Summer 2024 Update

Federal Administrative Law Cases and Materials (Fourth Edition)

by

Kristin E. Hickman
Richard J. Pierce, Jr.
Christopher J. Walker

Administrative law is a dynamic field, and there are always interesting new cases being decided and new debates unfolding. The Fourth Edition was published only one year ago, and most of it remains relatively up to date, but the past year has seen some big administrative law cases from the Supreme Court. In particular, the Court's decision to overturn *Chevron* deference fundamentally alters how instructors will need to address judicial review of agency interpretations of statutes. This memo provides excerpts and notes for a handful of the most significant cases since the release of the Fourth Edition. For a more comprehensive and detailed summary of recent cases and events as they relate to administrative law, we recommend Kristin E. Hickman & Richard J. Pierce, Jr., *Administrative Law Treatise* (7th ed. 2024), and biannual supplements thereto. We hope you find this memo helpful.

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A. *NATIONAL HORSEMEN'S II* & PRIVATIZATION

CHAPTER 2.A.1.F.: PRIVATIZATION

The saga of the Horseracing Integrity and Safety Act (HISA) continues. As related in the notes following the excerpt from *National Horsemen's Benevolent & Protective Ass'n v. Black*, after the Fifth Circuit decided that case, Congress amended HISA to give the Federal Trade Commission (FTC) a greater supervisory role over the Horseracing Integrity and Safety Authority (the Authority). Subsequently, the Sixth Circuit upheld the amended statute against a constitutional challenge in *Oklahoma v. United States*.

In *National Horsemen's Benevolent & Protective Ass'n v. Black*, __ F.4th __, 2024 WL 3311366 (5th Cir. July 5, 2024) (*National Horsemen's II*), the Fifth Circuit again considered the HISA's constitutionality, this time taking into account the statutory amendments that Congress adopted to make Federal Trade Commission (FTC) oversight more robust and to resolve the constitutional flaw that the Fifth Circuit had previously identified. The court agreed with the Sixth Circuit's decision in *Oklahoma v. United States*, 62 F.4th 221 (6th Cir. 2023), saying that the statutory amendments "solved the nondelegation problem with the Authority's rulemaking power." However, the court held that "HISA's enforcement provisions violate the private nondelegation doctrine." In the court's view, whereas the previous case concerned rulemaking, and thus "delegation of legislative authority," this case concerned "delegation of executive authority" in the form of "[t]he power to launch an investigation, to search for evidence, to sanction, to sue—all quintessentially executive functions" to private parties. As executive functions, the court said the Constitution does not allow private parties to perform them "without the FTC's involvement," which the court found to be lacking here. FTC's supervisory role of "review[ing] sanctions at the back end, after ALJ review" did not resolve the difficulty because, at that point, "[a]s far as enforcement goes, the horse as already out of the barn." In other words, "each and every one" of the enforcement functions performed by the Authority is executive action, and there is no guarantee that the performance of those functions in a given case will even reach FTC review (as opposed, for example, to being resolved through settlement).

B. *SEC V. JARKESY* & DELEGATIONS OF ADJUDICATORY POWER

CHAPTER 2.B: THE CONSTITUTIONALITY OF DELEGATING ADJUDICATORY POWER

Securities and Exchange Commission v. Jarkesy

144 S. Ct. 2117 (2024)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In 2013, the Securities and Exchange Commission initiated an enforcement action against respondents George Jarkesy, Jr., and Patriot28, LLC, seeking civil penalties for alleged securities fraud. The SEC chose to adjudicate the matter in-house before one of its administrative law judges, rather than in federal court where respondents could have proceeded before a jury. We consider whether the Seventh Amendment permits the SEC to compel respondents to defend themselves before the agency rather than before a jury in federal court.

I

A

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The remedy at issue in this case, civil penalties, also originally depended upon the forum chosen by the SEC. Except in cases against registered entities, the SEC could obtain civil penalties only in federal court. That is no longer so. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act That Act "ma[de] the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court." In other words, the SEC may now seek civil penalties in federal court, or it may impose them through its own in-house proceedings.

