# 2023 UPDATE FOR GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES & COMMENTS 13th EDITION

Todd D. Rakoff
Gillian E. Metzger
David J. Barron
Anne Joseph O'Connell
Eloise Pasachoff

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As with the Casebook, we often exclude internal citations in case excerpts without noting those exclusions. We do mark exclusions of other text.

# PART 1:
# OVERVIEW

# CHAPTER I:
# AN INTRODUCTION TO ADMINISTRATIVE LAW

## SECTION 1. AN INTRODUCTORY EXAMPLE

**Add before Section 2, p. 20:**

Airlines for America and International Air Transport Association successfully petitioned the Transportation Department in December 2022 to hold a public hearing on the proposed rule; the agency also reopened the comment period. As of July 2023, the Department had not issued a final rule.

Extreme weather, produced in part by climate change, will continue to generate flight disruptions. Recent issues have extended beyond weather, including Southwest Airlines' meltdown in December 2022 and United Airlines' vast cancellations in June 2023. The GAO determined that despite airlines running fewer flights, "[a]s many as 15 million passengers experienced flight cancellations, and potentially more than 116 million saw flight delays, between July 2021 (when flight disruptions became more frequent) and April 2022." As Demand for Flights Takes Off, What Is Being Done to Reduce Cancellations And Delays (May 18, 2023).[1]

The FAA recently temporarily relaxed at some airports its rules by which airlines lose unused takeoff/landing slots to prompt airlines to fly fewer, bigger planes to ease congestion. In May 2023, President Biden announced that airlines should have to compensate passengers for problems under their control. Such a mandate would require congressional action or agency rulemaking. Do you support such compensation? What else could the FAA (or Congress) do?

With the FAA's authorization expiring in September 2023, Congress has been working on reauthorization legislation. The Republican-controlled House passed its version in July. The Democrat-controlled Senate is considering more consumer-friendly legislation, including bars on "unreasonable or disproportionate" airline fees. Kayla Guo, House Overwhelmingly Passes Bill to Improve Air Travel, N.Y. Times (July 20, 2023).

## SECTION 2. THE BASICS

**Add at the end of "How do courts review the work of administrative agencies?", p. 28:**

The Supreme Court has agreed to hear Loper Bright Enterprises v. Raimondo in its 2023–2024 term. The question presented is: "Whether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." 143 S.Ct. 2429 (2023).

**Add at the end of "Is the administrative state legitimate?", p. 30:**

The Supreme Court granted review of the Fifth Circuit's decision; it will hear argument in its 2023–2024 term. SEC v. Jarkesy, 2023 WL 4278448 (June 30, 2023).

[1] https://www.gao.gov/blog/demand-flights-takes-what-being-done-reduce-cancellations-and-delays.

## SECTION 3. RACE (AND OTHER IDENTITIES) AND ADMINISTRATIVE LAW

**Add at the end of Adjudication, p. 33:**

Academic research has determined that "Black taxpayers are audited at 2.9 to 4.7 times the rate of non-Black taxpayers." Hadi Elzayn et al., Measuring and Mitigating Racial Disparities in Tax Audits (2023).[2] This study of racial disparities prompted the Internal Revenue Service to admit in a May 2023 letter to Congress that "Black taxpayers may be audited at higher rates than would be expected given their share of the population."[3]

**Add at the end of Presidential Directives, p. 34:**

President Biden followed up Executive Order 13985 with Executive Order 14091 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government) in February 2023. The second order directed the fifteen cabinet departments and eight other executive agencies, including the Social Security Administration, to establish "an Agency Equity Team within their respective agencies to coordinate the implementation of equity initiatives and ensure that their respective agencies are delivering equitable outcomes for the American people." It also established the White House Steering Committee on Equity to "coordinate Government-wide efforts to advance equity." And it ordered, starting in September 2023, "each agency head" annually to "submit an Equity Action Plan to the Steering Committee."

In April 2023, President Biden issued Executive Order 14094 (Modernizing Regulatory Review). Section 2 calls for "affirmative promotion of inclusive regulatory policy and public participation," including: "To inform the development of regulatory agendas and plans, agencies shall endeavor, as practicable and appropriate, to proactively engage interested or affected parties, including members of underserved communities; consumers; workers and labor organizations; program beneficiaries; businesses and regulated entities; those with expertise in relevant disciplines; and other parties that may be interested or affected." OIRA issued guidance for implementing this directive in July.[4] We address the executive order and guidance in more detail in Chapter IV in the Supplement, below.

**Add at the end of Appointees and Career Workers, p. 35:**

PPS's latest analysis examines the demographics of the career SES and larger civilian career federal workforce in 2022 (along with historical comparisons). It finds for that year that the SES was made up of 37.6 percent female workers (federal workforce: 44 percent) and 24.7 percent workers who identify as persons of color (federal workforce: 39.2 percent). Senior Executive Service: Trends over 25 Years.[5]

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2 https://siepr.stanford.edu/publications/working-paper/measuring-and-mitigating-racial-disparities-tax-audits.

3 https://www.irs.gov/pub/newsroom/werfel-letter-on-audit-selection.pdf.

4 https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf.

5 https://ourpublicservice.org/fed-figures/senior-executive-service-trends-over-25-years/.

# PART 2:
# UNDERSTANDING STATUTES

# CHAPTER II:
# STATUTORY INTERPRETATION

## SECTION 2. THEORIES OF STATUTORY INTERPRETATION

### c. The (Uncertain?) Line Between Textualism and Purposivism

#### NOTES ON THE (UNCERTAIN?) LINE BETWEEN TEXTUALISM AND PURPOSIVISM

**Add at the end of Note 2, p. 126:**

For another context in which the line between textualism and purposivism has become difficult to distinguish, see the discussion of substantive canons (Casebook pp. 190–195).

**Add a new Note 2(b), p. 126:**

(2)(b) ***Statutory Stare Decisis.*** What should the Court do with its statutory interpretation precedents under interpretive frameworks it has since repudiated? Under Section 2 of the Voting Rights Act, states cannot "impose[] or appl[y]" any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301. In Allen v. Milligan, 143 S.Ct. 1487 (2023), the Court affirmed a district court's preliminary injunction against an Alabama redistricting map under Thornburg v. Gingles, 478 U.S. 30 (1986) which "has governed . . . Voting Rights Act jurisprudence since it was decided 37 years ago." Id. at 1504.

In his dissent, Justice Alito remarked: "One important development has been a sharpening of the methodology used in interpreting statutes. Gingles was decided at a time when the Court's statutory interpretation decisions sometimes paid less attention to the actual text of the statute than to its legislative history, and Gingles falls into that category. The Court quoted § 2 but then moved briskly to the Senate Report. . . . Today, our statutory interpretation decisions focus squarely on the statutory text." Allen, 143 S.Ct. at 1553 (Alito, J., dissenting). Justice Thomas went further, arguing that the words "standard, practice, or procedure" apply only to "enactments that regulate citizens' access to the ballot or the processes for counting a ballot," not the "choice of one districting scheme over another." Id. at 1519 (Thomas, J., dissenting). He thus would have overturned Gingles to entirely preclude redistricting claims under Section 2. Id.

The majority responded that "statutory stare decisis counsels strongly in favor of not "undo[ing] . . . the compromise that was reached between the House and Senate when § 2 was amended in 1982." Id. at 1515 n.10 (majority opinion). Justice Kavanaugh concurred separately: "[T]he stare decisis standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict. Unlike with constitutional precedents, Congress and the President may enact new legislation to alter statutory precedents such as Gingles. In the past 37 years, however, Congress and the President have not disturbed Gingles, even as they have made other changes to the Voting Rights Act." Id. at 1517 (Kavanaugh, J., concurring). In response, Justice Thomas described Kavanaugh's "supposedly enhanced stare decisis force of statutory-interpretation precedents" as "puzzling": the Court's "judicial duty is to apply the law to the facts of the case, regardless of how easy it is for the law to change." Id. at 1521 n.4.

Should stare decisis take into account Congress's ability to overturn the Court's decision? If so, why does the Court not consider the likelihood of eliciting a legislative reaction in other contexts? See Einer Elhauge, Statutory Default Rules (2008). Alternatively, if Justice Thomas is right that the Court should merely try to get the law right each time, how is stare decisis justified at all? Regardless, should the strictness of stare decisis in statutory interpretation cases depend on whether the Court's earlier opinion was simply declaring the meaning of a statutory word or phrase or doing something more—such as creating tests for courts to implement the Voting Rights Act through " 'a common law of racially fair elections' "? Allen v. Milligan, 143 S.Ct. at 1521 n.4 (Thomas, J., dissenting) (quoting C. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 383 (2012)); see Anita Krishnakumar, Textualism and Statutory Precedents, 104 Va. L. Rev. 157 (2018).

## d. Pragmatic and Dynamic Statutory Interpretation

### NOTES ON DYNAMIC STATUTORY INTERPRETATION

**For the last paragraph of Note 5, p. 154, substitute the following:**

The Eleventh Circuit subsequently vacated the panel and reached the opposite decision en banc. 57 F.4th 791 (11th Cir. 2022) (en banc). The en banc majority distinguished Bostock's holding that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex" from the question in Adams: "whether discrimination based on biological sex necessarily entails discrimination based on transgender status." And unlike Title VII, Title IX specifically carves out "separate toilet . . . facilities on the basis of sex" from Title IX's general prohibition on sex discrimination. Concluding, along the lines of the original panel's dissent, that the ordinary meaning of "sex" in Title IX is unambiguously "biological sex," the majority thus held that the carveout applied to bathrooms segregated based on sex identified at birth and dismissed Adams's claim for sex discrimination.

# SECTION 3. TOOLS OF STATUTORY INTERPRETATION

## c. Canons of Construction

### NOTES ON SUBSTANTIVE CANONS

**Add at the end of Note 3, p. 192:**

In her concurrence in Sackett v. EPA, 143 S.Ct. 1322 (2023) (Supp. pp. 44, 55), Justice Kagan argued that the majority's use of the "judicially manufactured" federalism canon—requiring "exceedingly clear language" before Congress can "exercise power over private property"—amounts to "a thumb on the scale for property owners—no matter that the Act . . . is all about stopping property owners from polluting." Id. at 1360–61. Kagan also charged the majority with using the canon "not to resolve ambiguity or clarify vagueness, but instead to 'correct' breadth"—a "move" that she contended the majority also made in West Virginia v. EPA. Id. at 1361.

**Add at the end of Note 4, p. 193:**

In Biden v. Nebraska, 143 S.Ct. 2355 (2023) (Supp. pp. 33, 41, 45, 48), Justice Barrett wrote a concurrence addressing some of these questions. In her view, the major questions doctrine can be understood as a modest linguistic cannon growing out of "commonsense principles of communication," rather than as a constitutionally inspired clear statement rule. Id. at 2380. For further discussion of Barrett's concurrence, see Supp. p. 43. See also Ilan Wurman, Importance and Interpretive Questions, 109 Va. L. Rev. (forthcoming 2023) (defending the major questions doctrine as a linguistic canon consistent with textualism).

**Add at the end of Note 5, p. 193:**

In his concurrence in Wooden v. United States, 142 S.Ct. 1063, 1084 (2022) (discussed more fully at Casebook pp. 79–83), Justice Gorsuch wrote separately to suggest a bigger role for lenity in resolving ambiguities: "Some have suggested that courts should consult the rule of lenity only when, after employing every tool of interpretation, a court confronts a 'grievous' statutory ambiguity. See, e.g., Shaw v. United States, 137 S.Ct. 462, 469 (2016). But ask yourself: If the sheriff cited a loosely written statute as authority to seize your home, would you be satisfied with a judicial explanation that, yes, the law was ambiguous, but the sheriff wins anyway because the ambiguity isn't 'grievous'? If a judge sentenced you to decades in prison for conduct that no law clearly proscribed, would it matter to you that the judge considered the law 'merely'—not 'grievously'—ambiguous?

"This 'grievous' business does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions. Since the founding, lenity has sought to ensure that the government may not inflict punishments on individuals without fair notice and the assent of the people's representatives. A rule that allowed judges to send people to prison based on intuitions about 'merely' ambiguous laws would hardly serve those ends. Tellingly, this Court's early cases did not require a 'grievous' ambiguity before applying the rule of lenity. Instead, they followed other courts in holding that, '[i]n the construction of a penal statute, it is well settled . . . that *all reasonable doubts* concerning its meaning ought to operate in favor of [the defendant].' Harrison v. Vose, 50 U.S. (9 How.) 372, 378 (1850) (emphasis added)." See also Bittner v. United States, 143 S.Ct. 713, 724 (2023) (Opinion of Gorsuch, J.) ("Under the rule of lenity, this Court has long held, statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals.").

Kavanaugh separately concurred "to briefly explain why the rule of lenity has appropriately played only a very limited role in this Court's criminal case law . . . . [A]mbiguity is in the eye of the beholder and cannot be readily determined on an objective basis. Applying a looser front-end ambiguity trigger would just exacerbate that problem, leading to significant inconsistency, unpredictability, and unfairness in application." Wooden, 142 S.Ct. at 1075–76.

**Add a new Note 9, p. 195:**

(9) ***Substantive Canons and Textualism.*** In Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109 (2010), then-Professor Amy Coney Barrett noted the "significant tension" between substantive canons and textualism. Is the tension reconcilable? For Justice Barrett's own attempt to reconcile the two in the context of the major questions doctrine, see her concurrence in Biden v. Nebraska, 143 S.Ct. 2355 (2023) (Supp. p. 43).

In THE INCOMPATIBILITY OF SUBSTANTIVE CANONS AND TEXTUALISM, 137 Harv. L. Rev. (forthcoming), BENJAMIN EIDELSON and MATTHEW STEPHENSON first reject the likelihood that substantive canons are simply "guides to the 'natural' meaning of legal texts." For that to be true, a reader would not only have to personally be aware of and accept a given canon, but "also think that the lawmaker *knows* that they—and everyone else whom the lawmaker intends to address—all share this perspective." Without such hard-to-come-by knowledge, the reader can conclude no more than that "Congress may well have failed to say what it really *should* have said to best further its own purposes."

They then reject the "bootstrapping" argument: the idea that Congress legislates against a backdrop of established conventions known to drafter and reader alike. Where a statute is ambiguous, "surely the least likely inference is that the lawmaker gambled on a reader later determining the statute grievously ambiguous, and thus turning to" a substantive canon "in order to arrive at the content that the lawmaker actually *did* intend all along." They acknowledge that the bootstrapping argument could be reframed as instead positing that Congress might have tacitly endorsed courts' continued usage of established canons that it hasn't repudiated. But if that endorsement isn't in the text of a statute, the bootstrapping argument justifies a substantive canon based on an assumption about Congress's intent.

Eidelson and Stephenson's critique also applies to substantive canons based on constitutional principles. If a statute is unconstitutional, the Court can declare it as such, in which case the "canon" is simply defining a constitutional limit rather than doing any work in interpreting the meaning of a statute. But if the Court is taking effect away from the words of a statute based on "penumbras" that surround constitutional guarantees rather than actual limits on government action that have been sanctioned by the text of the Constitution, can that be squared with textualist principles?

# PART 3:
# THE AGENCY AT WORK

# CHAPTER III:
# PROCEDURAL FRAMEWORKS FOR ADMINISTRATIVE ACTION

## SECTION 2. THE FUNDAMENTAL PROCEDURAL CATEGORIES OF ADMINISTRATIVE ACTION: RULEMAKING AND ADJUDICATION

### b. The Fundamental Statute

#### NOTES ON THE HISTORY OF THE APA

**Add at the end of Note 2, p. 244:**

The Notre Dame Law Review hosted a symposium called History of the APA and Judicial Review in February 2023, with a keynote address by Justice Kavanaugh. Scholars presenting on the APA's history offered additional competing views to those offered in this Note. See Emily Bremer, The Administrative Procedure Act: Failures, Successes, and Danger Ahead, 98 Notre Dame L. Rev. 1873, 1875–76 (2023) (arguing that the APA's structure for adjudication has failed because "the statute did not, as is typically assumed, settle deep-seated disagreement about the need for or essential content of uniform minimum procedural requirements for adjudicatory hearings"); Evan D. Bernick, Movement Administrative Procedure, 98 Notre Dame L. Rev. 2177, 2179 (2023) (arguing that "the APA was shaped by a pluralist conception of democracy as interest-group competition; fear of communism; a southern congressional veto on social and economic legislation from which people of color might have benefited; and the elite bar's values and interests"); William N. Eskridge, Jr. & John Ferejohn, The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking, 98 Notre Dame L. Rev. 1893, 1904 (2023) (positing that the APA represents a "deep compromise reflect[ing] the practical needs of the citizenry devastated by the Great Depression, changing demography and views within the legal profession, the nation's transformative experience during World War II, and the entrenchment of a generous delegation doctrine and deferential approach to interpretation by the New Deal Court"); Noah A. Rosenblum, Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration, 98 Notre Dame L. Rev. 2143, 2170 (2023) (arguing that the absence of constraints on the President in the APA illustrates a consensus when the APA was adopted that the President was not a "runaway actor with his own agenda" but rather "Congress's ally, working with courts and the legislature to make the administrative state more accountable and efficacious").

#### NOTES ON INTERPRETING THE APA

**Add at the end of Note 1, p. 246:**

For a broad overview of methodological approaches to the APA, including not only the Supreme Court's varying modes of interpretation but also those of the lower courts and administrative law scholars, see Christopher J. Walker & Scott T. MacGuidwin, Interpreting the Administrative Procedure Act: A Literature Review, 98 Notre Dame L. Rev. 1963 (2023).

**Add to Note 4, p. 252, after paragraph on Perez v. Mortgage Bankers Ass'n:**

And in a concurring opinion in United States v. Texas, 143 S.Ct. 1964 (2023) (Supp. pp. 38, 45, 47, 55, 53), Justice Gorsuch, joined by Justices Thomas and Barrett, questioned the common practice of vacatur on the basis that the APA's reference to "set aside" is more naturally read as meaning "disregard" rather than "vacate." Id. at 1981. But see Ronald M. Levin, Vacatur, Nationwide

Injunctions, and the Evolving APA, 98 Notre Dame L. Rev. 1997 (2023) (arguing that vacatur is consistent with the language and legislative background of the APA). Kristin E. Hickman and Mark R. Thomson consider a variety of additional doctrines that may be in jeopardy with the emphasis on a textualist approach in Textualism and the Administrative Procedure Act, 98 Notre Dame L. Rev. 2071 (2023).

## SECTION 3. CONSTRAINTS ON AN AGENCY'S OPTION TO USE EITHER ADJUDICATION OR RULEMAKING

### NOTES ON THE CHENERY DECISIONS

**Add at the end of Note 1, p. 265:**

See also Calcutt v. FDIC, 143 S.Ct. 1373 (2023) (holding that the Sixth Circuit erred in upholding an FDIC decision on alternative grounds once it concluded that the agency had erred).

**Add at the end of Note 2, p. 266:**

See also Gary Lawson & Joseph Postell, Against the Chenery II "Doctrine," 99 Notre Dame L. Rev. (forthcoming 2024) (arguing that constitutional concerns involving due process and subdelegation counsel in favor of a presumption against, rather than for, agencies' ability to make law through adjudication).

