . forbid judges from excusing non-exhaustion");

p. 1298, add at the end of § 3:

In *Santos-Zacaria v. Garland*, 143 S. Ct. 1103 (2023), the Supreme Court held that a statutory exhaustion requirement in the Immigration and Nationality Act was not jurisdictional and that undocumented immigrants were not required to seek discretionary review in order to exhaust administrative remedies, abrogating the contrary holdings of several circuits. Under 8 U.S.C. § 1252(d)(1), "[a] court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right." If this requirement is a jurisdictional requirement, then a court must raise the lack of exhaustion on its own motion, the parties cannot waive the lack of exhaustion, and the courts lack the authority to craft equitable

exceptions. In light of these harsh consequences, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006), held that a procedural requirement is not jurisdictional unless Congress "clearly states" that it is jurisdictional. Emphasizing that exhaustion requirements are ordinarily not jurisdictional and contrasting the language of § 1252(d)(1) with other provisions that clearly were jurisdictional, the Court concluded that the requirement was not a jurisdictional one. The Court also concluded that the immigrant in that case had complied with § 1252(d)(1) anyway, finding that discretionary remedies such as reconsideration were not available "as of right." What are the implications of this decisions for judge-made exceptions to the exhaustion requirement? If exhaustion is not a jurisdictional requirement, does that mean that courts are free to apply the traditional exhaustion exceptions to § 1252(d)(1), or would application of those exceptions violate the statute?

p. 1300, add to the last partial paragraph before *Navajo Nation*: *Cochran v. U.S. Securities and Exchange Comm'n*, 20 F.4th 194, 212 (5th Cir. 2021) (constitutionality of for-cause removal restrictions on ALJ was fit for review because it presented purely legal question);

p. 1301, add to the carryover paragraph after "*cf.*": *NAACP v. Bureau of the Census*, 945 F.3d 183, 192-93 (4th Cir. 2019) (holding that a challenge to the means by which the Bureau intended to conduct the 2020 census under the Constitution's Enumeration Clause, on the theory that the method would lead to undercounting of racial and ethnic minority groups, was ripe and that plaintiffs need not wait for the census to be complete to pursue their claim);

p. 1303, add at the end of § 4:

Suppose that an agency has a single Director who is subject to statutory for-cause removal restrictions and that it issues an order demanding that a company provide information to assist the agency's inquiry into whether the company has violated agency regulations. The company refuses to comply, and before the agency seeks to enforce its order, the company brings suit to invalidate it. Even though the President has never sought to fire the Director, the company claims that the demand for information is invalid because the restrictions on the President's authority to remove the Director violate the separation of powers. Is the suit ripe for review, or must the issue's resolution await a suit by a Director alleging that he or she has been improperly fired by the President without good cause? *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) ("[We] have expressly 'reject[ed]' the "argument that consideration of the effect of a removal provision is not ripe until that provision is actually used,' because when such a provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court.") (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)).

p. 1313, add the following new principal case before *Clean Air Implementation Project v. EPA*:

Carr v. Saul

141 S. Ct. 1352 (2021)

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C.J., and ALITO, KAGAN, and KAVANAUGH, JJ., joined, in which THOMAS, GORSUCH, and BARRETT, JJ., joined as to Parts I, II–A, and II–B–2, and in which BREYER, J., joined as to Parts I, II–B–1, and II–B–2. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH

and BARRETT, JJ., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment.

■ Justice SOTOMAYOR delivered the opinion of the Court.

When the Social Security Administration (SSA) denies a claim for disability benefits, a claimant who wishes to contest that decision in federal court must first seek a hearing before an administrative law judge (ALJ). The petitioners here did just that: They each unsuccessfully challenged an adverse benefits determination in ALJ proceedings, and they now ask for judicial review. Specifically, petitioners argue that they are entitled to new hearings before different ALJs because the ALJs who originally heard their cases were not properly appointed under the Appointments Clause of the U.S. Constitution. The question for the Court is whether petitioners forfeited their Appointments Clause challenges by failing to make them first to their respective ALJs. The Court holds that petitioners did not forfeit their claims.