Civil penalties rank among the SEC's most potent enforcement tools. These penalties consist of fines of up to $725,000 per violation….

B

* * *

According to the SEC, Jarkesy and Patriot28 misled investors in at least three ways: (1) by misrepresenting the investment strategies that Jarkesy and Patriot28 employed, (2) by lying about the identity of the funds' auditor and prime broker, and (3) by inflating the funds' claimed value so that Jarkesy and Patriot28 could collect larger management fees. The SEC initiated an enforcement action, contending that these actions violated the antifraud provisions of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act, and sought civil penalties and other remedies.

Relying on the new authority conferred by the Dodd-Frank Act, the SEC opted to adjudicate the matter itself rather than in federal court. In 2014, the presiding ALJ issued an initial decision. The SEC reviewed the decision and then released its final order in 2020. The final order levied a civil penalty of $300,000 against Jarkesy and Patriot28, directed them to cease and desist committing or causing violations of the antifraud provisions, ordered Patriot28 to disgorge earnings, and prohibited Jarkesy from participating in the securities industry and in offerings of penny stocks.

Jarkesy and Patriot28 petitioned for judicial review. A divided panel of the Fifth Circuit granted their petition and vacated the final order. Applying a two-part test from *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the panel held that the agency's decision to adjudicate the matter in-house violated Jarkesy's and Patriot28's Seventh Amendment right to a jury trial. First, the panel determined that because these SEC antifraud claims were "akin to [a] traditional action[ ] in debt," a jury trial would be required if this case were brought in an Article III court. It then considered whether the "public rights" exception applied. That exception permits Congress, under certain circumstances, to assign an action to an agency tribunal without a jury, consistent with the Seventh Amendment. The panel concluded that the exception did not apply, and that therefore the case should have been brought in federal court, where a jury could have found the facts pertinent to the defendants' fraud liability. Based on this Seventh Amendment violation, the panel vacated the final order.

It also identified two further constitutional problems. First, it determined that Congress had violated the nondelegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate this action in an Article III court or to adjudicate the matter

itself. The panel also found that the insulation of the SEC ALJs from executive supervision with two layers of for-cause removal protections violated the separation of powers.

II

This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud. Our analysis of this question follows the approach set forth in *Granfinanciera* and *Tull v. United States*, 481 U.S. 412 (1987). The threshold issue is whether this action implicates the Seventh Amendment. It does. The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.

Since this case does implicate the Seventh Amendment, we next consider whether the "public rights" exception to Article III jurisdiction applies. This exception has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial. The exception does not apply here because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury. The Seventh Amendment therefore applies and a jury is required. Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.

A

We first explain why this action implicates the Seventh Amendment.

* * *

2

By its text, the Seventh Amendment guarantees that in "[s]uits at common law, ... the right of trial by jury shall be preserved." In construing this language, we have noted that the right is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. [T]he Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence.". The Amendment therefore "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume."

The Seventh Amendment extends to a particular statutory claim if the claim is "legal in nature." As we made clear in *Tull*, whether that claim is statutory is immaterial to this analysis.

In this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. [W]e have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law."

[T]he civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "a type of remedy at common law that could only be enforced in courts of law." That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims.

The close relationship between the causes of action in this case and common law fraud confirms that conclusion. Both target the same basic conduct: misrepresenting or concealing

material facts. That is no accident. Congress deliberately used "fraud" and other common law terms of art in the Securities Act, the Securities Exchange Act, and the Investment Advisers Act. In so doing, Congress incorporated prohibitions from common law fraud into federal securities law.

Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law "ancestor." "[W]hen Congress transplants a common-law term, the old soil comes with it." Our precedents therefore often consider common law fraud principles when interpreting federal securities law.