**Add at the end of Note 5, p. 270:**

(d) CONNOR RASO, CONTROL OVER LITIGATION AND AGENCY RULEMAKING, REG. REV. (Jan. 30, 2023):[1] "Consider two laws. Under the first law, the agency controls whether and where to bring lawsuits for noncompliance with the law and when to settle those suits. The agency has a full opportunity to express its views to the court in these cases. Under the second law, private parties can initiate suits on their own against other private parties for violating the law. The agency need not participate in the suit and may not even know about it. In this case, the agency risks having a court interpret the statute in a way that is unfavorable to its programmatic objectives or policy preferences, with the agency having much less control than in the first situation. The difference between these two situations presents an important and underappreciated factor shaping how agencies issue rules interpreting the laws that they are charged with administering. All else equal, agencies are more likely to write more detailed and prescriptive rules when they have less influence over how and when their statutes will be litigated. . . . In the first situation, where the statute is only enforceable by the agency, the agency has . . . less need—all else equal—to write highly prescriptive rules that attempt to shape how private parties and courts apply the law. Instead, it can choose to fill in the details of the law over time on a case-by-case basis."

**Add at the end of Note 6, p. 271:**

The Supreme Court granted certiorari in Jarkesy at the end of the October 2022 Term. SEC v. Jarkesy, 2023 WL 4278448 (June 30, 2023) (Supp. pp. 25, 32, 36, 39). For an evaluation of the tradeoffs involved in agencies' decisions to bring enforcement actions in federal courts as opposed to developing policy through rulemaking, see Chris Brummer, Yesha Yadav, & David Zaring, Regulation by Enforcement, 96 S. Cal. L. Rev. (forthcoming 2023).

[1] https://www.theregreview.org/2023/01/30/raso-control-over-litigation-and-agency-rulemaking/.

## SECTION 4. RULEMAKING AND ADJUDICATION IN CONTEXT: PUBLIC ADMINISTRATION AND THE TOOLS OF GOVERNMENT

### NOTES ON PUBLIC ADMINISTRATION AND THE TOOLS OF GOVERNMENT

**Add at the end of Note 5, p. 288:**

For additional views on the importance of effective administration and calls for reorienting the fields of administrative law and democracy to account for that importance, see Emily Bremer, Power Corrupts,[2] and Richard H. Pildes, The Neglected Value of Effective Government, The Election Law Handbook (Eugene Mazo ed. forthcoming 2024).

[2] https://ssrn.com/abstract=4375200.

# CHAPTER IV:
# RULEMAKING

## SECTION 1. INTRODUCTION

**Add at the end of Note 1, p. 293:**

In July 2023, Congress amended § 553(b)(1)–(3), adding a new fourth element to the notice requirement: that agencies post on regulations.gov a link to a brief, plain-language summary of each proposed rule. See Providing Accountability Through Transparency Act of 2023, Pub. L. No. 118–9 § 2 (July 25, 2023). For more on regulations.gov, see Casebook p. 365 (Note 4) and p. 368 (Note 7). For more on this recent amendment, see the addition for Casebook p. 336, Supp. p. 10.

**Add at the end of Note 3, p. 295:**

See also Christopher J. Walker & Shoba Sivaprasad Wadhia, Assessing Visions of Democracy in Regulatory Policymaking, 21 Geo. J. L. & Pub. Pol'y (forthcoming 2023) (arguing that notice-and-comment rulemaking is superior to other modes of regulatory policymaking from the perspective of democratic accountability).

**Add at the end of Note 5, p. 299:**

For an additional argument that the FTC does not have statutory authority to promulgate antitrust rules, see Thomas W. Merrill, Antitrust Rulemaking: The FTC's Delegation Deficit, 75 Admin. L. Rev. 277 (2023).

## SECTION 3. THE REQUIREMENTS OF § 553 NOTICE-AND-COMMENT RULEMAKING

### b. Notice

**Add at the end of Note 1, p. 335:**

In February 2023, the Biden Administration began a traditional notice-and-comment rulemaking on long-term school nutrition standards (including added sugars, milk, whole grains, and sodium) for school breakfast and lunch programs by issuing an NPRM. The Department of Agriculture extended the comment period once; it closed in May. According to the Unified Agenda, a final rule is expected in April 2024. The proposed rule and around 100,000 comments can be found online.[1]

**Add at the end of Note 3, p. 336:**

In the most recent modification of the APA's text, Congress amended § 553(b)(1)–(3) to add a new fourth element to the notice requirement: "The notice shall include . . . (4) the Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language, that shall be posted on the Internet website under section 206(d) of the E-Government Act of 2002 (44 U.S.C. 3501 note) (commonly known as regulations.gov)." See Providing Accountability Through Transparency Act of 2023, Pub. L. No. 118–9 § 2 (July 25, 2023). The bill passed on a unanimous basis in both the House and Senate. The Senate Report explained: "[T]he public's ability to offer useful feedback through comments is dependent upon the clarity and simplicity of the proposal, especially for parties who may

[1] https://www.regulations.gov/document/FNS-2022-0043-0001.

not be experts in the particular subject of the rule. Therefore, this bill offers a uniform and universally accessible standard for agencies to better communicate their intended policies to the public." S.Rep. No. 28, 118th Cong., 1st Sess. 2 (2023). To what extent do you think that this amendment will accomplish the legislation's goal?

## c. An Opportunity to Comment and a Concise General Statement of a Rule's Basis and Purpose

### NOTES ON THE PAPER HEARING

**Add at the end of Note 6, p. 353:**

Are deliberative materials part of the administrative record (i.e., the record for review)? In a case of first impression, the Ninth Circuit recently held that they are not and therefore that they do not need to be included in a privilege log. BLUE MOUNTAINS DIVERSITY PROJECT V. JEFFRIES, 72 F.4th 991 (9th Cir. 2023): "The District of Columbia Circuit . . . has held that deliberative materials are generally not part of the [administrative record] absent impropriety or bad faith by the agency. We agree. Our holding rests on two well-settled principles governing judicial review of agency action under the APA. First, 'the whole record,' 5 U.S.C. § 706, is ordinarily the record the agency presents. Like other official agency actions, an agency's statement of what is in the record is subject to a presumption of regularity. Thus, barring clear evidence to the contrary, we presume that an agency properly designated the Administrative Record. Second, we assess the lawfulness of agency action based on the reasons offered by the agency. Deliberative documents, which are prepared to aid the decision-maker in arriving at a decision, are ordinarily not relevant to that analysis. Because deliberative materials are not part of the administrative record to begin with, they are not required to be placed on a privilege log. We agree, however, with the D.C. Circuit that a showing of bad faith or improper behavior might justify production of a privilege log to allow the district to determine whether excluded documents are actually deliberative. But, [the plaintiff] does not assert any misconduct by the [agency], nor does it contend that specific documents were improperly classified as deliberative."

The Ninth Circuit also refused to supplement the administrative record (AR) in that case: "We place a thumb on the scale against supplementation of the AR, and [the plaintiff] has not demonstrated how the inclusion of 'over two thousand pages that the [agency] had included in the 2016 AR,' would identify and plug holes in the [AR]. Because [the plaintiff] has not met its heavy burden to show that the additional materials sought are necessary to adequately review the [agency]'s decision, the district court acted within its discretion in denying the motion to supplement the AR."

**Add a new Note 10, p. 354:**

(10) ***Access to Data and Prejudice with Hybrid Rulemaking Mandates: A Recent Example.*** Oil and gas producers challenged a safety standard issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) mandating the installation of "remote-controlled or automatic shut-off valves in some types of new or replaced gas and hazardous liquid pipelines." The agency operated under "hybrid rulemaking procedures laid out in the APA and the pipeline safety laws." In GPA MIDSTREAM ASS'N V. DEPARTMENT OF TRANSPORTATION, 67 F.4th 1188 (D.C. Cir. 2023), the D.C. Circuit determined that the agency failed to make critical information available and that the failure was prejudicial: "The PHMSA said nothing about the practicability or the costs and benefits of the standard for gathering pipelines until promulgating the final rule, even though the law required it to address those subjects when publishing the proposed rule for public comment and peer review. . . . We have long held that, in order to provide the public with a meaningful chance of participating in the rulemaking process, as required by the APA, an agency must disclose critical information justifying the proposal in time for public comment. The procedures required by the pipeline safety laws are more specific and still more demanding. As noted above, the PHMSA must submit for peer review and make available for public comment a risk assessment identifying 'the costs and benefits associated with the proposed standard.' . . . The petitioners do not dispute the rule was a logical outgrowth of the proposal;

they cheerfully concede they knew regulated gathering lines would be regulated unless carved out. Their gripe is with the agency's failure to do an adequate risk assessment in time for peer review and public comment. . . . To show prejudice, the petitioners must raise a credible argument about the merits of the rule. They need not show the agency, had it adhered to the procedural requirements of the law, would have reached a different result. They need only show they had something useful to say. We are convinced the petitioners do have something useful to say to the PHMSA, and that they raise a credible argument on the merits."

## NOTES ON THE OPPORTUNITY TO PARTICIPATE

**Add new Notes 6–7, p. 359:**

(6) ***Biden Administration's Efforts on Participation.*** After soliciting feedback through listening sessions and written comments, OIRA issued guidance to agencies in July 2023, Broadening Public Participation and Community Engagement in the Regulatory Process.[2] The memorandum notes two "actions agencies should take": "(1) Leveraging the release of the biannual Unified Agenda of Federal Regulatory Actions to discuss agencies' past, ongoing, and upcoming participation and engagement with the public, including underserved communities. (2) Ensuring that agency policies on communication during the rulemaking process promote accessible, equitable, and meaningful participation and engagement, especially early on in setting regulatory priorities and in the early stages of rule development before a proposed regulation is issued for comment." It also "discusses leading practices for participation and engagement that agencies can consider using" and "discuss[es] existing exemptions and flexibilities available to agencies under the Paperwork Reduction Act of 1995 to facilitate public participation and community engagement in the regulatory process." Bridget Dooling emphasizes the importance of engaging wide public participation "upstream" in the rulemaking process, including regulatory planning in the Unified Agenda. Adding Public Engagement Upstream, Notice & Comment Blog (June 2, 2023).[3]

(7) ***Data Access on Remand.*** In AMERICAN PUBLIC GAS V. DEPARTMENT OF ENERGY, 72 F.4th 1324 (D.C. Cir. 2023), the D.C. Circuit disapproved of the agency not making certain data available for comment in its proceedings after a court remand: "Generally, the technical studies and data upon which the agency relies must be revealed for public evaluation. This requirement remains binding on the agency even after our Court has remanded a rule for further explanation, including when an agency determines that additional fact gathering is necessary on remand. While we have recognized certain exceptions to this requirement, none apply here.

"First, the DOE contends that notice and comment was unnecessary on remand because the Final Rule merely 'advanced a hypothesis and some supporting explanation,' and the Supplement [to the record] 'provided additional support for that hypothesis . . . but . . . did not reject or modify the hypothesis such that additional comment was necessary.' . . . Here, the new studies and datasets referenced in the Supplement did not address alleged deficiencies in any pre-existing data. Instead, the additional materials referenced in the Supplement provided entirely new information critical to the Agency's determination of life-cycle costs. . . .

"Second, the DOE argues that it should be excused from the APA's notice and comment requirements because Petitioners have failed to demonstrate that they were prejudiced by the lack of opportunity to comment. . . . Petitioners make several objections to the studies and datasets cited in the Supplement. . . . These objections provide enough uncertainty as to whether the Petitioners' comments would have influenced the Agency's decision had they been given the opportunity to comment. Further, Petitioners had no knowledge of the new information until the Supplement was published and had no subsequent opportunity to provide comments. Under these circumstances,

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[2] https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf.

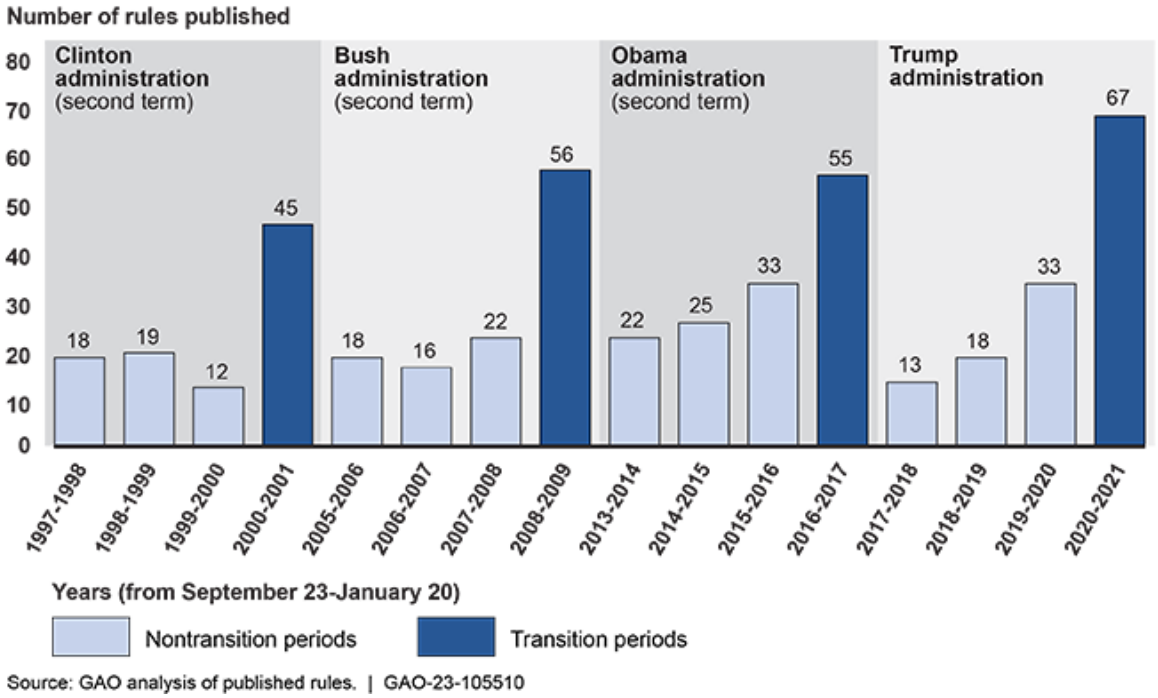
[3] https://www.yalejreg.com/nc/adding-public-engagement-upstream/.

Petitioners have demonstrated prejudice from the DOE's failure to provide notice and comment. . . ." Should the paper hearing mandates differ after judicial review?

## NOTES ON CURRENT TRENDS AND WRINKLES IN NOTICE-AND-COMMENT RULEMAKING

**Add at the end of Note 1, p. 364:**

The GAO recently "compared agency rulemaking in the last 120 days of the Trump administration to rulemaking in nontransition periods." It found: "In the Trump transition period, agencies published about 3 times more rules. During the 3 prior administrations' transition periods, agencies published about 2.5 times more rules." Federal Rulemaking: Trends at the End of Presidents' Terms Remained Generally Consistent across Administrations, GAO-23-105510 (Jan. 31, 2023). Consider this visualization of the data:



Source: GAO analysis of published rules. | GAO-23-105510

The Regulatory Studies Center examined the Biden Administration's Spring 2023 Unified Agenda: "The Spring 2023 Unified Agenda contains a total of 3,666 agency actions, including 317 economically significant actions—those with an expected annual effect of more than $100 million as defined in Executive Order 12866. It lists actions by stage of development: 2,617 are active (the next agency action is expected within 12 months), 582 are long-term (beyond 12 months), and 467 are completed (rules finalized or withdrawn since the previous Unified Agenda was published)." It continued: "The number of economically significant actions published in the Spring 2023 Unified Agenda is substantially higher than those published in previous administrations' fifth Agenda—a phenomenon also observed for previous Agendas. The increase is mostly driven by the number of active rulemakings, partially attributable to continued post-COVID actions such as the Paycheck Protection Program." Zhoudan Xie, Regulatory Studies Center, Biden's Spring 2023 Unified Agenda (June 20, 2023).[4]

[4] https://regulatorystudies.columbian.gwu.edu/bidens-spring-2023-unified-agenda.

**Add a new Note 8, p. 368:**

(8) ***Artificial Intelligence in Rulemaking.*** While the precise implications of artificial intelligence (AI) on rulemaking procedures are still unclear, new scholarship explores how the technology may be used to generate comments, process feedback on pending rules, consider that feedback in drafting a final rule, and to find existing rules that should be modified or withdrawn.

First, AI can be used to generate persuasive comments for submission. Generative AI tools—tools that don't just use AI to detect patterns but use AI to generate content based on a user prompt—can write comments from any assigned perspective. One scholar asked ChatGPT, a generative AI tool, to write a public comment within a certain word limit objecting to a proposed rule from the Department of Labor on classifying independent contractors. Mark Febrizio, Regulatory Studies Center, Will Chat GPT Break Notice and Comment for Regulations? (Jan. 13, 2023).[5] This use of AI raises many questions: Can ChatGPT generate comments unique enough to bypass bot detection systems? How should agencies consider these comments in comparison to those drafted by individuals or organizations? Should there be any limitation on the tools and resources concerned stakeholders can use to participate in notice-and-comment rulemaking? How will mass generation of AI-drafted comments shift participation from less well-resourced individuals—could it amplify underrepresented voices or will it drown them out?

How do AI-generated comments compare with mass comment campaigns? Bridget C.E. Dooling & Mark Febrizio, Brookings Inst., Robotic Rulemaking (Apr. 4, 2023):[6] "If generative AI adds to the richness of mass comments, that could be an improvement over many mass comment campaigns which tend to express up-or-down sentiment. Personal stories woven into comments can sometimes shed light on problems that agencies did not anticipate—the question is whether generative AI is poised to actually elucidate such richness or simply fake it." Do you worry about "made-up" information in AI-generated comments?

Febrizio, supra, notes that currently "[e]ven with an unlimited supply of AI-generated content, a malicious user would quickly hit a bottleneck when trying to submit those comments on agency rules. The web user interface was not designed for submitting large batches of comments, and the reCAPTCHA system is built to preclude computer-based tools from accessing and making numerous submissions in an automated manner."

Second, AI tools can be used to process comments. In recent years, online platforms have reduced the cost of participating in a rulemaking and therefore increased the number of comments received by agencies. Processing this "mega-participation" is resource-intensive, especially for rules that generate widespread public attention. Most agencies receive comments through regulations.gov, the federal website that compiles and allows agencies to track comments from interested parties. Regulations.gov does not use AI tools to accomplish these functions, but the technology may be increasingly helpful when searching for useful feedback in an extenstive collection of comments. Certain agencies also receive comments dominated by scientific, medical, or technical facts that could be summarized by AI for easier processing. For all agencies, AI could be used to identify duplicate comments, summarize the volume of comments on a particular issue, and sort comments by general sentiment. See David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, & Mariano-Florentino Cuéllar, Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies (2020) (report to ACUS).[7] Following the Federal Communication Commission's second net neutrality rulemaking, for example, Broadband for America employed a natural language processing (NLP) AI tool to analyze the text in the nearly 22 million comments received by the agency. NLP tools study human language constructs and can assign sentiments to commonly used words and analyze word ordering to predict meaning.