I

The six petitioners in these consolidated cases each applied for disability benefits between 2013 and 2015. After their applications were denied, petitioners followed the prescribed steps for seeking administrative review. They sought reconsideration of the agency's initial determination, received a hearing before an ALJ, and requested review by the SSA's Appeals Council. Petitioners were unsuccessful at every stage, concluding with the Appeals Council, which denied discretionary review.

[In *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), the Supreme Court held that ALJs within the Securities and Exchange Commission (SEC) were "Officers," rather than mere employees, whose appointment by SEC staff violated the Constitution. SSA ALJs also had been selected by lower level staff rather than appointed by the head of the agency. Shortly after *Lucia* was decided, the SSA's Acting Commissioner pre-emptively "address[ed] any Appointments Clause questions involving Social Security claims" by "ratif[ying] the appointments" of all SSA ALJs and "approv[ing] those appointments as her own."] The following year, the SSA issued a ruling stating that the Appeals Council should, in response to timely requests for Appeals Council review, vacate preratification ALJ decisions and provide fresh review by a properly appointed adjudicator. That remedy was only available, however, to claimants who had raised an Appointments Clause challenge in either their ALJ or Appeals Council proceedings. [Claimants, including Petitioners, who had not objected to the ALJs' appointments in their administrative proceedings would receive no relief. Each petitioner asked a federal district court for a new hearing before a constitutionally appointed ALJ, but the Commissioner took the position that they had forfeited their Appointments Clause challenges by failing to raise them before the agency.

The Supreme Court granted cert. to resolve a circuit split on whether disability claimants may challenge the constitutionality of an SSA ALJ's appointment for the first time in federal court.]

II

Administrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial review of that question. The source of this

requirement (known as issue exhaustion) varies by agency.[2] Typically, issue-exhaustion rules are creatures of statute or regulation. *Sims v. Apfel*, 530 U.S. 103, 107–108 (2000); *see United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36, n. 6 (1952) (collecting statutes). Where statutes and regulations are silent, however, courts decide whether to require issue exhaustion based on "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Sims*, 530 U.S. at 108–109. The Commissioner concedes that no statute or regulation obligated petitioners to raise their Appointments Clause challenges in administrative proceedings. Instead, the Commissioner asks this Court to impose a judicially created issue-exhaustion requirement in these cases.

A

"[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims*, 530 U.S., at 109. In conducting this inquiry, courts must take care not to "reflexively 'assimilat[e] the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts.' " *Id.,* at 110. Instead, "[t]he inquiry requires careful examination of 'the characteristics of the particular administrative procedure provided.' " *Id*. at 113 (O'Connor, J., concurring in part and concurring in judgment) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)). The critical feature that distinguishes adversarial proceedings from inquisitorial ones is whether claimants bear the responsibility to develop issues for adjudicators' consideration.[3]

With respect to the nature of the SSA proceedings at issue here, our inquiry starts from the baseline set by *Sims* v. *Apfel*. There, this Court held that issues not raised before the Appeals Council (the final stage of administrative review within the SSA) are nonetheless preserved for judicial review. In so holding, the Court explained that "the rationale for requiring issue exhaustion is at its greatest" when "the parties are expected to develop the issues in an adversarial administrative proceeding," but "the reasons for a court to require issue exhaustion are much weaker" when "an administrative proceeding is not adversarial." 530 U.S., at 110.

The plurality went on to explain that "[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings," where administrative "proceedings are inquisitorial rather than adversarial." *Id.,* at 110–111. Regulations governing SSA proceedings "expressly provide that the SSA 'conduct[s] the administrative review process in an informal, nonadversary manner' " and assures claimants that the SSA " 'will consider at each step

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[2] Issue exhaustion should not be confused with exhaustion of administrative remedies. There is no dispute in these cases that petitioners exhausted their administrative remedies, meaning that they proceeded through each step of the SSA's administrative review scheme and received a "final decision" before seeking judicial review. *See* 42 U.S. C. § 405(g).