That is not to say that federal securities fraud and common law fraud are identical. In some respects, federal securities fraud is narrower. For example, federal securities law does not "convert every common-law fraud that happens to involve securities into a violation." It only targets certain subject matter and certain disclosures. In other respects, federal securities fraud is broader. For example, federal securities fraud employs the burden of proof typical in civil cases, while its common law analogue traditionally used a more stringent standard. Courts have also not typically interpreted federal securities fraud to require a showing of harm to be actionable by the SEC. Nevertheless, the close relationship between federal securities fraud and common law fraud confirms that this action is "legal in nature."

B

1

Although the claims at issue here implicate the Seventh Amendment, the Government and the dissent argue that a jury trial is not required because the "public rights" exception applies. Under this exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. But this case does not fall within the exception, so Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal.

[W]e have repeatedly explained that matters concerning private rights may not be removed from Article III courts. A hallmark that we have looked to in determining if a suit concerns private rights is whether it "is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'" If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory.

At the same time, our precedent has also recognized a class of cases concerning what we have called "public rights." Such matters "historically could have been determined exclusively by [the executive and legislative] branches," even when they were "presented in such form that the judicial power [wa]s capable of acting on them,". In contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in such a case.

Our opinions governing the public rights exception have not always spoken in precise terms. This is an "area of frequently arcane distinctions and confusing precedents." The Court "has not 'definitively explained' the distinction between public and private rights," and we do not claim to do so today.

Nevertheless, since *Murray's Lessee*, this Court has typically evaluated the legal basis for the assertion of the doctrine with care. The public rights exception is, after all, an *exception*. It has no textual basis in the Constitution and must therefore derive instead from background

legal principles. Without such close attention to the basis for each asserted application of the doctrine, the exception would swallow the rule.[2]

From the beginning we have emphasized one point: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can ... withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." We have never embraced the proposition that "practical" considerations alone can justify extending the scope of the public rights exception to such matters. "[E]ven with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts."

2

This is not the first time we have considered whether the Seventh Amendment guarantees the right to a jury trial "in the face of Congress' decision to allow a non-Article III tribunal to adjudicate" a statutory "fraud claim.". We did so in *Granfinanciera*, and the principles identified in that case largely resolve this one.

We concluded that fraudulent conveyance actions were akin to "suits at common law" and were not inseparable from the bankruptcy process. The public rights exception therefore did not apply, and a jury was required.

* * *

3

Granfinanciera effectively decides this case. Even when an action "originate[s] in a newly fashioned regulatory scheme," what matters is the substance of the action, not where Congress has assigned it. And in this case, the substance points in only one direction.

According to the SEC, these are actions under the "antifraud provisions of the federal securities laws" for "fraudulent conduct." They provide civil penalties, a punitive remedy that we have recognized "could only be enforced in courts of law." And they target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles. In short, this action involves a "matter[ ] of private rather than public right." Therefore, "Congress may not 'withdraw' " it " 'from judicial cognizance.' ").

4

Notwithstanding *Granfinanciera*, the SEC contends the public rights exception still applies in this case because Congress created "new statutory obligations, impose[d] civil

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[2] The dissent would brush away these careful distinctions and unfurl a new rule: that whenever Congress passes a statute "entitl[ing] the Government to civil penalties," the defendant's right to a jury and a neutral Article III adjudicator disappears. It bases this rule not in the constitutional text (where it would find no foothold), nor in the ratification history (where again it would find no support), nor in a careful, category-by-category analysis of underlying legal principles of the sort performed by *Murray's Lessee* (which it does not attempt), nor even in a case-specific functional analysis (also not attempted). Instead, the dissent extrapolates from the outcomes in cases concerning unrelated applications of the public rights exception and from one opinion, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977). The result is to blur the distinctions our cases have drawn in favor of the legally unsound principle that just because the Government may extract civil penalties in administrative tribunals in some contexts, it must always be able to do so in all contexts….

penalties for their violation, and then commit[ted] to an administrative agency the function of deciding whether a violation ha[d] in fact occurred."