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5 https://regulatorystudies.columbian.gwu.edu/will-chatgpt-break-notice-and-comment-regulations.

6 https://www.brookings.edu/articles/robotic-rulemaking/.

7 https://www.acus.gov/document/government-algorithm-artificial-intelligence-federal-administrative-agencies.

This technology is helpful for detecting bots by identifying unnatural language and sorting comments by their position on net neutrality.[8]

Third, the use of AI to process comments and respond to them in the final rule may implicate the agency's duty to "consider and respond to significant comments." Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 96 (2015). For example, as Eli Nachmany describes, consider an agency that uses an AI tool to draft its final rule, prompting it as follows: "Defend the proposed rule against all of the most significant contentions raised in these comments. Make the best arguments why the proposed rule should not change." An AI model could do this, but will the final rule be "frustratingly general?" Eli Nachmany, Artificial Intelligence, Modernizing Regulatory Review, and the Duty to Respond to Public Comments, Notice & Comment Blog (May 30, 2023).[9] Does an AI tool's consideration of points raised in the comments count as adequate consideration by the agency itself? Caselaw suggests that an agency's response must be substantive enough to facilitate judicial review, but is unclear if an agency using AI in drafting a final rule could meet this standard. How would this fit with the Morgan cases (Casebook pp. 506–07, 552–54)?

Finally, AI tools could help agencies prioritize existing regulations for modification or repeal. The Deloitte Center for Government Insights applied "text analytics" in examining "all 217,714 sections of the 2017 CFR . . . [to] identif[y] targets of opportunity for regulatory reform." It determined that "[t]wo-thirds of all federal government regulations currently on the books have never been updated." Bill Eggers, Daniel Byler, & Jitinder Kohli, Using Advanced Analytics to Drive Regulatory Reform (2017).[10] Large language models (LLMs) could also be used in retrospective reviews of rulemaking. ACUS recently offered recommendations for this purpose in Recommendation 2023–3, Using Algorithmic Tools in Retrospective Review of Agency Rules, 88 Fed. Reg. 42681 (July 3, 2023).

The White House is paying attention to AI. Executive Order 14094 (Modernizing Regulatory Review) directed OIRA to "consider guidance or tools to modernize the notice-and-comment process, including through technological changes. These reforms may include guidance or tools to address mass comments, computer-generated comments (such as those generated through artificial intelligence), and falsely attributed comments." Section 2(d).

## SECTION 4. EXCEPTIONS TO § 553 NOTICE-AND-COMMENT REQUIREMENTS

### a. The Good Cause Exception

**Add at the end of Note 3, p. 383:**

The agencies responsible for the religious and conscientious exceptions to contraception coverage that were at issue in Little Sisters recently published a Notice of Proposed Rulemaking to amend those earlier regulations. Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. 7236 (Feb. 2, 2023). What factors do you think went into the decision to request comment on proposed rules rather than to promulgate an IFR relying on the good cause exception (as the agencies had previously done) or to promulgate an IFR and then quickly follow up with a final final rule (as Little Sisters appears to bless as a general matter)?

**Add at the end of Note 4, p. 384:**

(For recent questioning of the legality of vacatur itself, see Justice Gorsuch's opinion concurring in the judgment in United States v. Texas, 143 S.Ct. 1964 (2023) (Supp. p. 55).)

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[8] http://www.emprata.com/emp2017/wp-content/uploads/2017/08/FCC-Restoring-Internet-Freedom-Comments-Analysis.pdf.

[9] https://www.yalejreg.com/nc/artificial-intelligence-modernizing-regulatory-review-and-the-duty-to-respond-to-public-comments-by-eli-nachmany/.

[10] https://www2.deloitte.com/us/en/pages/public-sector/articles/advanced-analytics-federal-regulatory-reform.html.

**Add at the end of Note 5, p. 386:**

MARK SEIDENFELD, in RETHINKING THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING IN LIGHT OF INTERIM FINAL RULES, 75 Admin. L. Rev. (forthcoming 2023), argues: "The thesis of this Article is that courts should recognize an expanded good cause exception to encourage agencies to issue IFRs except in circumstances where the issuance of an IFR is unlikely to result in a net increase in social welfare. This thesis essentially balances the benefit of an IFR in minimizing regulatory delay against any detrimental effects the IFR might have on the ultimate FFR ['final final rule'] adopted. The Article goes on to describe the factors that might lead to issuance of IFR that results in a net loss of welfare and hence if present, would counsel against use of the good cause exception even if the agency issues an IFR. These factors consider the benefits of the IFR as a substitute for the regulatory status quo ante that would otherwise continue unless and until the agency completed a notice and comment rulemaking as well as the effects the IFR is likely to have on the quality of the ultimate FFR issued by the agency. In short, this Article's bottom line recommends that courts consistently soften the traditional reluctance to allow agencies to use IFRs instead of pre-promulgation notice and comment rulemaking when the issuance of an IFR and the resulting ultimate FFR are likely to best serve the public interest." Do you agree?

## b. The Guidance Exception: Interpretive Rules and Policy Statements

### NOTES ON DOCTRINAL TESTS AND JUDICIAL REVIEW

**Add at the end of Note 1, p. 405:**

Is there another category beyond legislative rules and nonlegislative rules? In Democratizing Administrative Law, 73 Duke L.J. (forthcoming 2024), Joshua D. Blank and Leigh Osofsky argue that "agency explanations of the law," especially for a non-sophisticated public, do not fit comfortably into either category. "An unstated assumption regarding the fundamental categories of legislative rules, interpretive rules, and policy statements is that, when agencies engage with the public, the agencies are describing what the law is, or what the agencies believe it to be. In contrast, when agencies offer simplified explanations of law to the general public, the agencies are frequently not describing the law as they believe it to be," because "the actual law is often too complex for the general public to understand." If this additional category exists, is it a problem? Blank and Osofsky "argue that administrative law's failure to address communications between agencies and the general public reflects a broader 'democracy deficit' " and propose "a framework for infusing agency communications with the general public with the same administrative law and democratic values as those that apply in interactions between agencies and sophisticated parties." What do you think?

**Add at the end of Note 6, p. 414:**

What about statements of agency leaders—should courts treat them as equivalent to presidential statements in evaluating whether a purported policy statement is actually binding? In Texas v. EEOC, 633 F.Supp.3d 824 (N.D. Tex. 2022), Judge Kacsmaryk concluded that an HHS guidance document was actually an improperly issued legislative rule based in part on a statement by HHS Secretary Becerra describing that document as "making clear that denials of health care based on gender identity *are illegal*, as is restricting doctors and health care providers from providing care because of a patient's gender identity," even though the document itself used more tentative language. Id. at 841. Do you agree with this approach?

## NOTES ON THE EXCEPTION'S SCOPE, DESIRABILITY, REQUIREMENTS, AND RECOMMENDATIONS

**Add at the end of Note 4, p. 425:**

The contrast between these critiques of guidance offered during the Trump Administration and the more positive stance during the Biden Administration might suggest that attitudes towards guidance vary by political party, with Republicans skeptical of the value of guidance documents and Democrats more accepting. What, then, do you make of the following approaches towards guidance offered in the Department of Labor during the Trump and Biden Administrations? Rebecca Rainey, Biden's Wage and Hour Division Shies Away From Opinion Letters, Bloomberg Law (Nov. 21, 2022): "The US Labor Department's wage arm is taking a more cautious approach to a certain type of regulatory guidance, vexing employers and management-side attorneys who say the directives are helpful for decoding complex labor laws. So far, the DOL's Wage and Hour Division hasn't issued a single opinion letter, which the agency historically has used to explain its interpretation of how the law would apply in a specific situation in response to a request from a business. . . . That caution . . . represents a stark departure from the Trump DOL. The latter issued dozens of opinion letters ranging from obscure issues like insect farm worker overtime eligibility to some of the most contentious questions in the employment landscape. . . . Management-side attorneys say the shift away from providing opinion letters can make it harder for businesses to navigate the law. . . . Instead of opinion letters, . . . the agency has issued a handful of fact sheets and 'toolkits' targeted toward helping the public and employers understand how to comply with the law."

In another issue area but picking up similar themes, see Joshua D. Blank & Leigh Osofsky, The Inequity of Informal Guidance, 75 Vand. L. Rev. 1093 (2022) (arguing that informal guidance in the tax system "systematically disadvantages[s] taxpayers who lack access to sophisticated advisors" and reframing "informal tax guidance . . . as a social justice issue").

# c. The Other Exceptions

## NOTES ON EXCEPTIONS FOR INTERNAL AGENCY MATTERS, PROPRIETARY MATTERS, AND MILITARY AND FOREIGN AFFAIRS

**Add at the end of Note 1, p. 435:**

In AFL-CIO v. NLRB, 57 F.4th 1023 (D.C. Cir. 2023), a panel of the D.C. Circuit divided over how to frame the appropriate standard for identifying a valid procedural rule and about whether the NLRB's 2019 revisions to the agency's rule governing union representation elections qualified as procedural. JUDGE PILLARD, joined by CHIEF JUDGE SRINIVASAN: "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. These precedents represent this court's current and consistent approach." Id. at 1034–35. Applying this standard, the court held that "three of the [five] challenged provisions—those regarding employers' production of voter lists, the delayed certification of election results, and who may serve as election observers—fall outside the scope of the procedural exception" because they "all substantively alter the rights or interests of parties." Id. at 1035. The court held that the other two "challenged provisions—those regarding pre-election litigation of certain issues and a related change to election scheduling—are procedural rules within the meaning of section 553(b)(A)" because both "are primarily directed toward internal agency operations." Id.

JUDGE RAO, dissenting: "While nodding to our more recent cases, the majority primarily evaluates whether the 2019 Rule has something like a 'substantial impact' on the parties. The majority begins its analysis of each rule by looking at the degree to which 'substantial' rights or interests are impacted. This is the wrong threshold question—at the outset we consider whether a rule regulates primary or secondary conduct. A rule is presumed procedural when it regulates only secondary conduct and the mere fact that such a rule impacts legal rights does not make it a substantive rule. The majority avoids the language of substantial impact, but uses synonyms that amount to the same thing, considering whether the Rule direct[ly] impact[s],' 'burdens,' 'affects,' 'curtails,' or 'trenches on' various rights and interests. The majority's analysis is directly at odds with this circuit's more recent decisions. We have repeatedly held that a 'substantial impact' or 'substantial burden' does not make a rule substantive. . . . To summarize, for a procedural rule to fit within the APA's exception to notice and comment requirements, it must regulate secondary conduct and not enshrine a substantive value judgment." Applying this standard, Judge Rao concluded, "The 2019 Rule does not encode a substantive value judgment, and it governs only secondary conduct by establishing procedures for representation elections. . . . Applying the correct standards, the critical fact for the challenged provisions in the 2019 Rule is that they do not change the 'substantive standards' governing who wins and who loses elections, or who is part of the bargaining unit. . . . The five provisions are properly classified as procedural, and therefore notice and comment was not required for any of them."

What do you make of the disagreement between the majority and the dissent about the framing of the appropriate standard? About whether the challenged provisions are properly classified as procedural? Is it relevant that the NLRB's 2019 rule modified an earlier rule promulgated in 2014 with notice and comment, although the agency in 2014 had said that "none of this process was required by law," because any substantive changes could have been made through adjudication and any procedural changes fell within the housekeeping exception? Id. at 1029. Is it relevant that the NLRB "has adjusted the rules for representation elections more than three dozen times without notice and comment since 1961"? Id. at 1051 (Rao, J., dissenting).

## SECTION 5. GETTING RULEMAKING STARTED

### b. Public Petitions for Rulemaking

**Add a new Note 5, p. 451:**

(5) ***Biden Administration's Directive on Petitions.*** President Biden's April 2023 Executive Order 14094 (Modernizing Regulatory Review) addressed rulemaking petitions in Section 2(b): "To inform the regulatory planning process, executive departments and agencies (agencies) shall, to the extent practicable and consistent with applicable law: (i) clarify opportunities for interested persons to petition for the issuance, amendment, or repeal of a rule under 5 U.S.C. 553(e); (ii) endeavor to respond to such petitions efficiently, in light of agency judgments of available resources and priorities; and (iii) maintain, subject to available resources, a log of such petitions received, and share with the Administrator of the Office of Information." What do you see as the advantages and disadvantages of centralized review of rulemaking petitions?

### c. Negotiated Rulemaking

**Add a new Note 5, p. 455:**

(5) ***Student Loans and Negotiated Rulemaking.*** After the Supreme Court's ruling in Biden v. Nebraska (Supp. pp. 33, 41, 45, 48), which invalidated the Biden Administration's loan forgiveness program under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), the Department of Education announced that it would pursue similar relief under a different statute, the Higher Education Act (HEA), which requires negotiated rulemaking. From the Department of Education's published "intent to establish a negotiated rulemaking committee": "Section 492 of the

HEA requires that, before publishing any proposed regulations to implement programs authorized under title IV of the HEA, the Secretary must obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from the public, the Secretary conducts negotiated rulemaking to develop the proposed regulations. We announce our intent to develop proposed title IV regulations by following the negotiated rulemaking procedures in section 492 of the HEA. We intend to select negotiators from nominees of the organizations and groups that represent the interests significantly affected by the proposed regulations. To the extent possible, we will select individual negotiators from the nominees who reflect the diversity among program participants, in accordance with section 492(b)(1) of the HEA." 88 Fed. Reg. 43069 (July 6, 2023).

## d. Regulatory Planning and Review

**Add at the end of Note 1, p. 456:**

The Senate confirmed Revesz in December 2022. The previous four Administrations had their first confirmed OIRA administrator in place much earlier. For an interesting profile of Revesz, see Coral Davenport, You've Never Heard of Him, but He's Remaking the Pollution Fight, N.Y. Times (May 28, 2023).

**Add at the end of Note 2, p. 459:**

In April 2023, President Biden issued Executive Order 14094 (Modernizing Regulatory Review), which made a number of changes to Executive Order 12866. First, it increased the threshold for an economically significant action from $100 million to $200 million and included an adjustment provision for inflation every three years. Second, it changed the fourth category of "significant regulatory action" to include "actions that raise legal or policy issues for which *centralized review would meaningfully further* the President's priorities or the principles set forth in this Executive order *as specifically authorized in a timely manner by the Administrator of OIRA in each case*." (emphasis added). These two items should decrease the number of actions OIRA reviews. For more on significant regulatory actions, see the addition for Casebook p. 462, Supp. p. 19. Third, it directed the OIRA Administrator to make meetings under Executive Order 12866 more inclusive. Fourth, it instructed OMB to revise its Circular A-4 (last updated in 2003) for how agencies should conduct their regulatory analysis under the order to, among other things "recognize distributive impacts and equity, to the extent permitted by law." For more information, see new Note 10, Casebook p. 478, Supp. p. 20, and new Note 10, Casebook p. 492, Supp. p. 21.

### NOTES ON THE MECHANICS OF EXECUTIVE ORDER 12866

**Replace the definition of "significant regulatory action," in Note 2, p. 462:**

> "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:
>
> (1) have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities;
>
> (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, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

Executive Order 14094, 88 Fed. Reg. 21879 (April 11, 2023).

**Add at the end of Note 2, p. 464:**

In Biden's second year, 3167 rules were published in the Federal Register. OIRA completed 490 reviews. The percentages in the Table slightly overstate the percentage of rules reviewed by OIRA as the agency typically reviews a rule twice (though not generally in the same year). At the time this Supplement was compiled, the OIRA dashboard was not showing counts of economically significant rules.

**Add at the end of Note 9, p. 469:**

The Biden Administration repealed this 2018 agreement in June 2023. In the latest agreement, OIRA and the Treasury Department specify that all tax regulatory actions are excluded from review under Executive Order 12866 (an even wider exclusion than existed before the 2018 deal).[11] See Stuart Shapiro, Biden Breaks With Precedent by Giving Up Some Authority, The Hill (June 19, 2023).

## NOTES ON ONGOING ISSUES WITH EXECUTIVE ORDER 12866 AND POTENTIAL CHANGES

**Add a new Note 10, p. 478:**

(10) ***Executive Orders 14091 and 14094 (and Related Actions).*** In February 2023, President Biden issued Executive Order 14091 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government), following up on Executive Order 13985, discussed in Note 9. The latest order instructed the fifteen cabinet departments and eight other executive agencies, including the Social Security Administration, to establish "an Agency Equity Team within their respective agencies to coordinate the implementation of equity initiatives and ensure that their respective agencies are delivering equitable outcomes for the American people." It also established the White House Steering Committee on Equity to "coordinate Government-wide efforts to advance equity." And it ordered, starting in September 2023, "each agency head" annually to "submit an Equity Action Plan to the Steering Committee."

In April 2023, as noted above (see the addition for Casebook p. 459, Supp. p. 19), President Biden issued Executive Order 14094 (Modernizing Regulatory Review), which made a number of changes to Executive Order 12866. It changed the definition of "significant regulatory action" in two ways—increasing the threshold for an economically significant action from $100 million to $200 million (and including an adjustment provision for inflation every three years) and changing the fourth category of "significant regulatory action" to include "actions that raise legal or policy issues for which *centralized review would meaningfully further* the President's priorities or the principles set forth in this Executive order as *specifically authorized in a timely manner by the Administrator of OIRA* in each case" (emphasis added). These changes to Section 3(f) of Executive Order 12866 should decrease (at least somewhat) the number of actions being reviewed by OIRA—by increasing the threshold for economic actions and by mandating that the OIRA Administrator sign off on discretionary review (previously OIRA staff could make that determination). And Executive Order 14094 directed OMB to revise its Circular A-4 (last updated in 2003) for how agencies should conduct their regulatory analysis under the order to "recognize distributive impacts and equity, to the extent permitted by law," among other items. The White House released a draft update to Circular A-4 the same day as the executive

[11] https://www.whitehouse.gov/wp-content/uploads/2023/06/Treasury-OMB-MOA.pdf.

order, and solicited comments through June 20, 2023.[12] For more on the draft update, see new Note 10, Casebook p. 492, Supp. p. 21.

Executive Order 14094 also called for "affirmative promotion of inclusive regulatory policy and public participation." It directed agencies to clarify their petitioning procedures (and to log petitions to share with OIRA if requested). See new Note 5, Casebook p. 451, Supp. p. 18, for more on rulemaking petitions. And it instructed that agencies should "proactively engage interested or affected parties, including members of underserved communities; consumers; workers and labor organizations; program beneficiaries; businesses and regulated entities; those with expertise in relevant disciplines; and other parties that may be interested or affected." OIRA issued guidance in July 2023, Broadening Public Participation and Community Engagement in the Regulatory Process.[13] See new Note 6, Casebook p. 359, Supp. p. 12 for more on the OIRA guidance.

Executive Order 14094, in addition, pushed OIRA to make its Executive Order 12866 meetings more inclusive, by encouraging "access for meeting requesters who have not historically requested such meetings" and "discouraging meeting requests that are duplicative of earlier meetings with OIRA regarding the same regulatory action by the same meeting requesters." It also encouraged greater transparency on these meetings. OIRA provided draft guidance and solicited comment on these issues. For more on meetings, see the update to Casebook p. 501, Supp. p. 22.