[3] The Commissioner invokes the "general rule," recognized in cases such as *L. A. Tucker Truck Lines*, that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). That general rule, however, originated in cases that "each involved an adversarial proceeding." *Sims v. Apfel*, 530 U.S. 103, 110 (2000). Where claimants are not expected to develop certain issues in ALJ proceedings, it is generally inappropriate to treat those issues as forfeited. *See id.,* at 109 ("[C]ourts require administrative issue exhaustion 'as a general rule' because it is usually 'appropriate under [an agency's] practice' for 'contestants in an adversary proceeding' before it to develop fully all issues there" (quoting *L.A. Tucker Truck Lines*, 344 U.S., at 36–37).

of the review process any information you present as well as all the information in our records.' " *Id.,* at 111 (quoting 20 CFR § 404.900(b) (1999)). At the Appeals Council level, "the Council's review is plenary unless it states otherwise." *Sims*, 530 U.S., at 111 (plurality opinion). Rather than appear "as a litigant opposing the claimant," the Commissioner serves "just as an adviser to the Council." *Ibid.* . . . Thus, in the context of Appeals Council review, the plurality observed that the "adversarial development of issues by the parties . . . on which [the judicial-proceedings] analogy depends simply does not exist." *Ibid.* . . .

Much of what the *Sims* opinions said about Appeals Council review applies equally to ALJ proceedings. The *Sims* plurality itself noted that "[i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits" and that "[t]he Commissioner has no representative before the ALJ to oppose the claim for benefits." *Id.,* at 111. The SSA regulations that ensure informal, nonadversarial proceedings and plenary review apply as much to ALJs as to the Appeals Council. Regulations also provide that ALJs will "loo[k] fully into the issues" themselves, 20 C.F.R. § 404.944, and may "raise a new issue" at "any time . . . before mailing notice of the hearing decision," § 404.946(b)(1). . . . Last, as with the Appeals Council, SSA "regulations provide no notice that claimants must . . . raise specific issues before" the ALJ "to preserve them for review in federal court." *Sims*, 530 U.S., at 113 (opinion of O'Connor, J.).

B

The parallels between ALJ and Appeals Council proceedings are many, but the Commissioner correctly notes several differences that may make ALJ hearings relatively more adversarial. For one, ALJ hearings are typically available as a matter of right, while Appeals Council review is discretionary. Most claimants thus submit no more than a one-page request for review to the Appeals Council before having their request denied. Mandatory ALJ proceedings, by contrast, present far more opportunities for claimants to press issues, and the SSA consequently relies more heavily on those proceedings to "conduc[t the agency's] principal and most thorough investigation of . . . disability claim[s]." Brief for Respondent 35–36. Additionally, before every hearing, the SSA mails claimants a "notice of hearing" that includes logistical information and lists the "[t]he specific issues to be decided in [the] case." § 404.938(b)(1). Claimants must notify the ALJ in writing if they "object to the issues to be decided at the hearing." § 404.939. Similarly, SSA conflict-of-interest regulations instruct claimants to "notify the [ALJ] at [the] earliest opportunity" if they "object to the [ALJ] who will conduct [their] hearing." § 404.940.