The foregoing from *Granfinanciera* already does away with much of the SEC's argument. Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be ... taken to an administrative tribunal." Nor does the fact that the SEC action "originate[d] in a newly fashioned regulatory scheme" permit Congress to siphon this action away from an Article III court. The constructive fraud claim in *Granfinanciera* was also statutory, but we nevertheless explained that the public rights exception did not apply. Again, if the action resembles a traditional legal claim, its statutory origins are not dispositive.

The SEC's sole remaining basis for distinguishing *Granfinanciera* is that the Government is the party prosecuting this action. But we have never held that "the presence of the United States as a proper party to the proceeding is ... sufficient" by itself to trigger the exception. Again, what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. The object of this SEC action is to regulate transactions between private individuals interacting in a pre-existing market. To do so, the Government has created claims whose causes of action are modeled on common law fraud and that provide a type of remedy available only in law courts. This is a common law suit in all but name. And such suits typically must be adjudicated in Article III courts.

5

The principal case on which the SEC and the dissent rely is *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). Because the public rights exception as construed in *Atlas Roofing* does not extend to these civil penalty suits for fraud, that case does not control. And for that same reason, we need not reach the suggestion made by Jarkesy and Patriot28 that *Tull* and *Granfinanciera* effectively overruled *Atlas Roofing* to the extent that case construed the public rights exception to allow the adjudication of civil penalty suits in administrative tribunals.

The litigation in *Atlas Roofing* arose under the Occupational Safety and Health Act of 1970 (OSH Act), a federal regulatory regime created to promote safe working conditions. The Act authorized the Secretary of Labor to promulgate safety regulations, and it empowered the Occupational Safety and Health Review Commission (OSHRC) to adjudicate alleged violations. If a party violated the regulations, the agency could impose civil penalties.

Unlike the claims in *Granfinanciera* and this action, the OSH Act did not borrow its cause of action from the common law. Rather, it simply commanded that "[e]ach employer ... shall comply with occupational safety and health standards promulgated under this chapter." These standards bring no common law soil with them. Rather than reiterate common law terms of art, they instead resembled a detailed building code. The purpose of this regime was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law. Rather, Congress stated that it intended the agency to "develop[ ] innovative methods, techniques, and approaches for dealing with occupational safety and health problems." In both concept and execution, the Act was self-consciously novel.

Facing enforcement actions, two employers alleged that the adjudicatory authority of the OSHRC violated the Seventh Amendment. The Court rejected the challenge, concluding that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the

Seventh Amendment[ ]." As the Court explained, the case involved "a new cause of action, and remedies therefor, unknown to the common law." The Seventh Amendment, the Court concluded, was accordingly "no bar to ... enforcement outside the regular courts of law."

Atlas Roofing concluded that Congress could assign the OSH Act adjudications to an agency because the claims were "unknown to the common law." The case therefore does not control here, where the statutory claim is "'in the nature of '" a common law suit. As we have explained, Jarkesy and Patriot28 were prosecuted for "fraudulent conduct," and the pertinent statutory provisions derive from, and are interpreted in light of, their common law counterparts.

The reasoning of *Atlas Roofing* cannot support any broader rule.

For its part, the dissent also seems to suggest that *Atlas Roofing* establishes that the public rights exception applies whenever a statute increases governmental efficiency. Again, our precedents foreclose this argument. As *Stern* explained, effects like increasing efficiency and reducing public costs are not enough to trigger the exception. Otherwise, evading the Seventh Amendment would become nothing more than a game, where the Government need only identify some slight advantage to the public from agency adjudication to strip its target of the protections of the Seventh Amendment.

The novel claims in *Atlas Roofing* had never been brought in an Article III court. By contrast, law courts have dealt with fraud actions since before the founding, and Congress had authorized the SEC to bring such actions in Article III courts and still authorizes the SEC to do so today. Given the judiciary's long history of handling fraud claims, it cannot be argued that the courts lack the capacity needed to adjudicate such actions.

In short, *Atlas Roofing* does not conflict with our conclusion. When a matter "from its nature, is the subject of a suit at the common law," Congress may not "withdraw [it] from judicial cognizance."