Finally, Executive Order 14094 called on OIRA to "consider guidance or tools to modernize the notice-and-comment process, including through technological changes. These reforms may include guidance or tools to address mass comments, computer-generated comments (such as those generated through artificial intelligence), and falsely attributed comments."

For a range of views on these items, see Symposium on Modernizing Regulatory Review, Notice & Comment Blog (May–June 2023).[14] For a nice overview, see Connor Raso, Brookings Inst., The Biden Administration's Recent Regulatory Review and Analysis Changes (May 18, 2023).[15]

## NOTES ON COST-BENEFIT ANALYSIS AND RISK ASSESSMENT

**Add a new Note 10, p. 492:**

(10) ***Biden Administration's Proposals on Cost-Benefit Analysis.*** Executive Order 14094 instructed OMB to revise its Circular A-4 (last updated two decades ago) for how agencies should conduct their regulatory analysis. It noted: "Regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with Executive Order 12866, Executive Order 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law." The White House released a 91-page draft update to Circular A-4 the same day as the executive order and solicited comments through June 20, 2023.[16]

Among other things, the draft update proposes:

- Agencies use a default discount rate of 1.7 percent ("the real (inflation-adjusted) rate of return on long-term U.S. government debt"), a meaningful decrease from the 3 percent current default discount rate in many cases—making future benefits appear larger in cost-benefit calculations;

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12 https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf.

13 https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf.

14 https://www.yalejreg.com/topic/symposium-on-modernizing-regulatory-review/.

15 https://www.brookings.edu/articles/overview-and-analysis-of-the-biden-administrations-recent-regulatory-review-and-analysis-changes/.

16 https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf.

- Agencies assess whether to consider global effects of regulations (widening the "geographic scope of analysis")—increasing benefits for environmental actions, for example;
- Agencies employ, in more contexts, a post-statutory baseline (instead of a pre-statutory baseline)—allowing agencies to treat the relevant statute as a floor;
- Agencies pay more attention to "difficult to quantify" benefits and costs—because this seems to apply more to benefits, allowing wider inclusion of benefits; and
- Agencies consider examining the distribution of regulatory action on particular groups (instead of focusing only on the overall net benefits)—permitting agencies "to conduct a benefit-cost analysis that applies weights to the benefits and costs accruing to different groups in order to account for the diminishing marginal utility of goods when aggregating those benefits and costs."

There are other parts of the draft update, including agency treatment of uncertainty and risk aversion.

For enthusiastic views of these changes, see K. Sabeel Rahman, Modernizing Regulatory Review, Reg. Rev. (May 15, 2023)[17]; Daniel Farber, Making Regulation More Equality-Friendly, Notice & Comment Blog (May 25, 2023).[18]

For critical takes on the draft update, see Susan E. Dudley, Circular Reasoning?, Notice & Comment Blog (May 25, 2023);[19] Kristin E. Hickman, OMB Should Not Accommodate Treasury/IRS's Dubious Baseline Preferences, Notice & Comment Blog (June 5, 2023);[20] Mary Sullivan, Distributional Weights Should Be Dropped from the Draft Circular A-4, Notice & Comment Blog (June 1, 2023).[21]

## SECTION 6. FAIRNESS AND BIAS IN THE DECISIONMAKING PROCESS

### a. Ex Parte Contacts

**Add at the end of Note 6, p. 501:**

Executive Order 14094 (Modernizing Regulatory Review) also addressed Executive Order 12866 meetings: "Public trust in the regulatory process depends on protecting regulatory development from the risk or appearance of disparate and undue influence, including in the OIRA review process." To decrease this "risk or appearance," it instructed OIRA both to widen access and curtail it. For the former, it told OIRA to "[p]rovide information to facilitate the initiation of meeting requests regarding regulatory actions under OIRA review from potential participants . . . who have not historically requested such meetings, including those from underserved communities" and to consider broader reforms to encourage access. For the latter, it suggested reforms "discouraging meeting requests that are duplicative of earlier meetings with OIRA regarding the same regulatory action by the same meeting requesters" and the "consolidation of meetings by requester, subject matter, or any other consistently applied factors deemed appropriate to improve efficiency and effectiveness." The directive also encouraged transparency reforms. OIRA published draft guidance the same day, seeking comments.[22] Among other items, the draft guidance notes that OIRA is considering collecting the following information from meeting requesters: "a narrative description . . . of the purpose of the meeting request"; "individuals or organizations that the primary meeting requester may be representing at the time of request"; type of requester ("an individual member of the public; a state,

17 https://www.theregreview.org/2023/05/15/rahman-modernizing-regulatory-review/.

18 https://www.yalejreg.com/nc/making-regulation-more-equality-friendly-by-daniel-farber/.

19 https://www.yalejreg.com/nc/circular-reasoning-by-susan-e-dudley/.

20 https://www.yalejreg.com/nc/omb-should-not-accommodate-treasury-irss-dubious-baseline-preferences-by-kristin-e-hickman/.

21 https://www.yalejreg.com/nc/distributional-weights-should-be-dropped-from-the-draft-circular-a-4-by-mary-sullivan/.

22 https://www.whitehouse.gov/wp-content/uploads/2023/04/ModernizingEOSection2eDraftGuidance.pdf.

local, territorial, or Tribal government; a business or trade association; a union; or a non-profit, among other relevant categorizations"); and "[l]obbyist status." For a critical view on the guidance, see Jamie Conrad, OIRA's Draft Guidance on EO 12866 Meetings, Notice & Comment Blog (May 26, 2023).[23]

**Add a new Note 8, p. 502:**

(8) ***Biden Administration Guidance on Ex Parte Communications and Public Engagement.*** In its July 2023 guidance, Broadening Public Participation and Community Engagement in the Regulatory Process,[24] OIRA addressed agency ex parte policies, warning that some agencies' policies may be too restrictive: "OIRA has heard from members of the public and agencies that in some cases, agency ex parte communications policies—or the interpretation of those policies—may unnecessarily interfere with agencies' outreach and engagement efforts, particularly if these policies are outdated or unnecessarily restrictive. This may present particular obstacles to engagement with communities that do not typically participate in the regulatory process.

"OIRA encourages agencies, in consultation with their agency counsel, to review their policies on communication and outreach for notice-and-comment rulemaking to ensure that ex parte communications policies are consistent with the law and the following principles:

- Agency ex parte communications policies should recognize the importance of early engagement and transparency. Before issuing a proposed rule, agencies may solicit public input and ideas through a range of channels. When engagement occurring before issuance of the proposed rule has a substantive effect on the design of the proposal, for transparency agencies should, in consultation with their counsels, describe in the proposed rule's preamble or in the public docket who the agency engaged with, when, and what information was provided. After a proposed rule has been issued agencies should focus outreach on encouraging participation through the written comment process.
- Agency ex parte communications policies should support proactive outreach by the agency, especially prior to issuing an individual proposed rule when doing so would result in fairer and more equitable treatment. Agency ex parte communications policies should recognize that fairness means paying close attention to members of the public who might be interested in, or affected by, a regulation but who might not otherwise participate in the regulatory process because of the barriers described above (such as knowledge, accessibility, language access, and trust in government). Proactive outreach by the agency may be necessary to hear from certain interested and affected parties before a particular rulemaking, especially members of underserved communities that have not participated in the regulatory process before.

"Where existing policies are not consistent with these principles, OIRA encourages agencies to consider revising them in consultation with their agency counsels. In all cases, OIRA encourages agencies to ensure that agency staff, including staff in regulatory, outreach, communications, and engagement offices, are aware of relevant policies (for instance, through training or other outreach)."

What do you see as the potential attraction and drawbacks of this guidance on ex parte policies?

## b. An Open-Minded Decisionmaker?

**Add at the end of Note 8, p. 510:**

Khan's decision not to recuse from the Meta case generated conflict within the FTC, some of which has recently come to light. The agency's designated ethics official advised that she should recuse, but noted: "I also recognize that reasonable minds may disagree." The general counsel's office said recusal

[23] https://www.yalejreg.com/nc/oiras-draft-guidance-on-eo-12866-meetings-by-jamie-conrad/.

[24] https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf.

was not needed. The Democratic majority at the FTC approved Khan's decision not to recuse. The only Republican member, Christine Wilson, strongly dissented. The conflict apparently "led to Wilson's resignation." Leah Nylen, Lina Khan Rejected FTC Ethics Recommendation to Recuse in Meta Case, Bloomberg News (June 16, 2023). Khan's memorandum on her decision not to recuse was released in June 2023.[25] Do you think the FTC Chair should have recused?

[25] https://www.ftc.gov/system/files/ftc_gov/pdf/d09411_khan_statement_re_meta-within_11-18-2022.pdf.

# CHAPTER V:
# ADJUDICATION

## SECTION 1. THE INSTITUTIONAL FRAMEWORK OF AGENCY ADJUDICATION

**Add a new Note 8, p. 526:**

(8) ***Coming Soon at a Court Near You.*** The SEC, not surprisingly, filed a certiorari petition in the Jarkesy case, 2023 WL 2478988. The petition presented three questions for review:

> 1. Whether statutory provisions that empower the Securities and Exchange Commission (SEC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment.
>
> 2. Whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.
>
> 3. Whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads enjoy for-cause removal protection.

On June 30, 2023, as it broke for its summer recess, the Supreme Court granted the petition. 2023 WL 4278448. Presumably sometime during the 2023–2024 Term of the Court, we will get answers to some or all of these questions (in a case now called SEC v. Jarkesy). For additional discussion of the Jarkesy grant, see Supp. pp. 32, 36, and 39.

## SECTION 2. FORMAL ADJUDICATION

**Add at the end of Note 5, p. 557:**

The Supreme Court granted certiorari in Jarkesy at the end of June 2023. 2023 WL 4278448 (June 30, 2023). See new Note 8, Casebook p. 526, Supp. p. 25, and infra pp. 32, 36, and 39 for additional discussion. One of the questions presented in the petition is whether the independence of the administrative law judges in the case violated Article II. So again, "stay tuned."

**Add a new Note 6, p. 557:**

(6) ***ALJs as a System.*** In many agencies, such as the Department of Agriculture or the SEC, there are only a few ALJs, each handling very discrete matters. But in a few, notably the Social Security Administration, there are a great many—well over a thousand in the SSA—handling recurrent situations. (Ludwig v. Astrue, Casebook p. 541, determining whether a claimant deserves disability payments, is a prime example.) In such a case, the fairness of the system is a matter not only of particular facts—such as the off-the-record comment in Ludwig—but of the structure and pressure of the system as a whole. A recent Washington Post article reported that over the last two fiscal years, the federal courts have remanded for a new hearing 58% of cases that had been appealed to court after a denial of benefits had been upheld by the agency's own internal Appeals Council. Lisa Rein, Judges Rebuke Social Security for Errors as Disability Denials Stack Up, Wash. Post (May 25, 2023). Since most denials are not appealed, one cannot be sure of the overall significance of this statistic; it may simply reflect good case selection by claimants' lawyers. But, according to the article, participants in the system—claimants' lawyers and some ALJs themselves—attribute the high error rate to particular features of the decisional system as a whole. Especially mentioned are ALJ productivity quotas (requiring decisions in so many cases a month) that may lead to hasty decisions; some questioning by superiors of individual ALJs who grant benefits more often than most do, creating a fear of being too generous; and growing agency reliance on the opinions of its own consulting doctors in place of the judgments of doctors who have been treating the claimants. Whatever the rights or wrongs of these claims, they illustrate dimensions of procedural justice that are not well addressed in the APA. Or, to

put the matter in other words, the relationship of ALJs to the agency in which they work is greater than simply their independence (or not) from the particular personnel otherwise involved in the instant case. (For further discussion of this problem, see Casebook pp. 1106–07.)

# SECTION 4. DUE PROCESS AS A SOURCE OF PROCEDURAL RIGHTS IN ADJUDICATION

## c. Due Process and "Private" Administration

### NOTES ON "COMMON LAW DUE PROCESS"

**Add at the end of Note 4, p. 692:**

In "A Timing Update on Title IX Rulemaking" released on its official blog on May 26, 2023, the Department of Education said that it had received over 240,000 comments on the proposed rule.[1] "Carefully considering and reviewing these comments takes time, and is essential to ensuring the final rule is enduring. That is why the Department is updating its Spring Unified Agenda to now reflect an anticipated date of October 2023 for the final Title IX rule." So, as of July 2023: not yet.

[1] https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/.

# CHAPTER VI:
# TRANSPARENCY AND THE INFORMATION AGE

## SECTION 1. INTRODUCTION

**Add at the end of Note 1, p. 699:**

A Bloomberg News analysis of the released White House visitor logs for the first two years of the Biden Administration "found duplications, anomalies and missing names." But the logs also provide insight into the Administration: "Sixteen of the top 20 visitors to Biden himself are Democratic representatives and senators, including [West Virginia Senator Joe] Manchin, a moderate who delayed and ultimately scuttled the president's then-flagship policy bill before helping pass a heavily revised version, the Inflation Reduction Act. Arizona Senator Kyrsten Sinema—another ally famous for breaking ranks—was also a top visitor." Eric Fan & Josh Wingrove, Who's Visiting the White House? The Logs Include 300,000 Names and Are Still Incomplete, Bloomberg News (June 26, 2023). White House officials told House Republicans in January 2023 that such logs were not kept at Biden's Delaware residence after members sought information on visitors after classified documents were found there.

**Add after the first paragraph of Note 2, p. 699:**

In December 2022, the Biden Administration released the Fifth U.S. Open Government National Action Plan,[1] which focuses on five themes: Improve Access to Government Data, Research, and Information; Increase Civic Space to Engage the Public; Transform Government Service Delivery; Counter Corruption and Ensure Government Integrity and Accountability to the Public; and Ensure Equal Justice Under the Law. The plan, "developed in collaboration between the Federal Government and U.S. civil society," noted at the start: "It is . . . imperative that the United States lead by example: to show that democracies can be inclusive, responsive, transparent, and accountable to all their citizens, including by supporting the basic rights necessary for full participation in social, economic, and civic life."

## SECTION 2. SECRET LAW

### NOTES ON ACCESS TO GOVERNMENT DECISIONS

**Add at the end of n. 14, p. 708:**

Since December 2022, ACUS has made several new proactive transparency-related recommendations, including about agency settlement agreements, agency enforcement manuals, and agency legal materials. More information can be found at the provided link.

**Add before the last paragraph of Note 8, p. 716:**

In March 2023, the district court sided with the Department of Justice, finding that the agency could sue to enforce the Presidential Records Act's mandates and that those mandates covered Navarro's personal emails. 2023 WL 2424625. The D.C. Circuit rejected Navarro's application for an emergency stay.

In June 2023, President Trump was indicted by Special Counsel Jack Smith for mishandling classified documents. As the Presidential Records Act does not provide for criminal penalties, the indictment centers on other statutes, including the Espionage Act. President Biden also had classified documents in a garage area storage unit in his Delaware residence (and in an old office) from his time

[1] https://open.usa.gov/national-action-plan/5/.

as Vice President. Attorney General Merrick Garland appointed Special Counsel Robert Hur to investigate further. NARA has asked all former Presidents and Vice Presidents to scour their files for classified material.

NARA also issued new mandates in January 2023 clarifying that the retention of electronic material extends beyond email to include text and similar messages under the Federal Records Act.

**Add at the end of Note 9, p. 717:**

In January 2023, the Supreme Court issued a statement and report on its investigation of the Dobbs leak, noting that "the team has to date been unable to identify a person responsible by a preponderance of the evidence."[2]

**Add at the end of Note 11, p. 719:**

See Lewis Kamb, Some U.S. Government Agencies Are Testing Out AI to Help Fulfill Public Records Requests, NBC News (Aug. 1, 2023) (noting that "the State Department, the Justice Department and the Centers for Disease Control and Prevention . . . have tried out or are now testing machine-learning models and algorithms to help search for information in repositories holding billions of government records" and that "[o]fficials from multiple agencies also have separately tested an AI prototype called 'FOIA Assistant' that's being developed by a federally funded research group as a possible model for dealing with record-high numbers of new requests and growing backlogs of existing ones.").

## SECTION 3. FREEDOM OF INFORMATION LEGISLATION

### a. FOIA Overview

**Add at the end of Note 2, p. 724:**

The Department of Justice issued guidance on the Garland memorandum one year later, covering the application of the "foreseeable harm" standard and communication with requesters.[3] On the first, the guidance specified: "The foreseeable harm analysis should be made on a case-by-case basis and agencies should individually consider the applicable harms for each record or similar category of records." On the second, it noted: "Another key element of administering FOIA with a presumption of openness is working with requesters in a spirit of cooperation and effectively communicating agency FOIA determinations."

**Add at the end of Note 3, p. 725:**

In FY 2022, the 120 federal agencies covered by FOIA received 928,353 requests, beating the previous record in FY 2018.[4] DHS again received the most—539,807 (almost 60 percent of the total). The next four agencies were the same as in FY 2021. These five agencies received more than 80 percent of all the submitted requests in FY 2022. Of the processed requests in FY 2022, 21.5 percent asked for records that did not exist, 17.4 percent were granted in full, and 39.1 percent were granted in part. As noted previously, disclosure rates would look worse if you also included the number of pending requests in the denominator. Exemptions were similar to earlier years. In FY 2022, agencies relied on Exemption 6 (29.8% of all claimed exemptions), Exemption 7(C) (26.6%), and Exemption 7(E) (25.2%) the most.

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2 https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf.

3 https://www.justice.gov/oip/oip-guidance-applying-presumption-openness-and-foreseeable-harm-standard.

4 https://www.justice.gov/media/1289846/dl?inline.

## b. FOIA's General Characteristics

### NOTES ON COMPARING FOIA AND TRADITIONAL APA

**Add at the end of Note 4, p. 747:**

The parties have since jointly dismissed the case.

## c. FOIA in Operation

### NOTES ON EXEMPTIONS PROTECTING THE OPERATIONAL NEEDS OF AGENCIES AND THE PRESIDENT INSIDE AND OUTSIDE OF FOIA

**Add at the end of Note 2, p. 759:**

The federal government initially issued a NCND response to Bloomberg News's FOIA request for President Trump's declassification order (which Trump cited after classified material was found at his Mar-a-Lago residence), if it existed. The government later told Bloomberg that each of the relevant agencies "possesses no records responsive to your request" about whether Trump had issued such an order. Jason Leopold, Trump 'Standing Order' to Declassify Not Found by DOJ, Intelligence Agency, Bloomberg News (June 29, 2023).

The D.C. Circuit recently upheld a NCND response to a FOIA requester who sought "records [from various intelligence agencies] about the unmasking of members of President Trump's campaign and transition team . . . to uncover what he alleges was inappropriate intelligence surveillance for political purposes." The panel stressed that if an agency properly makes a NCND response (using the older term, Glomar), it does not need to search for relevant records. SCHAERR V. DEPARTMENT OF JUSTICE, 69 F.4th 924 (D.C. Cir. 2023): "An agency properly issues a Glomar response when its affidavits plausibly describe the justifications for issuing such a response, and these justifications are not substantially called into question by contrary record evidence. Because the Glomar procedure protects information about even the existence of certain records, an agency need not search for responsive records before invoking it. Here, the Agencies have properly invoked Glomar on the grounds that the information [the requester] seeks is protected by FOIA Exemptions One and Three, and nothing in the record suggests the Agencies acted in bad faith in issuing their responses."