Even accepting that ALJ proceedings may be comparatively more adversarial than Appeals Council proceedings, the question nonetheless remains whether the ALJ proceedings at issue here were adversarial enough to support the "analogy to judicial proceedings" that undergirds judicially created issue-exhaustion requirements. *Sims*, 530 U.S., at 112 (plurality opinion). In the specific context of petitioners' Appointments Clause challenges, two additional considerations tip the scales decidedly against imposing an issue-exhaustion requirement.[15]

1

First, 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

[5] Outside the context of Appointments Clause challenges, such as in the sphere of routine objections to individual benefits determinations, the scales might tip differently.

technical expertise. See, *e.g., Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010). As such, it is sometimes appropriate for courts to entertain constitutional challenges to statutes or other agency-wide policies even when those challenges were not raised in administrative proceedings.[6] *See*, *e.g., Mathews v. Diaz*, 426 U.S. 67, 76–77 (1976). Thus, this Court observed in *Mathews v. Eldridge*, 424 U.S. 319 (1976), that, so long as a Social Security claimant "had exhausted the full set of available administrative review procedures" (as petitioners did here), "failure to have raised his constitutional claim would not bar him from asserting it later in a district court." *Id.*, at 329 n. 10.

Second, this Court has consistently recognized a futility exception to exhaustion requirements. *See*, *e.g., Bethesda Hospital Assn. v. Bowen*, 485 U.S. 399, 405–406 (1988). It makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested. Such a vain exercise will rarely "protec[t] administrative agency authority" or "promot[e] judicial efficiency." *McCarthy*, 503 U.S., at 145.

Both considerations apply fully here: Petitioners assert purely constitutional claims about which SSA ALJs have no special expertise and for which they can provide no relief. Relying on *L. A. Tucker Truck Lines*, the Commissioner argues that it nevertheless would have been fruitful for petitioners to raise Appointments Clause challenges in their ALJ hearings because " '[r]epetition of the objection' in multiple cases could have led 'to a change of policy.' " Brief for Respondent 45. But the Commissioner misses a key distinction: In *L. A. Tucker Truck Lines*, the aggrieved litigant had the opportunity to object to the relevant method of appointment before the full Interstate Commerce Commission itself. *Id.*, at 34. Repetition of such an objection in cases before the full Commission might have persuaded it to change its "predetermined policy on th[e] subject." *Id.,* at 37. Here, by contrast, the SSA's administrative review scheme at no point afforded petitioners access to the Commissioner, the one person who could remedy their Appointments Clause challenges. Nor were the ALJs capable of remedying any defects in their own appointments. After all, there were no Commissioner-appointed ALJs to whom objecting claimants' cases could be transferred, and the ALJs could not very well have reappointed themselves.

Internal SSA guidance confirms as much. On January 30, 2018, soon after this Court granted certiorari in *Lucia*, the agency issued an "emergency message" to ALJs advising them that "adjudicators may see challenges . . . related to the constitutionality of the appointment of SSA's ALJs." The agency warned ALJs that, because the "SSA lacks the authority to finally decide constitutional issues such as these," they should "not discuss or make any findings related to the Appointments Clause issue on the record." Instead, ALJs were directed to acknowledge any Appointments Clause objections with standardized language explaining that they " 'd[id] not have the authority to rule on that challenge.' " The SSA reiterated these instructions in a second

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[6] Contrary to the Commissioner's assertion, *Richardson v. Perales*, 402 U.S. 389 (1971), has no bearing on whether an issue-exhaustion requirement is appropriate in these cases. In *Perales*, the Court rejected a claimant's procedural due process challenge to the admissibility of an adverse medical report, explaining (among other reasons) that "[a]lthough the claimant complain[ed] of the lack of opportunity to cross-examine the reporting physicians, he did not take advantage of the opportunity" to subpoena the physicians. *Id.,* at 404. *Perales* thus stands for the uncontroversial (and irrelevant) proposition that a claimant is not denied due process if he declines to take advantage of the adequate procedures available to him.

emergency message issued shortly after *Lucia* was decided. . . .

2

Taking a somewhat different tack, the Commissioner contends that petitioners are not entitled to new hearings before constitutionally appointed ALJs because they failed to make "timely challenge[s]" to their adjudicators' appointments. *Ryder v. United States*, 515 U.S. 177, 182 (1995); *Lucia*, 138 S. Ct., at 2055 (quoting *Ryder*). That argument, however, presumes what the Commissioner has failed to prove: that petitioners' challenges are, in fact, untimely. . . . Where, as here, claimants are not required to exhaust certain issues in administrative proceedings to preserve them for judicial review, claimants who raise those issues for the first time in federal court are not untimely in doing so.