* * *

A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator. Rather than recognize that right, the dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands. Jarkesy and Patriot28 are entitled to a jury trial in an Article III court. We do not reach the remaining constitutional issues and affirm the ruling of the Fifth Circuit on the Seventh Amendment ground alone.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I write separately to highlight that other constitutional provisions reinforce the correctness of the Court's course. The Seventh Amendment's jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property. The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process

promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal."

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

Throughout our Nation's history, Congress has authorized agency adjudicators to find violations of statutory obligations and award civil penalties to the Government as an injured sovereign. The Constitution, this Court has said, does not require these civil-penalty claims belonging to the Government to be tried before a jury in federal district court. Congress can instead assign them to an agency for initial adjudication, subject to judicial review. This Court has blessed that practice repeatedly, declaring it "the 'settled judicial construction'" all along; indeed, "'from the beginning.'" *Atlas Roofing*. Unsurprisingly, Congress has taken this Court's word at face value. It has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations. Congress had no reason to anticipate the chaos today's majority would unleash after all these years.

Today, for the very first time, this Court holds that Congress violated the Constitution by authorizing a federal agency to adjudicate a statutory right that inheres in the Government in its sovereign capacity, also known as a public right. According to the majority, the Constitution requires the Government to seek civil penalties for federal-securities fraud before a jury in federal court. The nature of the remedy is, in the majority's view, virtually dispositive. That is plainly wrong. This Court has held, without exception, that Congress has broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries.

Beyond the majority's legal errors, its ruling reveals a far more fundamental problem: This Court's repeated failure to appreciate that its decisions can threaten the separation of powers. Here, that threat comes from the Court's mistaken conclusion that Congress cannot assign a certain public-rights matter for initial adjudication to the Executive because it must come only to the Judiciary.

The majority today upends longstanding precedent and the established practice of its coequal partners in our tripartite system of Government. Because the Court fails to act as a neutral umpire when it rewrites established rules in the manner it does today, I respectfully dissent.

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Notes and Questions

1. The Court is clear that the applicability of the Seventh Amendment does not require a statutory cause of action to be identical to a common law cause of action. How much resemblance between the two is required to make it unconstitutional for an agency to adjudicate a regulatory dispute? The Court describes the fatal relationship in varying language, e.g., a statutory action that has a "close relationship" to a common law cause of action, a statutory cause of action that is "akin to" a common law action, and a statutory cause of action that "brings common law soil" with it. How easy is it to apply these tests? Do they all have the same meaning?

2. What is the status of the Court's holdings in *Union Carbide* and *Schor* after *Jarkesy*? Can the CFTC even adjudicate a dispute in which it alleges that someone violated the Commodity Exchange Act after *Jarkesy*? That statute has a history and origin that is similar to the SEC's civil penalty statute. Congress concluded that there was widespread fraud in the commodities futures markets and that the judicially implemented common law fraud remedy was inadequate to address the problem. It concluded that the problem could only be addressed effectively by an agency with expertise in futures markets. Does that reason to enact an agency-administered regulatory statute and to allocate adjudication of disputes under the statute to the agency mean that the statute is unconstitutional?

3. As the dissent notes, Congress has enacted over 200 statutes in which it has authorized over a dozen agencies to adjudicate disputes involving civil penalties for violations of a regulatory statute. Congress enacted many of those statutes based on reasoning like its reasons for enacting the SEC's civil penalty statute and the Commodity Exchange Act. How many of those statutes are likely to be held unconstitutional after *Jarkesy*? Are statutes of that type likely to be effective for their intended purpose if the agency must litigate all enforcement actions in court? Are judges and juries likely to have enough subject matter knowledge to adjudicate the disputes accurately and consistently?

4. The holding in *Jarkesy* is limited to issues of law because the question is whether the Seventh Amendment applies. Yet, the Court relies interchangeably on Seventh Amendment precedents and Article III precedents. Article III does not distinguish between legal remedies and equitable remedies. Predict the results when the Court addresses the issue of whether Congress can allocate adjudication of securities fraud cases to the SEC when the agency seeks only equitable remedies.