**Add at the end of Note 4, p. 760:**

Before dismissing the case on the grounds that it should not have agreed to hear it, In re Grand Jury, 143 S.Ct. 543 (2023), the Supreme Court had been expected to decide how the privilege applies to "dual-purpose" communications. Specifically, the Ninth Circuit decision below required the legal advice to be *the* "primary purpose" for the communication. Other courts have used a "because of" test or *a* "significant purpose" test, which covers more communications.

### NOTES ON PRIVACY AND DISCLOSURE

**Add at the end of Note 3, p. 776:**

The D.C. Circuit reversed in CREW V. DOJ, 58 F.4th 1255 (D.C. Cir. 2023): "In sum, the Bureau does not attempt to show that its contractors' names are 'commercial' in and of themselves, but instead reasons by example to suggest the contractors will suffer commercial harm on disclosure. Heeding the Supreme Court's command to give FOIA exemptions a 'narrow compass,' Milner [Casebook p. 734], we reaffirm that withheld information must be commercial in and of itself to qualify for withholding under Exemption 4; that disclosure might cause commercial repercussions does not suffice to show that information is 'commercial' under Exemption 4. Because the Bureau impermissibly relies solely on the downstream opposition that the pentobarbital contractors might suffer on disclosure of their names, we need not now decide whether or under what other circumstances a business name might itself be

'commercial . . . information' for purposes of Exemption 4. . . . On remand, the district court may require supplemental affidavits to help it determine whether the contractors' names demonstrably pertain to the exchange of goods or services or the making of a profit, such that they may be withheld under Exemption 4. What matters is whether the contractors' names in and of themselves are commercial or noncommercial, not whether the names might reveal the existence of a contract likely to attract public scrutiny."

## NOTES ON FOIA COSTS, DELAYS, AND LITIGATION

**Replace the first indented paragraph in Note 1, p. 778:**

For FY 2022, the DOJ reported: "5268.33 'full-time FOIA staff' were devoted to the administration of the FOIA throughout the government. The total estimated cost of all FOIA related activities across the government was $584,752,705.30. Nearly 93% ($543,794,471.90) of total costs were attributed to the administrative processing of requests and appeals by agencies. Seven percent (7%) ($40,958,233.39) was reported to have been spent on litigation-related activities. By the end of the fiscal year, agencies reported collecting a total of $2,192,645.36 in FOIA fees. The FOIA fees collected in FY 2022 amounts to less than 0.4% of the total costs related to the government's FOIA activities."[5]

**Add after the first paragraph of Note 2, p. 779:**

At the end of FY 2022, there were 206,720 backlogged requests, more than a one-third jump from FY 2021. DOJ had the most, reporting close to 65,000 such requests. DHS had over 52,000. For reporting agencies, the average processing time for "simple track requests" was 41 days, about 8 days more than the preceding year. As before, there is no average provided for complex submissions: "Similar to FY 2021, the percentage of complex requests processed in fewer than 40 days increased by nearly 7% in FY 2022. A total of 73.44% of complex requests were processed in 100 days or fewer."[6]

**Add at the end of Note 3, p. 781:**

The Department of Justice's 2022 FOIA Litigation and Compliance Report notes that its searches of PACER reveal that 797 cases were filed that year, up from 608 the previous year. Spreadsheets of the filed cases as well as of decisions issued in 2022 can be found on DOJ's website.[7]

# d. The Reverse FOIA Action

## NOTES ON THE ABILITY OF SUPPLIERS TO ENSURE THE PROTECTION OF INFORMATION THEY PROVIDE THE GOVERNMENT

**Add at the end of n. 41, p. 788:**

In February 2023, House Education and the Workforce Committee Chair Virginia Foxx wrote to the Department of Labor, asserting that the Department had not given contractors "sufficient information and time to object to having their confidential data released" and demanded more time for companies to do so. In April 2023, the Department of Labor "released 19,289 federal contractor EEO-1 forms [from 2016 to 2020]" but only from "companies that didn't object to their information being released." The agency announced that it would "decide later whether objectors' arguments are valid and . . . release the remaining forms later this year." J. Edward Moreno & Nicole Sadek, Big-Name Federal Contractors Dodge DOL Diversity Data Release, Bloomberg Law (April 25, 2023).

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5 https://www.justice.gov/media/1289846/dl?inline.

6 https://www.justice.gov/media/1289846/dl?inline.

7 https://www.justice.gov/oip/2022-litigation-and-compliance-report.

**Add at the end of the first paragraph of Note 4, p. 789:**

The Fifth Circuit recently issued a decision in a reverse-FOIA case, finding that the district court did not adequately consider "the 'relevant factors' of Exemption 4 laid out in Argus" when it affirmed the agency's decision to release documents related to material a tax consulting firm had provided to the government. Ryan, LLC v. Department of Interior, 2022 WL 17250186 (5th Cir. 2022).

## SECTION 4. OTHER TRANSPARENCY STATUTES: SUNSHINE ACT, FEDERAL ADVISORY COMMITTEE ACT

### NOTES ON THE SUNSHINE ACT AND FEDERAL ADVISORY COMMITTEE ACT

**Add at the end of Note 1, p. 795:**

The D.C. Circuit recently determined "that the Sunshine Act does not apply to [the U.S. International Development Corporation] because a majority of its Board members serves ex officio by virtue of their appointments to other positions." Center for Biological Diversity v. U.S. International Development Finance Corporation, 2023 WL 4378303 (D.C. Cir. 2023).

## SECTION 5. INFORMATION COLLECTION AND DISCLOSURE AS REGULATION

### a. Information Demands and Inspections

**Add before b., p. 806:**

The EPA reported that its inspections jumped more than 80 percent in FY 2022 (from just under 3200 to just over 5860), "reflecting the agency's pledge to ratchet up enforcement particularly in disadvantaged communities long suffering from pollution." Dean Scott, EPA Inspections Rising Under Biden Administration, Agency Says, Bloomberg Law (Dec. 16, 2022).

# PART 4:
# THE AGENCY AND THE CONSTITUTION

# CHAPTER VII:
# AGENCY RELATIONSHIPS WITH CONGRESS, THE PRESIDENT, AND THE COURTS: THE STRUCTURAL CONSTITUTION

## SECTION 2. CONGRESS AND ADMINISTRATIVE AGENCIES

### a. Delegation of Regulatory Power

#### (1) The Constitutionality of Regulatory Delegations

**Add at the end of Note 9, p. 858:**

The Supreme Court will have two nondelegation arguments before it in its 2023–2024 term, but neither is the main challenge of the case at issue. In Consumer Financial Protection Bureau v. Community Financial Services Association, 143 S.Ct. 978 (Feb. 27, 2023) (cert. granted), two associations of financial lenders have raised the argument that Congress can't constitutionally delegate to the CFPB the authority to set its budget. But the Fifth Circuit held that the associations had forfeited this argument on appeal, and the case before the Court really centers on the charge, upheld by the Fifth Circuit, that the statutory funding mechanism for the CFPB violates the Appropriations Clause. (It's worth noting that the Second Circuit rejected the nondelegation argument on the merits, CFPB v. Law Offices of Crystal Moroney, 63 F.4th 174, 183–84 (2d Cir. 2023), but the petition for certiorari recently filed in that case asserts only the Appropriations Clause claim. For more on these cases, see Supp. p. 35.) The second case presenting a nondelegation argument is SEC v. Jarkesy, in which the Court recently granted certiorari, 2023 WL 4278448 (June 30, 2023). As noted in the Casebook (pp. 525, 1019, 1090, 1093) the Fifth Circuit invalidated the administrative adjudication at issue in Jarkesy on multiple grounds, one of which was that the SEC's freedom to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine. For additional discussion of Jarkesy, see Supp. pp. 25, 36, and 39.

Nondelegation challenges continue to surface in lower courts, however, and one might make its way up to the Supreme Court. Several such suits involve challenges to Section 254 of the 1996 Telecommunications Act. Congress has long required that adequate telecommunications services be provided to all people in the United States at reasonable rates. Section 254 elaborates on this universal service mandate in several ways, including by creating a Federal State Joint Board to make recommendations for services that should be covered, instructing the FCC to issue rules that respond to these recommendations, and requiring the Joint Board and FCC to base their policies on several listed universal service principles such as ensuring quality and reasonable rates, providing access to advanced services and in rural and high-cost areas, and having telecommunications providers make equitable and nondiscriminatory contributions. The section also defines universal service as "an evolving level of telecommunications services that the Commission shall establish periodically" and directs the FCC, in setting that level, to consider "the extent to which" particular telecommunications services are "essential to education, public health, or public safety; . . . have . . . been subscribed to by a substantial majority of residential customers; . . . are being deployed in public telecommunications networks by telecommunications carriers; and . . . are consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254. And it requires carriers to contribute to the mechanisms the FCC establishes to support universal service. Exercising its Section 254 authority, the FCC has established a universal service fund to which carriers must contribute, with the amount of their contributions

being based on projections and data that the nonprofit corporation that runs the fund submits to the FCC on a quarterly basis for its approval.

In the Sixth Circuit, telecommunications carriers along with consumers and a nonprofit organization claimed that Section 254's funding requirement violated the nondelegation doctrine, because it "neither capped the amount that the FCC may raise in contributions for the Fund nor imposed a formula for how to calculate the contributions to the Fund," offered no "meaningful definitions" and had "standardless" principles. The Sixth Circuit rejected this claim, describing the universal services principles as "[t]ogether . . . provid[ing] comprehensive and substantial guidance and limitations on how to implement Congress's universal-service policy, and in turn, how the FCC funds the USF." The appeals court also emphasized the specified factors that limit the FCC in deciding which kinds of telecommunications services are supported by the fund, limits on who contributes to the fund, and specifications on who benefits from the fund. It concluded "that [Section] 254(b)'s principles, Congress's numerous details and limitations on the FCC's implementation of the USF throughout the remainder of [Section] 254, the statute's purpose, and Congress's history of pursuing universal service clearly articulate an intelligible principle and sufficiently limit the FCC's discretion." Consumers' Research v. FCC, 67 F.4th 773, 788–95 (6th Cir. 2023). The D.C. Circuit reached the same conclusion, Rural Cellular Ass'n v. FCC, 685 F.3d 1083, 1091 (D.C. Cir. 2012), as did a panel of the Fifth Circuit, but the Fifth Circuit recently vacated that decision and took the case en banc, Consumers' Research v. FCC, 63 F.4th 441, vacated, 72 F.4th 107 (5th Cir. 2023), which may lead to a circuit split on the question.

The Sixth Circuit also rejected the challengers' claim that the role played by the private corporation in administering the fund violated the private nondelegation doctrine, concluding that the private corporation was "subordinate to the FCC and performs ministerial and fact-gathering functions." Consumers Research, 67 F.4th at 795–96. By contrast, the Fifth Circuit upheld a private delegation challenge to the Horseracing Integrity and Safety Act, which granted a private authority power to promulgate rules relating to thoroughbred horseracing, emphasizing that the Federal Trade Commission could determine whether the authority's proposed rules were consistent with the Act, but could not review substance of rules themselves or modify the rules, and the authority had no obligation to accept any of the FTC's recommendations. National Horsemen's Benevolent and Protective Ass'n v. Black, 53 F.4th 869 (5th Cir. 2022).

### (3) Alternative Approaches to Nondelegation

**Add at the end of Note 2, p. 871:**

The latest installment in the Court's development of the major questions doctrine came in BIDEN V. NEBRASKA, 143 S.Ct. 2355 (2023) (Supp. pp. 41, 45, 48), where the Court held that the Department of Education lacked statutory authority to adopt its student debt forgiveness plan. CHIEF JUSTICE ROBERTS analogized the plan to actions invalidated in its other recent major questions decisions, noting that: (1) the "Secretary has never previously claimed powers of this magnitude" under the statute at issue, the HEROES Act; (2) the "economic and political significance of the Secretary's action is staggering by any measure," given the nearly half-a-trillion dollar price-tag for the plan and the sharp debates it had engendered; and (3) "the sweeping and unprecedented impact of the Secretary's loan forgiveness program" made it "more accurate to describe the program as being in the wheelhouse of the House and Senate Committees on Appropriations." Id. at 2372–75. The majority also rejected the government's argument that the major questions doctrine applies only to agency regulatory actions, not agency actions involving benefits, noting that "[a]mong Congress's most important authorities is its control of the purse. It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations. As we observed in West Virginia [v. EPA], experience shows that major questions cases 'have arisen from all corners of the administrative state,' and administrative action resulting in the conferral of benefits is no exception to that rule. 142 S.Ct. [2587,] 2608 [(2022)]."

Interestingly, the majority opinion invoked the major questions doctrine only after a lengthy discussion of the Act's text, in which the majority concluded that the plan did not fall under the terms of the Secretary's authority to "waive or modify" statutory and regulatory provisions. In dissent, JUSTICE KAGAN argued that "[w]hen a court is confident in its interpretation of a statute's text, it spells out its reading and hits the send button. Not this Court, not today. This Court needs a whole other chapter to explain why it is striking down the Secretary's plan. And that chapter is not about the statute Congress passed and the President signed, in their representation of many millions of citizens. It instead expresses the Court's own 'concerns over the exercise of administrative power.' " Id. at 2396. By contrast, in a lengthy concurrence JUSTICE BARRETT argued that the major questions doctrine should not be viewed as a clear statement rule or broader substantive canon of interpretation that put a thumb on the scales against broad legislative delegations of authority to agencies. In her view, the doctrine is better understood as rooted in "common sense" and "emphasiz[ing] the importance of context when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation." Id. at 2376–78. The Biden Administration announced several actions in response to the decision, including a proposal for negotiated rulemaking on the government's ability to provide debt relief under the Higher Education Act, see Supp. p. 18.

In a further development of the major questions doctrine by lower courts, the Ninth Circuit held in MAYES V. BIDEN, 67 F.4th 921 (9th Cir. 2023), that the major questions doctrine does not apply to actions by the President: "The Major Questions Doctrine is motivated by skepticism of agency interpretations that 'would bring about an enormous and transformative expansion in regulatory authority without clear congressional authorization' [quoting Util. Air. Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)]. Those concerns are not implicated here as the President does not suffer from the same lack of political accountability that agencies may, particularly when *the President* acts on a question of economic and political significance. . . . If we were to determine that the Major Questions Doctrine prevents the President from exercising lawfully delegated power, we would be rewriting the Constitution's Faithfully Executed Clause in a way never contemplated by the Framers. We decline to do so." Id. at 932–33. It further held that, even if the major questions doctrine did apply to presidential actions, the doctrine would not invalidate an executive order directing agencies to require federal contractors to comply with the federal government's COVID Task Force's guidance as a condition of federal contracts. Id. at 934–35. The Ninth Circuit acknowledged that the Fifth, Sixth, and Eleventh Circuits disagreed with its view about the scope of the doctrine and the sustainability of the contractor requirement under it. See Supp. p. 44 for additional discussion of these cases.

What do these further permutations of the major questions doctrine suggest about whether it is serving as a nondelegation surrogate? Note that despite the Nebraska majority's extended focus on statutory interpretation, Chief Justice Roberts defends the application of major questions doctrine to appropriations expressly in separation of powers terms. Do you agree that agency actions involving government benefits should be treated the same for major question purposes as agency actions involving regulations? If you have read the discussion of delegation of adjudicatory authority in Section 4 of Chapter VII, you'll have seen that Supreme Court doctrine and commentary often treat public benefits cases as not raising the same separation of powers cases as regulatory cases. Should the majority have engaged with this jurisprudence and scholarship in analyzing whether and how major questions doctrine applies to benefit cases? And what about the Ninth Circuit's exclusion of presidential actions from the major questions doctrine's ambit: Do you agree with its reasoning? Do you think the Supreme Court would?

## b. Congressional Control of Regulatory Policy

### (1) Legislation and Vetoes

**Add at the end of Note 2, p. 899:**

Notwithstanding Democratic control of the Senate, in April 2023 a Congressional Review Act resolution passed Congress that would have overturned a Labor Department rule that allows investment decisionmakers to consider environmental, social, and governance factors when selecting investments. The resolution prompted President Biden to exercise his first veto of legislation. See Alexandra Walsh, On Anti-ESG Resolution, Biden Issues First Veto, Reg. Rev. (April 24, 2023).[1] The resolution offers anecdotal support for a recent empirical paper that studies all resolutions disapproving of agency regulations introduced over a twenty-six-year period and concludes that Democrats as well as Republicans make regular use of the CRA, and further argues that resolutions are consistently pursued outside of presidential transitions. See Steven J. Balla, Bridget C.E. Dooling, & Daniel R. Pérez, Beyond Republicans and the Disapproval of Regulations (Jan. 21, 2023).[2]

### (2) Appropriations and Spending

**Add at the end of Note 4, p. 905:**

The Supreme Court granted the government's petition for certiorari and will hear the case in its 2023–2024 term. CFPB v. Consumer Financial Servs. Ass'n, 143 S.Ct. 978 (Feb. 27, 2023). In the meantime, the Second Circuit declined to follow the Fifth Circuit and held in a similar challenge that the CFPB's funding scheme did not violate the Appropriations Clause. CFPB v. Law Offices of Crystal Moroney, 63 F.4th 174 (2nd Cir. 2023). According to the Second Circuit, "[t]he Clause 'was intended as a restriction upon the disbursing authority of the Executive department' and 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.' Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). . . . Because the CFPB's funding structure was authorized by Congress and bound by specific statutory provisions, we find that the CFPB's funding structure does not offend the Appropriations Clause. . . . [W]e cannot find any support for the Fifth Circuit's conclusion in Supreme Court precedent. . . . We likewise find no support for the Fifth Circuit's reasoning in the Constitution's text. The Appropriations Clause states that '[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.' U.S. Const. art. I, § 9, cl. 7. Nothing in the Constitution, however, requires that agency appropriations be 'time limited' or that appropriated funds be drawn from a particular 'source,' " as the Fifth Circuit required. 63 F.4th at 181–83. (As noted above, Supp. p. 32, the Second Circuit also rejected the claim that the CFPB's funding scheme violated the nondelegation doctrine.)

# SECTION 3. THE PRESIDENT, ADMINISTRATIVE AGENCIES, AND THE EXECUTIVE BRANCH

## b. Appointment and Removal

### (1) Appointment and Confirmation

**Add at the end of Note 3, p. 955:**

The Supreme Court denied Arthrex's petition for certiorari of the Federal Circuit's decision on remand. 143 S.Ct. 2493 (2023).

[1] https://www.theregreview.org/2023/04/24/walsh-on-anti-esg-resolution-biden-issues-first-veto/.

[2] https://regulatorystudies.columbian.gwu.edu/beyond-republicans-and-disapproval-regulations.