* * *

Taken together, the inquisitorial features of SSA ALJ proceedings, the constitutional character of petitioners' claims, and the unavailability of any remedy make clear that "adversarial development" of the Appointments Clause issue "simply [did] not exist" (and could not exist) in petitioners' ALJ proceedings. *Sims*, 530 U.S., at 112 (plurality opinion). The Courts of Appeals therefore erred in imposing an issue-exhaustion requirement on petitioners' Appointments Clause claims. . . .

■ Justice THOMAS, with whom Justice GORSUCH and Justice BARRETT join, concurring in part and concurring in the judgment.

I join Parts I, II–A, and II–B–2 of the opinion of the Court, which correctly explain that the nonadversarial nature of an agency proceeding generally gives good reason to refrain from creating an issue-exhaustion requirement. *See Sims v. Apfel*, 530 U.S. 103, 109–110 (2000). Proceedings before an administrative law judge (ALJ) of the Social Security Administration are plainly nonadversarial: The regulations assure claimants that the agency will "conduct the administrative review process in an informal, non-adversarial manner." 20 CFR § 404.900(b) (2020). . . . This decidedly pro-claimant, inquisitorial process is quite unlike an adversarial suit in which parties are expected to identify, argue, and preserve all issues. . . .

Because these proceedings bear little resemblance to adversarial litigation, I agree with the Court that there is no need for an exhaustion rule. I would end the analysis there.

■ Justice BREYER, concurring in part and concurring in the judgment.

I continue to believe that, "[u]nder ordinary principles of administrative law a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency." *Sims v. Apfel*, 530 U.S. 103, 114 (2000) (Breyer, J., dissenting). I also adhere to my prior view that, in the particular context of the Social Security Administration, a claimant "ordinarily must raise all relevant issues before the ALJ" and that the "nonadversarial nature" of the agency's procedures is generally irrelevant to whether the ordinary rule requiring issue exhaustion ought to apply. *Id.*, at 117. Here, however, I agree with the Court that the Appointments Clause challenges at issue fall into the well-established exceptions for constitutional and futile claims. See *Sims*, 530 U.S., at 115 (Breyer, J., dissenting). I therefore join Parts I, II–B–

1, and II–B–2 of the Court's opinion and concur in the Court's judgment.

Questions

1. What exactly is the source of the courts' authority to impose an issue exhaustion requirement that is not required by statute or regulation? Is this authority consistent with *Vermont Yankee's* pronouncement that courts lack authority to impose judge-made procedural requirements in rulemaking? Would *Carr* support the imposition of a judge-made issue exhaustion requirement in notice and comment rulemaking? Would the imposition of a judge-made issue exhaustion requirement that is not prescribed by statute or regulation provide fair notice to affected parties?

2. Recall from Unit 1.6 that the constitutional validity of the for-cause limitation on the President's power to remove the Social Security Commissioner is in doubt. After *Carr*, would a claimant be able to raise that sort of challenge on judicial review notwithstanding the failure to raise it during the administrative process?

3. What is the significance of the Court's discussion of the inquisitorial nature of Social Security adjudications? Does that discussion indicate that *Carr* would apply to nonconstitutional issues in Social Security cases? For example, could a claimant argue on judicial review that an ALJ or the Appeals Council failed to give sufficient weight to a treating physician's opinion of the claimant's alleged disability if the litigant failed to raise the issue before the Appeals Council? If so, what practical impact would that have on the Social Security disability determination process? If not, is the Court's discussion of the inquisitorial nature of the process necessary to the outcome? How would *Carr* apply to other administrative adjudications, such as EPA permit decisions, NLRB adjudications, FCC licensing decisions, or IRS collection due process adjudications?