5. In *Stern v. Marshall*, the Court referred to its application of the public rights doctrine in *Union Carbide* and *Schor* using pragmatic reasoning: the exception applies "to cases in which the claim at issue derives from a federal regulatory regime, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." Is that description accurate after *Jarkesy*? What, if anything, remains within the scope of the public rights doctrine after *Jarkesy*?

6. The Supreme Court leaves in effect the Fifth Circuit's holding that an agency cannot use an ALJ to adjudicate a dispute because no officer appointed by the President has the power to remove an ALJ without cause. If your client loses an adjudication at an agency, in which Circuit should it file its petition for review? Is your client likely to be treated more fairly by an administrative judge who can be removed without cause by the agency that accuses your client of violating a statute?

C. *OHIO V. EPA* & HARD LOOK REVIEW

CHAPTER 5, SECTION C: ARBITRARY AND CAPRICIOUS ("HARD LOOK") REVIEW

A symbiotic relationship exists between the requirement that an agency respond to significant comments received under APA § 553(c), which is discussed in Section B.2.c. of this Chapter, and arbitrary and capricious review under APA § 706(2)(A). In *Ohio v. Environmental Protection Agency*, 144 S. Ct. 2040 (2024), a five-Justice majority of the Supreme Court rejected an EPA rule imposing a single Federal Implementation Plan (FIP) upon 23 states with State Implementation Plans (SIPs) that EPA decided violated the Clean

Air Act's "Good Neighbor Provision." The Court's reasoning, in short, was that EPA failed to adequately address public comments received in response to its proposal.

According to the Court, after two years of failing to act on SIPs, EPA first proposed disapproving 19 SIPs, and then a few months later proposed disapproving another 4 SIPs. While public comments were pending on those disapprovals, EPA proposed a single, uniform FIP for all 23 states. In response to the proposed FIP, EPA received comments that EPA's assessment of cost effectiveness assumed that the FIP would apply to all covered states, when it "was not an entirely speculative possibility" that some states might not be covered. If only some of the 23 states were covered by the FIP, the commenters claimed that EPA then would need "to conduct a new assessment and modeling of contribution and subject those findings to public comment." According to the Court, subsequent litigation "seemed to vindicate at least some of the commenters' concerns," prompting two circuits to stay some of the SIP denials. Yet EPA went ahead and finalized the FIP, responding to the comments by adopting a severability provision applying the FIP to any states that did not drop from its coverage as a result of then-pending litigation. Considering whether to enjoin enforcement of the FIP, the Court held that EPA's final FIP violated the arbitrary and capricious standard and *State Farm*. The Court found that EPA "offered no reasoned response" to the above-described comments. The Court said that the severability provision merely demonstrated EPA's awareness of the concerns raised and was "not itself an explanation" for why those concerns were unwarranted. The Court also rejected arguments that the comments were insufficiently specific and that the challengers should have sought reconsideration of the final FIP by EPA before filing suit.

Justice Barrett's dissent, joined by Justices Sotomayor, Kagan, and Jackson, raised several objections. The dissenters accused the majority of "downplay[ing] EPA's statutory role in ensuring that States meet air-quality standards." They argued that EPA's SIP disapprovals might prove to be valid. They noted that EPA was "obliged" to start the FIP process to satisfy a statutory deadline. They said the Court "identifie[d] no evidence that the FIP's emissions limits would have been different for a different set of States." And they noted that "the final rule and its supporting documents suggest that EPA's methodology for setting emissions limits did not depend on the number of States in the plan, but on nationwide data for the relevant industries." The opinion of the Court rejected these arguments as well, saying that, "if the government had arguments along these lines, it did not make them," and thus "forfeited" them.