## NOTES ON THE STRUCTURE AND REACH OF THE APPOINTMENTS CLAUSE

**Add at the end of Note 3, p. 961:**

In MCINTOSH V. DEPARTMENT OF DEFENSE, 53 F.4th 630 (Fed. Cir. 2022), the Federal Circuit in a decision by Judge Hughes concluded that the Merit Systems Protection Board's structure and the way its administrative judges are appointed and issue decisions meant that the AJs are not principal officers, unlike the administrative patent judges at issue in Arthrex: "The MSPB itself is made up of three members who are appointed by the President with the advice and consent of the Senate, making them principal officers. The Board's administrative judges, who are appointed under the Board Chairman's general authority, adjudicate cases and issue initial decisions under the Board's appellate jurisdiction. An administrative judge's initial decision becomes the final decision of the Board unless a party appeals or the Board reopens the case on its own motion. . . . The Board's statutory structure mirrors that of the PTAB following the Arthrex remedy: the Board has the unfettered authority to review decisions rendered by administrative judges, and so even if the administrative judges are protected by the § 7513 removal standard, they are 'subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate,' just as administrative patent judges are following the Arthrex remedy. Arthrex, 141 S. Ct. at 1988. We hold that the Board's administrative judges are not principal officers."

## (2) The Removal Power

## NOTES ON THE IMPLICATIONS FOR INDEPENDENT AGENCIES

**Replace the final sentence of the penultimate paragraph of Note 3, p. 1019, with the following:**

The Supreme Court granted the SEC's petition for certiorari on whether the for-cause removal protection for ALJs violates Article II, as well as on the Fifth Circuit's additional holdings that the SEC administrative enforcement proceeding violated the Seventh Amendment and the SEC's ability to choose to between administrative adjudication or a judicial proceeding for enforcement violated the nondelegation doctrine. See SEC v. Jarkesy, 2023 WL 4278448 (June 30, 2023). The Court will hear the case in its 2023–2024 term. For more on the Jarkesy grant, see Supp. pp. 25, 32, and 39.

**Replace the final sentence at the end of Note 3, p. 1019, with the following:**

The Supreme Court resolved this split in its 2022–2023 term, holding that such a constitutional challenge can be brought directly in federal district court. See Axon Enterprise, Inc. v. FTC, 143 S.Ct. 890 (2023), Supp. pp. 38, 48.

**Add at the end of Note 4, p. 1020:**

If a statute provides for a term of office for an agency head but does not otherwise address removability, should it be read as providing removal protection? No, said the D.C. Circuit in SEVERINO V. BIDEN, 71 F.4th 1038 (D.C. Cir. 2023), at least if there is nothing about the functions of the agency in question that suggests that Congress intended to limit the President's removal authority. At issue in Severino was the Administrative Conference of the United States or ACUS—an agency likely familiar to you from the many citations to its reports and recommendations on administrative procedure and other aspects of agency functioning in the pages of the casebook. The statute creating ACUS provides for it to be overseen by a Council, consisting of ACUS's Chair and ten members, half government employees and half private individuals, each of whom serves a three-year term. Severino was appointed to the Council four days before President Biden took office. When Biden removed him

shortly thereafter, Severino sued, arguing that he was statutorily protected from removal by his three-year term in office. In an opinion written by JUDGE MILLETT, the D.C. Circuit disagreed:

"Under the Constitution, the 'President's removal power is the rule, not the exception.' Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2206 (2020). . . . Because of the background presumption that the President may remove anyone he appoints, Congress must make it clear in a statute if it wishes to restrict the President's removal power. . . . In construing statutes, the Supreme Court has recognized only two ways Congress can send such a clear signal. First, Congress may impose a removal restriction in the plain text of a statute. Second, Congress may clearly indicate its intent to restrict removals through the statutory structure and function of an office. Congress did neither when it created the Council. . . . The statutory text nowhere imposes conditions or constraints on either the timing of or reasons for removal of Council members. . . . When used in federal appointment statutes, the word 'term' has a long-settled meaning of limiting a person's tenure in office, not investing the person with a guaranteed minimum period of service." The appellate court noted that "under Humphrey's Executor's and Wiener's binding precedent, when Congress assigns to an agency quasi-judicial or quasi-legislative functions that are deemed to be operationally incompatible with at-will Presidential removal, that can be a relevant signal that Congress meant for members of that agency to be shielded from Presidential removal, even without an explicit textual statement to that effect." Here, however, "Congress designed the Conference to be a forum inside the Executive Branch for shop talk and collaboration with external experts. It has no adjudicatory or legislative features that would clearly signal a need for some measure of independence from Presidential control." As evidence of Congress believing that "Presidential influence is completely consistent with the Conference's wholly advisory and consultatory mission," the court pointed to the fact that Congress had "made roughly half of the Conference's membership, and up to half of the members of the Council, employees of the Executive Branch." Concurring, Judge Walker agreed that there was no need in this case to determine whether a "broad reading" of Humphrey's Executor and Weiner survived later decisions such as Seila Law, but indicated that in his view "only a very narrow reading of those cases is still good law."

**Add at the end of Note 5, p. 1021:**

Recent empirical scholarship adds to the complexity of debates over independent agencies. In THE INDEPENDENT AGENCY MYTH, 108 Cornell L. Rev. (forthcoming 2023), NEAL DEVINS and DAVID C. LEWIS argue that current political and ideological fights over independent agencies are deeply misguided. Based largely on extensive surveys in 2014 and 2020 of 554 political appointees and 4,776 career executives, they conclude "that the independent agency model no longer works; most independent agencies are not particularly expert, not particularly influential, and their policies and policy-making processes are subject to (not insulated from) elected branch oversight and manipulation." They trace this "mismatch between the presuppositions of the independent agency design to the realities of the politics of the last 40 years," including party polarization; expansionist presidential tendencies; and the administrative state's much greater size and complexity than during the Progressive Era, which mean that "Congress and the White House lack the time and resources necessary to attend to smaller independent agencies," leading to these agencies being "effectively orphaned. . . . Other changes in government also hamper today's independent agencies; for example, agencies are no longer self-contained fiefdoms; instead, an agency's power and reputation are tied to its ability to coordinate with other agencies." Devins and Lewis maintain that "the fight now playing out in the Supreme Court is being driven by rhetorical priors, not actual facts. Democratic interests are not well served by the independent agency design and Republicans will not see a restoration of presidential power if the Supreme Court eviscerates independent agencies." They "call for a moratorium on new independents . . .[and] for orphaned independent agencies to be refashioned as executive branch agencies" but not for "elimination of politically salient major independents," out of concerns about unintended consequences.

Meanwhile, BRIAN D. FEINSTEIN and DAVID ZARING, in DISAPPEARING COMMISSIONERS, 109 Iowa L. Rev. (forthcoming 2024), highlight another reality of contemporary independent commissions that has not received much attention in public debates: "the disappearing associate commissioner."

Feinstein and Zaring note that "associate commissioners' mean tenure dropped by one-third in the past generation, from 6.0 years in the 1980s to 3.9 in the 2010s." They trace this decline to a variety of factors, including that "legal changes have empowered chairs and agency staff at associate commissioners' expense; political actors' enhanced monitoring of commissions has reduced their discretion; and polarization has split once-deliberative bodies along party lines." They argue that these shorter tenures "generate sea changes in commissioners' *functional* independence."

### c. Presidential Direction of Regulatory Outcomes

**Add at the end of Note 1, p. 1027:**

The Eleventh Circuit subsequently vacated the district court's decision, holding that the end of the COVID-19 national emergency rendered the case moot. Health Freedom Defense Fund v. Biden, 71 F.4th 888 (11th Cir. 2023).

### (2) The Legal Basis for Presidential Directive Authority

**Add at the end of Note 5, p. 1043:**

For a recent examination of early incarnations of a presidential approval power and argument that the historical evidence does not support claims that the founders understood Article II to grant the President general authority to approve the decisions of subordinates, see Christine Kexel Chabot, The President's Approval Power, Fordham L. Rev (forthcoming 2023).

### (3) Presidential Directive Authority in Context

**Add at the end of Note 2, p. 1049:**

The question of presidential control over enforcement arose in United States v. Texas, 143 S.Ct. 1964 (2023), in which Texas and Louisiana sought to challenge the Biden Administration's failure to enforce the immigration laws adequately. A lopsided 8–1 majority held that the states lacked standing to bring the suit, but for different reasons. (See Supp. pp. 45, 47, 53.) Dissenting, Justice Alito strongly rejected the majority's argument that the Executive's exercise of prosecutorial discretion was unreviewable as "improperly inflating the power of the Executive" and violating the separation of powers: "Congress enacted a law that requires the apprehension and detention of certain illegal aliens whose release, it thought, would endanger public safety. The Secretary of DHS does not agree with that categorical requirement. He prefers a more flexible policy. And the Court's answer today is that the Executive's policy choice prevails unless Congress, by withholding funds, refusing to confirm Presidential nominees, threatening impeachment and removal, etc., can win a test of strength. Relegating Congress to these disruptive measures radically alters the balance of power between Congress and the Executive, as well as the allocation of authority between the Congress that enacts a law and a later Congress that must go to war with the Executive if it wants that law to be enforced." Id. at 2001–02.

## SECTION 4. CONSTITUTIONAL FRAMEWORKS FOR ADMINISTRATIVE ADJUDICATION

**Add at the end of Note 7, p. 1089:**

Finally, in AXON ENTERPRISE, INC. V. FTC, 143 S.Ct. 890 (2023) (Supp. p. 48), the Court held that an individual or entity subject to an administrative enforcement action could bring suit directly in federal court to challenge the constitutionality of the removal protection of the administrative law judge who oversaw the administrative proceeding, without having to first present the constitutional challenge to the agency. The Court focused only on jurisdiction and did not address the substance of the constitutional challenge, which will be before the Court next term in SEC v. Jarkesy, 2023 WL

4278448 (June 30, 2023) (Supp. pp. 25, 32, 36). JUSTICE THOMAS concurred in the Court's jurisdictional decision but wrote separately to note his "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end. . . . This mixed system—primary adjudication by an executive agency subject to only limited Article III review—is unlike the system that prevailed for the first century of our Nation's existence. . . . [W]hen private rights are at stake, full Article III adjudication is likely required. . . . The 'appellate review model' of agency adjudication . . . raises serious constitutional concerns. It may violate the separation of powers by placing adjudicatory authority over core private rights—a judicial rather than executive power—within the authority of Article II agencies. It may violate Article III by compelling the Judiciary to defer to administrative agencies regarding matters within the core of the Judicial Vesting Clause. And, it may violate due process by empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights." 143 S. Ct. at 906–10 (Thomas, J., concurring).

**Add to Note 8, at the end of the first full paragraph, p. 1090:**

The Supreme Court granted certiorari to review the Fifth Circuit's decision. See SEC v. Jarkesy, 2023 WL 4278448 (June 30, 2023) (Supp. pp. 25, 32, 36).

## NOTES ON THE PUBLIC/PRIVATE RIGHTS DISTINCTION AND THE RIGHT TO A JURY TRIAL

**Add at the end of Note 2, p. 1094:**

The Supreme Court granted certiorari to review the Fifth Circuit's Seventh Amendment holding as well. See SEC v. Jarkesy, 2023 WL 4278448 (June 30, 2023) (Supp. pp. 25, 32, 36).

# PART 5:
# JUDGING THE WORK OF AGENCIES

# CHAPTER VIII:
# SCOPE OF REVIEW OF ADMINISTRATIVE ACTION

## SECTION 1. THE BASELINE NORM OF LEGAL REGULARITY

**Add a new Note 7, p. 1107:**

(7) ***Mass Consistency in Practice?*** In Christopher J. Walker, Melissa Wasserman, & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication (Dec. 6, 2022) (report to ACUS),[1] the authors studied the various systems in use in different agencies regarding if, and when, to accord precedential status within the agency's decisional processes to its prior decisions. Some agencies mirrored the practice of the federal courts, making all or designated appellate opinions precedential, while others, notably some high-volume agencies, sought regularity through rulemaking and guidance and didn't claim to require later decisions to conform to prior ones. For instance, the rules of the Board of Veterans' Appeals provided: "Although the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided. Prior decisions in other appeals may be considered in a case to the extent that they reasonably relate to the case, but each case presented to the Board will be decided on the basis of the individual facts of the case in light of applicable procedure and substantive law." 38 C.F.R. § 20.1303.

How did such a practice fare in court? The authors say they "identified only a few cases in which a party has challenged an agency's failure to follow its non-precedential decisions. Each rejected the suggestion that, as far as arbitrary-and-capricious review is concerned, non-precedential decisions stand on any different footing than precedential decisions. Departure from a non-precedential decision, under these cases, thus demands the same justification as from a precedential decision. The result is that, even if an agency's rules provide otherwise (as some do), the agency is still bound in some sense by its non-precedential decisions, and it may not simply ignore them if a party cites them." Walker, Wasserman, & Wiener, supra, at 45. But, they comment: "Few if any litigants before a mass adjudication program would have the resources or incentive, even in an aggregate proceeding, to identify significant patterns of decisional inconsistency." Id. at 46.

Can a litigant throw the burden of identifying similar cases upon the agency? The plaintiffs in TREEZ, INC. V. U.S. DEP'T OF HOMELAND SECURITY, 2023 WL 4240142 (N.D. Cal.), seem recently to have done that. Plaintiffs Treez, Inc., and Ameya Pethe brought suit under the APA alleging the agency wrongfully denied their H1-B visa petition. They alleged the agency " '[f]ailed to explain or articulate the reasons for departing from past precedent, including . . . other H-1B petitions for nonimmigrants employed by companies that provide independent services to customers in the state-legal cannabis industry,' and applied a new erroneous legal standard for H-1B visas." Under the rubric of requiring the agency to produce the "whole record," the Magistrate Judge required it to "search for and produce . . . materials concerning past adjudications of similarly situated petitions and any departure from those decisions or their past policy," apparently without regard to whether those decisions had been consulted in reaching this particular decision. The opinion does note: "In their briefing to the Court, Defendants do not advance any argument that locating these materials would be burdensome or difficult." Is this a fair reading of "the court shall review the whole record" in the APA, 5 U.S.C. § 706? Does this mean that modern technologies of searching and retrieving documents will transform the administrative law of mass justice?

[1] https://www.acus.gov/report/final-report-precedential-decision-making-agency-adjudication.

## SECTION 3. THE FRAMEWORK OF THE GOVERNING STATUTES

### b. The Present-Day Framework, Part I: Chevron, the Basics

**Add after the second paragraph on p. 1205:**

The Supreme Court will revisit Chevron in October Term 2023 in Loper Bright Enterprises v. Raimondo. 143 S.Ct. 2429. In Loper, the D.C. Circuit applied Chevron and deferred to the National Marine Fisheries Service's interpretation of the Magnuson-Stevens Fishery Conservation and Management Act of 1976. 45 F.4th 359 (D.C. Cir. 2022). The Supreme Court granted certiorari to answer the following question presented: "Whether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." 143 S.Ct. 2429 (2023). With this case pending, Chevron is in an increasingly precarious position.

#### NOTES ON THE RELATIONSHIP BETWEEN CHEVRON AND JUDICIAL STATUTORY PRECEDENT

**Add at the end of Note 5, p. 1236:**

In 2023, the Fifth Circuit, sitting en banc, addressed the waiver question directly in Cargill v. Garland, 57 F.4th 447 (5th Cir. 2023). In an opinion by Judge Elrod, the Fifth Circuit concluded that "Chevron does not apply for the simple reason that the Government does not ask us to apply it." Id. at 465. The Fifth Circuit made clear that the Government's choice not to argue for Chevron deference "means that the Chevron argument has been waived—not merely forfeited." Id. According to the Fifth Circuit, "the conclusion is obvious, and flows from well-settled waiver principles. After all, that a court should defer to the Government's expressed interpretation is just a legal argument, and a party waives a legal argument if it fails to raise the argument when presented with the opportunity." Id. Is the conclusion that Chevron can be waived as obvious as the Fifth Circuit states? Compare the reasoning in Cargill with the reasoning in the Guedes case.

### d. The Present-Day Framework, Part III: Limits on Chevron

#### NOTES ON WHAT IS A "MAJOR QUESTION" UNDER WEST VIRGINIA V. EPA

**Add a new Note 6, p. 1364:**

(6) ***A New Entrant in the Major Questions Doctrine?*** President Biden's 2020 campaign included support for a plan to cancel a large swath of student loan repayments. After exploring many options, the Biden Administration's Secretary of Education put forth such a plan in 2022, using the COVID-19 national emergency to define its terms. In BIDEN V. NEBRASKA, 143 S.Ct. 2355 (2023), the Supreme Court held that the Secretary of Education's loan forgiveness program was not authorized by the Higher Education Relief Opportunities for Students Act of 2003, relying partially on the major questions doctrine to reach that conclusion.

The HEROES Act provides that the Secretary of Education "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1). The HEROES Act provides that the Secretary may issue waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." § 1098bb(a)(2)(A).

The Court, in a majority opinion written by CHIEF JUSTICE ROBERTS, held that the HEROES Act does not authorize the loan cancellation plan. Citing MCI, the Court stated that the Secretary's power to "modify" statutory and regulatory provisions under the HEROES Act "does not authorize 'basic and fundamental changes in the scheme' designed by Congress." Id. at 2368. After discussing past invocations of the HEROES Act, the Court described the Secretary's loan forgiveness plan as "a novel and fundamentally different loan forgiveness program." Id. at 2369. The Court likewise dismissed arguments that the Secretary's plan fell under the Secretary's power to "waive" statutory and regulatory provisions, concluding that "[n]o specific provision of the Education Act establishes an obligation on the part of student borrowers to pay back the Government," so " 'waiver'—as used in the HEROES Act—cannot refer to 'waiv[ing] loan balances' or 'waiving the obligation to repay' on the part of a borrower." Id. at 2370.

Turning to the major questions doctrine, the majority discussed the economic and political significance of the plan. The majority noted that, in enacting the loan forgiveness plan, "the Secretary of Education claims the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans." Id. at 2372. The majority described this claimed authority as "staggering by any measure" and a case of "the Executive seizing the power of the Legislature." Id. at 2373.

The dissent, authored by JUSTICE KAGAN, reached markedly different conclusions. The dissent focused on the Secretary's discretion under the HEROES Act, arguing that the Secretary was empowered to "give the relief that was needed, in the form he deemed most appropriate, to counteract the effects of a national emergency on borrowers' capacity to repay." Id. at 2384. The dissent argued that, in light of the HEROES Act's textually broad grant of authority, the Secretary "did only what Congress had told him he could." Id. at 2385. The dissent critiqued the majority's reading as atextual, arguing that, in cases involving "broad delegations allowing agencies to take substantial regulatory measures," such as West Virginia and Nebraska, the "rules of the game change" and "the Court reads statutes unnaturally, seeking to cabin their evident scope." Id. The dissent also noted that the Secretary's "authority kicks in only under exceptional conditions": the Secretary "can act only when the President has declared a national emergency," "may provide benefits only to 'affected individuals,' " and "can only do what he determines to be 'necessary' to ensure that those individuals 'are not placed in a worse position financially in relation to' their loans 'because of' the emergency." Id. at 2391–92. The dissent interpreted the HEROES Act provision granting the Secretary authority to "waive or modify any statutory or regulatory provision" to grant more expansive authority than the majority deemed appropriate, noting the "expansive meaning" of the word "any." Id. Contra the majority, the dissent concluded that to waive or modify a requirement "means to lessen its effect, from the slightest adjustment up to eliminating it altogether." Id. The dissent also argued that the majority's construction "makes the Act inconsequential" because it leaves the Secretary "with no ability to respond to large-scale emergencies in commensurate ways." Id. at 2395. The dissent contrasted this construction with the purpose of the HEROES Act, which was "designed to deal with national emergencies" that are "typically major in scope" and "often unpredictable in nature." Id.

Turning to the major questions doctrine, the dissent argued that the majority "prevents Congress from doing its policy-making job in the way it thinks best" by "wielding the major-questions sword" to overrule Congress's "legislative judgments." Id. at 2397. The dissent emphasized the democratic accountability of Congress and agency officials relative to the Court and argued that, by employing the major questions doctrine to override Congress's delegations to the Executive Branch, the Court "becomes the arbiter—indeed, the maker—of national policy." Id. Addressing several indicia from prior major questions cases, the dissent noted that "[s]tudent loans are in the Secretary's wheelhouse," that the delegation at issue "is at the statute's very center," and that the provision granting authority to the Secretary is a "recently enacted" one as opposed to a "long-extant" one. Id. at 2398. Accordingly, the dissent concluded that the majority was "wrong to say that 'the indicators from our previous major questions cases are present here,' " id., and that the Court's decision "moves the goalposts for triggering the major questions doctrine." Id. at 2398–99.

Is the majority's opinion in Nebraska consistent with prior major questions doctrine cases? Or is the dissent's argument that the majority opinion is out of step with prior major questions doctrine cases correct? Given the different "factors" analyzed across major questions cases, can the major questions doctrine be characterized as a single doctrine with a set list of factors or indicia? Does Nebraska identify which factors are sufficient for a question to be considered "major"?

Note that in the "major questions" discussion, the majority noted how the "sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act" and how "Congress did not unanimously pass the HEROES Act with [the power to pass such an extraordinary program] in mind." Id. at 2374. Should the margins by which an act is passed influence statutory interpretation? The force of law applies whether a law was passed by 51% of Congress or 100% of Congress. But can margins of passage meaningfully illuminate legislative intent? In addition, the Court stated that the major questions doctrine applies to cases involving the provision of government benefits just as it applies to cases involving agencies' power to regulate. Id. at 2374–75. Should the major questions doctrine apply equally to regulations and government benefits?

JUSTICE BARRETT wrote a concurring opinion in Nebraska (discussed earlier in Chapter 2, Supp. p. 4), arguing that the major questions doctrine is a linguistic canon—not a substantive one—and for that reason comports with a textualist interpretive approach. According to Justice Barrett, the major questions doctrine "emphasize[s] the importance of context when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation." Id. at 2376. Justice Barrett distinguished the major questions doctrine from clear-statement rules, noting that the major questions doctrine does not require an " 'unequivocal declaration' from Congress authorizing the precise agency action under review, as [the Court's] clear-statement cases do in their respective domains." Id. at 2378. Instead, Justice Barrett claimed that the major questions doctrine "serves as an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.' " Id.

Is Justice Barrett's account persuasive or, as discussed in Chapter 2, does it just reflect the instability of any distinction between a textualism that accounts for context and purposivism? After all, Justice Barrett is not saying that the relevant context can be found in the text of the statute itself. Instead, it is to be discerned on her account from a "common sense" understanding of what the text must mean but does not necessarily say. But can't every substantive canon be defended on that same "common sense"-based ground? In other words, if the question motivating the inquiry into a common sense understanding of the text is, "What did Congress intend?" then isn't that question just a way of potentially asking, what was Congress's purpose? Note that no other Justices joined Justice Barrett's concurrence.

President Biden has signaled that his Administration will seek to institute a new debt relief plan under a different statute, the Higher Education Act. See The White House, FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers (June 30, 2023);[2] Supp. p. 18.

## NOTES ON THE LEGAL BASIS FOR THE MAJOR QUESTIONS DOCTRINE

**Add a new Note 5, p. 1367:**

(5) ***The Major Questions Doctrine and the President.*** Just as West Virginia left questions about *how to apply* the major questions doctrine, it also left questions about *to whom* the doctrine applies. While Congress typically delegates to agencies, many statutes delegate authority to the President directly. For a discussion of some notable statutes that delegate to the President, see Shalev Roisman, Presidential Law, 105 Minn. L. Rev. 1269 (2021). When a statute delegates directly to the President,

[2] https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/30/fact-sheet-president-biden-announces-new-actions-to-provide-debt-relief-and-support-for-student-loan-borrowers/.

should that delegation be subject to a "major questions" analysis? Circuit courts have split on the question. In cases regarding the COVID-19 vaccine mandate for federal contractors issued by President Biden pursuant to authority delegated to the President by the Federal Property and Administrative Services Act of 1949, three Circuits, the Fifth, Sixth, and Eleventh, have concluded that the doctrine does apply to the President. See Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022); Kentucky v. Biden, 57 F.4th 545 (6th Cir. 2023); Georgia v. President of the United States, 46 F.4th 1283 (11th Cir. 2022). One Circuit, the Ninth, has concluded that the doctrine does not apply. See Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023) (Supp. p. 34). For an argument that the major questions doctrine should not apply to the President, see Recent Case, Georgia v. President of the United States, 46 F.4th 1283 (11th Cir. 2022), 136 Harv. L. Rev. 2020 (2023).

## NOTES ON FEDERALISM AND AGENCY ACTION

**Add at the end of Note 1, p. 1380:**

In October Term 2022, the Supreme Court decided Sackett v. EPA, 143 S.Ct. 1322 (2023) (Supp. pp. 4, 55), relying partially on a federalism canon. The majority opinion, written by Justice Alito, stated that Congress must use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power" and that "[r]egulation of land and water use lies at the core of traditional state authority," citing SWANCC. Id. at 1341. The majority opinion also turned to a linguistic canon, citing Whitman v. American Trucking Assns., Inc's famous "elephants in mouseholes" line (Casebook p. 1321) to argue that Congress likely would not have "tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs." 143 S.Ct. at 1340.

Notably, the majority opinion never cited West Virginia or made any mention of the major questions doctrine. That could suggest that, even if there were no "major questions doctrine" as such, it would still exist in practical effect so long as judges are inclined to think "big things" can't be found in statutory language that fails to make clear it is saying something big. Another possibility, though, is that a concern about federalism is itself something "major," even if no major question would otherwise be presented.

# CHAPTER IX:
# ACCESS TO JUDICIAL REVIEW: JUSTICIABILITY

## SECTION 1. STANDING

### a. The Basic Doctrinal Framework

#### NOTES ON STANDING DOCTRINE'S CONSTITUTIONAL BASIS

**Add at the end of Note 5, p. 1430:**

The latest surfacing of Article II in standing analysis came in UNITED STATES V. TEXAS, 143 S.Ct. 1964 (2023) (Supp. pp. 38, 47, 53), where the Court held that Texas and Louisiana lacked standing to challenge the Biden Administration's immigration enforcement guidelines as violating governing statutes. Writing for the majority, Justice Kavanaugh argued that "lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law." Id. at 1971. Concurring in the judgment, Justice Barrett expressed skepticism about this rationale: "I question whether the President's duty to " 'Take Care that the Laws be faithfully executed,' Art. II, § 3, is relevant to the standing analysis. While it is possible that Article II imposes justiciability limits on federal courts, it is not clear to me why any such limit should be expressed through Article III's definition of a cognizable injury. Moreover, the Court works . . . magic on the Take Care Clause . . . : It takes an issue that entered the case on the merits and transforms it into one about standing." Id. at 1988.

### b. Defining Injury in Regulatory Settings

#### (2) The Requirement of Concrete and Imminent Injury

**Add at the end of the second paragraph of Note 2, p. 1446:**

The Supreme Court has granted certiorari in a case that may address the extent to which testers have standing, involving an individual with disabilities who has filed hundreds of suits against hotels across the country alleging that their online registration systems violate the Americans with Disabilities Act and implementing regulations. See Acheson Hotels, LLC v. Laufer, 143 S.Ct. 1053 (2023).

**Add at the end of Note 5, p. 1450:**

(c) For a more recent contrast in approach to injury and causation, consider the Supreme Court's decisions on standing in two companion cases challenging the Biden Administration's student debt forgiveness plan. The plan was promulgated by the Secretary of Education, who relied on statutory authority in the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) "to waive or modify any provision" applicable to federal "student financial assistance" programs "as may be necessary to ensure that . . . recipients of student financial assistance" are no worse off "financially in relation to that financial assistance because" of a national emergency or disaster. Under the plan, student debt borrowers with annual incomes below $125,000 if single, or $250,000 if married, would have $10,000 in student debt forgiven; those who had received Pell grants (a form of relief aimed at low-income borrowers) could receive $20,000 in forgiveness.

In BIDEN V. NEBRASKA, 143 S.Ct. 2355 (2023) (Supp. pp. 33, 41, 48), a group of states filed suit to challenge the plan. Although none of the states were directly or indirectly regulated by the plan, they argued they were injured because cancelling the loans now would cost them tax revenue, in that under federal tax law—which the states had incorporated into their own tax codes—student loans discharged

between 2021 and 2025 wouldn't count as taxable income. The states also argued that one state, Missouri, had standing because the plan would lower federal payments to a state-created corporation, the Missouri Higher Education Loan Authority (MOHELA), that holds and services student loans. A 6–3 majority of the Court, in an opinion written by CHIEF JUSTICE ROBERTS, concluded that Missouri's relationship to MOHELA gave Missouri standing and made it unnecessary for the Court to consider whether the other states had standing as well. Id. at 2365. According to the majority, "[b]y law and function, MOHELA is an instrumentality of Missouri: It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State. The Secretary's plan will cut MOHELA's revenues, impairing its efforts to aid Missouri college students. This acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself."

JUSTICE KAGAN strongly dissented, stating that "[i]n adjudicating Missouri's claim, the majority reaches out to decide a matter it has no business deciding. It blows through a constitutional guardrail intended to keep courts acting like courts." Id. at 2388. In her view, all of the states in the case had "no personal stake in the Secretary's loan forgiveness plan" and were "classic ideological plaintiffs" who lacked standing. Id. at 2385. Emphasizing that MOHELA was legally and financially independent under state law, such that its loss of servicing fees would not affect the state financially at all, she criticized the majority for allowing "Missouri to piggy-back on the legal rights and interests of an independent entity. If MOHELA wanted to, it could have brought this suit. It declined to do so." Id. at 2391.

On the same day, the Court rejected standing in DEPARTMENT OF EDUCATION V. BROWN, 143 S.Ct. 2343 (2023). There, two individual student loan borrowers—one who was not eligible for any relief under the plan, and one who was eligible for $10,000 rather than $20,000 in relief—sought to challenge the Secretary of Education's failure to promulgate the plan through negotiated rulemaking and notice-and-comment procedures. The plaintiffs claimed that the Department of Education lacked authority under the HEROES Act to adopt the plan; that as a result the agency needed to use negotiated-rulemaking and notice-and-comment procedures; that had the agency done so, they would have used their opportunities to participate to argue that the agency should instead adopt a different loan-forgiveness plan that was more generous to them under a different statutory authority (the Higher Education Act); and that there was a chance of these events coming to pass if the Court vacated the plan. According to the unanimous opinion written by JUSTICE ALITO, this "unusual" claim failed to establish standing: The borrowers "claim they are injured because the Government has not adopted a lawful benefits program under which they would qualify for assistance. But the same could be said of anyone who might benefit from a benefits program that the Government has not chosen to adopt. It is difficult to see how such an injury could be particular (since all people suffer it) or concrete (since an as-yet-uncreated benefits plan is necessarily 'abstract' and not 'real'). Nor have we ever accepted that an injury is redressable when the prospect of redress turns on the Government's wholly discretionary decision to create a new regulatory or benefits program. Nonetheless, we think the deficiencies of respondents' claim are clearest with respect to traceability. They cannot show that their purported injury of not receiving loan relief under the HEA is fairly traceable to the Department's (allegedly unlawful) decision to grant loan relief under the HEROES Act." Id. at 2353.

Can the decisions in Nebraska and Brown be squared? One potential difference is that no one disputed MOHELA's potential financial harm from the plan would suffice for standing if MOHELA had sued, whereas the Court was very skeptical that the plaintiffs in Brown had alleged a cognizable injury. But MOHELA hadn't sued, and standing was premised on harm to MOHELA causing harm to Missouri. Yet the majority never investigated the factual basis for that injury and causal relationship, as it did in Brown. Are you persuaded that the fact that the state appoints MOHELA's board members and oversees MOHELA, or the fact that MOHELA serves a public function, is a sufficient basis on which to conclude an injury to MOHELA causes Missouri direct harm?

### (3) Procedural Rights

NOTES ON PROCEDURAL RIGHTS

**Add at the end of Note 2, p. 1455:**

The Supreme Court again reaffirmed the need for concrete injury in addition to a procedural violation in Department of Education v. Brown, 143 S.Ct. 2343 (2023). As noted above, Supp. p. 46, the Court held that two student loan borrowers who could not show that Biden Administration student debt forgiveness plan caused their alleged injury lacked standing to challenge the Administration's failure to use negotiated rulemaking and notice and comment procedures in adopting it: "Regardless of the redressability showing we have tolerated in the procedural-rights context, we have never held a litigant who asserts such a right is excused from demonstrating that it has a concrete interest that is affected by the deprivation of the claimed right." Id. at 2351.

## c. Causation and Redressability in Regulatory Settings

### (1) The Impact of Sanctions and Incentives

**Add at the end of Note 2, p. 1464:**

The Supreme Court's most recent discussion of causation came in in Department of Education v. Brown, discussed above (Supp. p. 46). There, the Court concluded that the Department of Education's "decision to give other people relief under a different statutory scheme did not cause [the plaintiffs] not to obtain the benefits they want. The cause of their supposed injury is far more pedestrian than that: The Department has simply chosen not to give them the relief they want. Ordinarily, a party's recourse to induce an agency to take a desired action is to file not a lawsuit, but a 'petition for the issuance, amendment, or repeal of a rule.' 5 U.S.C. § 553(e). . . . Contesting a separate benefits program based on a theory that it crowds out the desired one, however, is an approach for which we have been unable to find any precedent."

## d. Governmental Standing

**Add at the end of Note 2, p. 1475:**

Further clues on the Court's approach to state standing came in several cases in the 2022–2023 Term. UNITED STATES V. TEXAS, 143 S.Ct. 1964 (2023), involved a suit by Louisiana and Texas, challenging immigration enforcement guidelines issued by the Department of Homeland Security. (See also Supp. pp. 38, 45, 53.) The states argued that the guidelines, which prioritized the arrest and removal of noncitizens who were suspected terrorists or dangerous criminals, violated governing statutes that required the agency to arrest more noncitizens pending their removal. The Supreme Court, in a majority opinion written by JUSTICE KAVANAUGH, held that the states lacked standing to bring this claim, emphasizing that "this Court has long held 'that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.' " Id. at 1968 (quoting Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973)). The majority did not mention Massachusetts v. EPA's invocation of special solicitude for states, and instead in a footnote cautioned that "federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer." He added: "To be sure, States sometimes have standing to sue the United States or an executive agency or officer. But in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending. And when a State asserts, for example, that a federal law has produced only those kinds of indirect effects, the State's claim for standing can become more attenuated." Id. at 1972 n.3. A subsequent footnote observed that the states had invoked Massachusetts "as part of their argument for standing," but "[p]utting aside any disagreements that some may have with that case," Massachusetts "does not control this case. The issue there involved a challenge to the denial of a

statutorily authorized petition for rulemaking, not a challenge to an exercise of the Executive's enforcement discretion." Id. at 1975 n.6. Concurring in the judgment and joined by Justices Thomas and Barrett, JUSTICE GORSUCH argued that the states lacked standing here because their injuries were not redressable, but rejected the majority's argument that the states lacked a cognizable interest in enforcement of those laws. Justice Alito, the lone dissenter, argued that the majority's holding was inconsistent with its standing jurisprudence, including Massachusetts, and that "even if we do not view Texas's standing argument with any 'special solicitude,' we should at least refrain from treating it with special hostility by failing to apply our standard test for Article III standing." Id. at 1997.

The Court additionally rejected state standing in Haaland v. Brackeen, 143 S.Ct. 1609 (2023). There, in a majority opinion written by Justice Barrett, it held that Texas lacked standing to bring an Equal Protection challenge to the Indian Child Welfare Act, emphasizing that Texas had no equal protection rights of its own and that states cannot bring a parens patriae action on their citizens' behalf against the federal government. The Court also rejected Texas's claims as to why it was directly injured by the child custody placement preferences in the Act. Id. at 1640. By contrast, in Biden v. Nebraska, 143 S.Ct. 2355 (2023) (Supp. p. 46), the Court found that Missouri had standing to challenge the Biden Administration's student loan forgiveness program as unlawful, concluding that injury to a state corporation was an injury to the state notwithstanding the corporation's legal and financial independence.

Do these cases provide much guidance about the Roberts Court's views of state standing? In his concurrence in Texas, Justice Gorsuch argued that " 'special solicitude' " has not "played a meaningful role in this Court's decisions in the years since" Massachusetts and that "the Court says nothing about 'special solicitude' in this case," from which he concluded "that lower courts should just leave that idea on the shelf in future [cases]." Id. at 1977. In his dissent, Justice Alito stated that "the majority's footnote on Massachusetts raises more questions about Massachusetts itself—most importantly, has this monumental decision been quietly interred?" Id. at 1997. Do you agree with these assessments?

# SECTION 2. REVIEWABILITY, TIMING, AND REMEDIES

## b. Preclusion of Judicial Review

### (2) Statutory Preclusion of Review

**Replace the final two paragraphs of Note 7, p. 1517, with the following:**

The Court reaffirmed its Free Enterprise approach to preclusion in AXON ENTERPRISE, INC. V. FTC, 143 S.Ct. 890 (2023) (Supp. p. 38), which was decided in combination with the separate case of SEC v. Cochran. When the FTC and SEC initiated administrative enforcement actions against them, Axon Enterprise and Michelle Cochran both filed suit in federal court, arguing that the administrative proceedings were unconstitutional because the ALJ presiding over them enjoyed multiple levels of for-cause removal protection in violation of the President's removal power. Axon also claimed that the combination of prosecutorial and adjudicative functions in the FTC rendered its enforcement actions unconstitutional. Both the FTC Act and the Exchange Act (applicable to the SEC) provide for review of final Commission decisions in a court of appeals, rather than a district court. The government argued that these provisions meant that neither Axon Enterprise nor Cochran could file suit directly in district court, but instead had to first proceed through the administrative proceedings and then, if needed, could assert their constitutional claims in appeals court on review of the Commissions' final orders.

The Supreme Court disagreed, in an opinion for eight justices written by JUSTICE KAGAN: "One way of framing the question we must decide is whether the cases before us are more like Thunder Basin and Elgin or more like Free Enterprise Fund. The answer appears from 30,000 feet not very hard. . . . The claims here are of the same ilk as the one in Free Enterprise Fund. . . . The challenges here, as in Free Enterprise Fund, are not to any specific substantive decision . . . . They are instead

challenges, again as in Free Enterprise Fund, to the structure or very existence of an agency: They charge that an agency is wielding authority unconstitutionally in all or a broad swath of its work." Id. at 902.

Justice Kagan identified three considerations, drawn from Thunder Basin, that were designed to help determine whether Congress intended the particular claims as issue to be reviewed within a statutory review scheme: "First, could precluding district court jurisdiction foreclose all meaningful judicial review of the claim? Next, is the claim wholly collateral to the statute's review provisions? And last, is the claim outside the agency's expertise?" Id. at 900. According to Justice Kagan, "each of the three Thunder Basin factors signals that a district court has jurisdiction to adjudicate Axon's and Cochran's . . . sweeping constitutional claims." First, although Axon and Cochran "can (eventually) obtain review of their constitutional claims through an appeal from an adverse agency action to a court of appeals," that review would not be able to remedy their asserted harm of " 'being subjected' to 'unconstitutional agency authority'—a 'proceeding by an unaccountable ALJ.' " . . . The collateralism factor favors Axon and Cochran for much the same reason—because they are challenging the Commissions' power to proceed at all, rather than actions taken in the agency proceedings. . . . Third and finally, Cochran's and Axon's claims are 'outside the Commissions' expertise.' On that issue, Free Enterprise Fund could hardly be clearer. Claims that tenure protections violate Article II, the Court there determined, raise 'standard questions of administrative' and constitutional law, detached from 'considerations of agency policy.' 561 U.S. at 491." Id at 902–06. Concurring in the judgment, Justice Gorsuch argued that Axon and Cochran's access to court had "nothing to do with the 'Thunder Basin factors.' Instead, it follows directly from 28 U.S.C. § 1331."

### (3) Committed to Agency Discretion by Law

**Potential replacement for pp. 1518–23:**

For a more recent case on § 701(a)(2) preclusion than Webster v. Doe, consider the following:

## HOLBROOK v. TENNESSEE VALLEY AUTHORITY

United States Court of Appeals for the Fourth Circuit (2022).
48 F.4th 282.

■ RICHARDSON, CIRCUIT JUDGE.

The Tennessee Valley Authority sells its power to the BVU Authority in Virginia, one of its many customers. The BVU Authority in turn sells its power to local consumers who need electricity. Among those local consumers is David Holbrook, and Holbrook thinks he has been paying too much for power. He believes that the TVA has a statutory duty to use the fruits of its sales to large industrial buyers to subsidize consumers' electricity consumption. He bases this view largely on § 11 of the Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, § 11, 48 Stat. 58, 64–65 (codified at 16 U.S.C. § 831j). . . . [H]e sued BVU Authority and TVA under three theories, which all more or less amount to claims that the TVA failed to live up to its statutory duties under § 11. The district court dismissed all three claims because TVA's ratemaking authority is committed to agency discretion and thus unreviewable. We affirm.

I. Background

. . . In 2010, the TVA began putting [a Strategic Pricing] Plan . . . into motion in power contracts with local power companies, [including BVU]. The Plan aimed to achieve fairness in pricing and increase competitiveness by charging customers based on their proportion of total cost of service. . . . Because supplying power to industry is cheaper, TVA sought to create new benefits and discounts for industrial consumers, things like manufacturing credits and high-volume discounts. . . . Holbrook alleges that all those changes to benefit industrial customers unjustifiably shifted costs onto consumers. . . .

## II. Discussion

Under the APA, "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. That language sets up a "basic presumption of judicial review" of agency action. See Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967) [Casebook p. 1496]. But the APA's text lays out two exceptions to that basic principle: first, where "statutes preclude judicial review," § 701(a)(1), and second, where "agency action is committed to agency discretion by law," § 701(a)(2). Only the second exception might apply here, so we must figure out whether TVA ratemaking is "committed to agency discretion by law."[5]

Courts have dealt with two initial puzzles about what it means under the APA for something to be "committed to agency discretion by law." The first puzzle is how to differentiate the two exceptions to judicial review. At a glance, it's hard to see the difference between a statute that precludes judicial review and law that commits decisions to agency discretion (thereby precluding judicial review). Yet the Supreme Court has given us some guidance. The Court tells us the § 701(a)(1) exception for statutes precluding judicial review "applies when Congress has expressed [its] intent" and the § 701(a)(2) standard for agency discretion applies when there is "no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 830, (1985) [Casebook p. 1527]. So the first exception is for explicit statutory limitations on review, and the second exception—the one at issue—is for implicit limitations on review.

The second puzzle arises from the seeming tension between the second exception, § 701(a)(2), and § 706, the APA's provision defining the scope of agency review. Under § 706(2)(A), courts are instructed to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . an abuse of discretion." One might wonder how courts can set aside something as abuse of discretion when discretionary questions committed to the agency by law are insulated from judicial review in the first place. The Supreme Court's solution to this puzzle has been to focus on the suitability of the agency action for judicial review—"if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.' " Chaney, 470 U.S. at 830. If courts can naturally review for an abuse of discretion, they should; if they can't, § 701(a)(2) tells them to steer clear. So the main task under § 701(a)(2) is to determine when there are or are not "judicially manageable standards" for judging an agency's exercise of discretion.

Early cases applying this subsection used a "no law to apply" test drawn from the legislative history of the APA. The test asks whether this is one of "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." [Citizens to Preserve] Overton Park, [Inc. v. Volpe,] 401 U.S. [402,] 410 [(1971)] [Casebook p. 1145]. The problem with that test is that there is nearly always some law to apply—"beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest." Webster v. Doe, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting) [Casebook p. 1518]. Remember § 706 and abuse-of-discretion review as well: Arbitrary-and-capricious review only involves "articulat[ing] a satisfactory explanation for [agency] action including a rational connection between the facts founds and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) [Casebook p. 1126]. We could always apply that legal test by making sure the agency had offered reasoned explanation of its actions.

Because the "no law to apply" test is so difficult to meet, the Supreme Court has often taken a different approach to § 701(a)(2), one that operates more like a common-law analysis than

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[5] One influential administrative law scholar had this to say about the task of figuring out what § 701(a)(2) means: "I don't see how anybody can find the meaning of those words. The words seem to contradict themselves; they don't make any sense; if they do, what might the sense be? Nobody can extract from the words an answer to this simple question: When discretionary power is conferred by statute on an agency, when, if ever, may a court review for abuse of discretion?" Present at the Creation: Regulatory Reform Before 1946, 38 Admin. L. Rev. 507, 519 (1986) (remarks of Kenneth Culp Davis). Well, that's our task.

a task of statutory interpretation. The aim of this common-law approach has been to determine categories of administrative action that "courts traditionally have regarded as committed to agency discretion." Dep't of Com. v. New York, 139 S. Ct. 2551, 2568 (2019) [Casebook p. 1177]. Once we are in a traditional category, the "presumption of reviewability" under the APA flips, and the agency action becomes "presumptively unreviewable." Chaney, 470 U.S. at 831–32. But only presumptively. Even in an area that has been traditionally insulated from review, "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." Id. at 833.

We take all this to create a two-part inquiry. We begin by considering whether TVA ratemaking is the kind of agency action that "has traditionally been committed to agency discretion." Id. at 832. We hold that it is. From there, we determine whether the TVA Act intentionally limits agency discretion by setting guidelines or otherwise providing a limit. We hold that it does not. So we affirm the district court's decision that TVA ratemaking is committed to agency discretion by law.

1. Traditional Categories Committed to Agency Discretion

No clean rule materializes for determining whether an agency action is the kind of action that has traditionally been committed to agency discretion. But the Supreme Court has looked to a few factors that characterize such action. First, these actions involve "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," Lincoln [v. Vigil], 508 U.S. [182,] at 193 [Casebook p. 1533], especially decisions that involve resource allocation and the need for flexibility to "adapt to changing circumstances," [id.] at 192. Next, these are areas that often do not involve the use of coercive power, which means they will not trigger the traditional rights-protecting duties of the federal courts. Chaney, 470 U.S. at 832. And perhaps most importantly, these areas enjoy a tradition of nonreviewability. Id. at 832. Past practice should guide us. And an unbroken practice of judicial deference that predates the APA is strong evidence of an area where judicial review is inappropriate. See ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 282 (1987).

TVA ratemaking has each of these characteristics. To start, TVA price setting is a balancing act that demands significant expertise and involves complicated, counterfactual questions of resource allocation. As we explain below, the TVA Act tasks the TVA with several goals that necessarily require trade-offs, including a focus on self-sufficiency, equitable service across States, building up capacity, repaying the Treasury, supporting consumers, and more. And as a look through the TVA's 2018 Wholesale Rate Change shows, the practical difficulties of electricity pricing are even more complicated, including additional hurdles like "distributed generation, energy efficiency, technological advances, shifts in customer behavior, and regulatory requirements," not to mention the interplay between price (which is calculated to the quarter cent) and demand. All that suggests a "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." Lincoln, 508 U.S. at 193. Setting a price is complicated, and it is not a task on which judges are traditionally expected to be experts. Indeed, the opposite may be closer to the truth.

And price setting isn't coercive either. . . . Prices are agreed-to, not enforced. Therefore, these issues will rarely implicate the traditional rights-protecting duties of the federal courts. Any argument that Holbrook is somehow forced to buy from BVU because of limited options would stretch the idea of coercive power beyond recognition. . . . Finally, federal courts in the Tennessee Valley region have a long history of declining to review TVA ratemaking[, a] trend [that] reaches back at least 84 years to a case decided just a few years after the TVA Act was passed. Tenn. Elec. Power Co. v. TVA, 21 F. Supp. 947 (E.D. Tenn. 1938), aff'd, 306 U.S. 118 (1939). . . . And Tennessee Electric Power Company was decided eight years before the APA was passed, which makes this tradition a part of the existing law that the APA was understood to embrace and preserve. . . .

Holbrook argues that (1) under the APA, "the approval or prescription for the future of rates [or] prices [or] costs" is defined as a kind of "rule," 5 U.S.C. § 551(4); (2) all "rules" are "agency action," § 551(13); and (3) that all "agency action" is subject to judicial review, § 704. By adding these premises up, Holbrook argues that TVA ratemaking must not be one of the traditional categories we are talking about.

But that argument misses the point. No one has questioned, and we do not deny, that TVA ratemaking is agency action or that the general rule is that agency action is presumptively reviewable. The question here is whether this is the kind of agency action where that presumption is flipped because of § 701(a)(2), which is separate from the analytically antecedent answer that this was an "agency action." After all, Chaney dealt with "agency decisions to refuse enforcement," 470 U.S. at 831, and we know that "failure to act" is defined as "agency action" under § 551(13). But the Court there found refusal to enforce to be "committed to agency discretion" under § 701(a)(2) anyway. . . .

2. Congressional Guidelines or Limits on Traditional Discretion

Congress may overcome the presumption against review by providing "guidelines for the agency to follow in exercising its enforcement powers," by "setting substantive priorities, or by otherwise circumscribing an agency's power." Chaney, 470 U.S. at 833. Because the question is about what Congress did, it amounts to a question of statutory interpretation. The only argument that Holbrook makes here is based on the twin goals of TVA Act § 11, but we do not read that provision to provide the kind of clear guidance or instruction that would overcome the presumption against judicial review. . . .

Section 11 has two relevant sentences. The first sentence reads: "It is declared to be the policy of the Government so far as practical to distribute and sell the surplus power . . . equitably among the States, counties, and municipalities within transmission distance." The next sentence elaborates on that policy by laying out a primary and a secondary purpose:

> This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates. . . .

Holbrook argues that this is a command that the TVA use industry sales to subsidize consumer sales. . . . We disagree. Instead, we read this provision as a general policy statement and, in places, as a kind of aspiration about what Congress hopes will be accomplished. . . .

Start with the fuzzy language in the provision: "so far as practical," "primarily," "economically," "sufficiently." Each of those words suggests room for discretion. And all that discretion adds up. Taken together, the mass of discretionary lingo suggests that, far from being a provision that withdraws discretion, this provision acknowledges and accentuates that discretion.[14]

. . . Notice that the first sentence of the provision suggests that the policy should be carried out only "so far as practical," and notice further that the second sentence of § 11 begins "This policy is further declared to be . . . ," before then discussing consumer and industry sales. Read together, this suggests that both sentences are referencing the same policy, and that the policy should only be pursued "so far as practical." That is not a directive. . . .

Finally, turn to the discussion of sales to industry . . . . The text says that sales to industry are to be used to secure high load factors and strong revenues. And then it says those things "will permit" better treatment for consumers, in the form of "the lowest possible rates." The "will permit" suggests that this isn't really a command or a "methodology" for achieving a specified

[14] "Shall" does often mandate behavior. But here the shalls are attached to broad policy goals. . . .

"goal" as Holbrook argues. Rather, the text suggests that Congress had an expectation, that by selling to industry, the TVA would get higher load factors, allowing more consistent energy usage, which in turn would bring in revenues to the company, which would help to increase returns to scale, and all of that "will" naturally make sales to consumers easier and cheaper. "Will permit" highlights how this policy is an aspiration not a command. And even if we read that as something more than an aspiration, we would be confronted again by the discretionary phrases "sufficiently high" and "lowest possible" which do little to cabin the agency's actions.

We cannot read § 11 as the kind of guideline or command that would overcome the presumption against judicial review here. Because TVA ratemaking is a category that has traditionally been insulated from judicial review and because Congress has not provided clear limits on the exercise of that discretion, we hold that TVA ratemaking is "committed to agency discretion by law." So the district court was correct to dismiss the APA claim under § 701(a)(2). . . .

## NOTES ON THE REVIEWABILITY OF AGENCY REFUSALS TO ACT

**Add at the end of Note 2, p. 1531:**

The Supreme Court's most recent engagement with nonenforcement decisions came in UNITED STATES V. TEXAS, 143 S.Ct. 1964 (2023) (pp. 45, 47), where eight justices concluded that the states of Texas and Louisiana lacked standing to challenge the Biden Administration's immigration enforcement guidelines for failing to take enforcement actions the states claimed were required by statute. In addition to holding that the states lacked a cognizable interest in the prosecution of others, Justice Kavanaugh's majority opinion emphasized that "when the Executive Branch elects not to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property." He also argued that "[u]nder Article II, the Executive Branch possesses authority to decide how to prioritize and how aggressively to pursue legal actions against defendants who violate the law. The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses on behalf of the United States. . . . That principle of enforcement discretion over arrests and prosecutions extends to the immigration context, where the Court has stressed that the Executive's enforcement discretion implicates not only normal domestic law enforcement priorities but also foreign-policy objectives." Finally, "[i]n addition to the Article II problems raised by judicial review of the Executive Branch's arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices in this area. After all, the Executive Branch must prioritize its enforcement efforts. That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people." Id. at 1971–72.

But Kavanaugh emphasized that the Court was not "suggest[ing] that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions." He identified several instances when courts might do so, including those in which Congress "specifically authorize suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement" and "specifically authorize the Judiciary to enter appropriate orders." He added that "the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions," and also distinguished instances involving "a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities and the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis. That is because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion." Finally, he noted that "policies governing the continued detention of noncitizens who have already been arrested arguably might raise a different standing question than arrest or prosecution policies." Id. at 1973–74.

Concurring in the judgment, Justice Gorsuch, joined by Justices Thomas and Barrett, questioned the majority's Article II justifications for rejecting standing and its carve-outs (as did Justice Alito in dissent). In their view, the majority's Article II rationale for denying review of nonenforcement here

would have significant implications. As Justice Gorsuch put it, Article II "give[s] the President a measure of discretion over the enforcement of all federal laws, not just those that can lead to arrest and prosecution. So if the Court means what it says about Article II, can it mean what it says about the narrowness of its holding?"

## c. Timing of Review

### (2) Finality

**Replace Part II of Sackett v. EPA, pp. 1540–41, with the following:**

II

. . . We consider first whether the compliance order is final agency action. There is no doubt it is agency action, which the APA defines as including even a "failure to act." §§ 551(13), 701(b)(2). But is it *final*? It has all of the hallmarks of APA finality that our opinions establish. Through the order, the EPA "determined" "rights or obligations." Bennett v. Spear, 520 U.S. 154, 178 (1997). By reason of the order, the Sacketts have the legal obligation to "restore" their property according to an agency-approved Restoration Work Plan, and must give the EPA access to their property and to "records and documentation related to the conditions at the Site." App. 22, ¶ 2.7. Also, " 'legal consequences . . . flow' " from issuance of the order. Bennett, supra, at 178. For one, according to the Government's current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding. It also severely limits the Sacketts' ability to obtain a permit for their fill from the Army Corps of Engineers, see 33 U.S.C. § 1344. The Corps' regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so "is clearly appropriate." 33 CFR § 326.3(e)(1)(iv) (2011).

The issuance of the compliance order also marks the " 'consummation' " of the agency's decisionmaking process. Bennett, supra, at 178. As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the compliance order contained were not subject to further agency review. The Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to "engage in informal discussion of the terms and requirements" of the order with the EPA and to inform the agency of "any allegations [t]herein which [they] believe[d] to be inaccurate." App. 22–23, ¶ 2.11. But that confers no entitlement to further agency review. The mere possibility that an agency might reconsider in light of "informal discussion" and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.

The APA's judicial review provision also requires that the person seeking APA review of final agency action have "no other adequate remedy in a court," 5 U.S.C. § 704. In CWA enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA under 33 U.S.C. § 1319. But the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability. The other possible route to judicial review—applying to the Corps of Engineers for a permit and then filing suit under the APA if a permit is denied—will not serve either. The remedy for denial of action that might be sought from one agency does not ordinarily provide an "adequate remedy" for action already taken by another agency. . . .

**Add at the end of Note 1, p. 1543:**

The Court took up Sackett again in its 2022–2023 term, this time on the merits, holding that the wetlands on the Sacketts' property were not part of the "waters of the United States" under the Clean Water Act and therefore EPA lacked jurisdiction. Sackett v. EPA, 143 S.Ct. 1322 (2023) (Supp. pp. 4, 44).

## d. Remedies

### (1) Injunctive and Declaratory Relief

#### NOTES ON NATIONWIDE INJUNCTIONS AND VACATUR OF RULES

**Add at the end of Note 5, p. 1565:**

Justice Gorsuch engaged this debate in his opinion concurring in the judgment in United States v. Texas, 143 S.Ct. 1964 (2023) (pp. 45, 47, 53), arguing that the arguments for why the APA does not empower courts to vacate agency action are "serious enough to warrant careful consideration." Id. at 1980. As to the argument that vacatur is authorized by § 706(A)(2)'s instruction that courts should "set aside" agency action found to be unlawful, Gorsuch responded: "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." Dissenting, Justice Alito described the concurrence's position as "a sea change in administrative law as currently practiced in the lower courts." Id. at 1996.