D. *LOPER BRIGHT ENTERPRISES V. RAIMONDO* & CHEVRON DEFERENCE

CHAPTER 6 IN GENERAL

"*Chevron* is overruled." With those words in *Loper Bright Enterprises v. Raimondo*, Chief Justice Roberts for the Court completely upended how we teach judicial review of agency interpretations of statutes. We offer an excerpt and teaching notes for *Loper Bright* below. In addition, we recommend teaching judicial review of agency interpretations of statutes using the textbook as follows:

- **Assignment 1:** The Pre-*Chevron* Approach (*NLRB & Hearst Publications*; *Skidmore v. Swift & Co.*, pages 721-738).

  The Court in *Loper Bright* spoke favorably of both *Hearst Publications* and *Skidmore* as exemplars of the traditional approach to judicial review of agency interpretations of

statutes. Consequently, these two cases not only reflect the pre-*Chevron* past but also foreshadow how lower courts may address future cases. Likewise, the short essay on *Skidmore* after *United States v. Mead Corp.* may shed some light

- **Assignment 2:** The *Chevron* Revolution (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, pages 738-747; *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 870-881)

  Obviously, *Chevron* kicked off forty years of significant jurisprudence governing judicial review of agency statutory interpretations. Students need to know about it, and *Loper Bright* will make no sense if they do not. Much of what came after (and is covered at length in Chapter 6) can be addressed in a brief lecture. We suggest *Brand X* because, in our view, the holding of that case, by allowing agencies to reverse decisions of the courts of appeals, was a critical driver of the push by several justices to overturn *Chevron*.

- **Assignment 3:** *Chevron* Is Overturned (*Loper Bright Enterprises v. Raimondo*, excerpt below; The Modern *Skidmore* Doctrine, pages 869-870)

  We will be analyzing the meaning and consequences of the *Loper Bright* decision for years to come. The essay on *Skidmore* as applied by the lower courts after the Supreme Court's 2001 decision in *United States v. Mead Corp.* may offer some insights regarding how those courts might approach at least some judicial review of agency interpretations after *Loper Bright*.

- **Assignment 4:** Major Questions Doctrine (Intro to the topic and *West Virginia v. EPA*, pages 911-912, 915-938, skipping the excerpt from *King v. Burwell*; include also the discussion of *Biden v. Nebraska* contained in this supplemental memo).

  It seems likely to us that major questions doctrine will continue to influence judicial review of agency interpretations of statutes.

- **(Potential) Assignment 5:** Although *Kisor v. Wilkie*, governing judicial review of agency interpretations of agency regulations, is only a few years old, it is unclear at this juncture what the impact of the reasoning of *Loper Bright* on *Kisor*'s several steps will be. The material in Chapter 6.G. on this topic could be a fifth assignment, or you might choose to skip this material until we gain greater clarity.

Loper Bright Enterprises v. Raimondo

144 S. Ct. 2244 (2024)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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I

Our *Chevron* doctrine requires courts to use a two-step framework to interpret statutes administered by federal agencies. After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." If, and only if, congressional intent is "clear," that is the end of the inquiry. But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at *Chevron*'s

second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute."

* * *

The National Marine Fisheries Service (NMFS) administers the [Magnuson-Stevens Fishery Conservation and Management Act (MSA)] under a delegation from the Secretary of Commerce.

The MSA established eight regional fishery management councils composed of representatives from the coastal States, fishery stakeholders, and NMFS. The councils develop fishery management plans, which NMFS approves and promulgates as final regulations. * * *

Relevant here, a plan may also require that "one or more observers be carried on board" domestic vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." The MSA specifies three groups that must cover costs associated with observers: (1) foreign fishing vessels operating within the exclusive economic zone (which *must* carry observers), (2) vessels participating in certain limited access privilege programs, which impose quotas permitting fishermen to harvest only specific quantities of a fishery's total allowable catch, and (3) vessels within the jurisdiction of the North Pacific Council, where many of the largest and most successful commercial fishing enterprises in the Nation operate. In the latter two cases, the MSA expressly caps the relevant fees at two or three percent of the value of fish harvested on the vessels. And in general, it authorizes the Secretary to impose "sanctions" when "any payment required for observer services provided to or contracted by an owner or operator ... has not been paid."

The MSA does not contain similar terms addressing whether Atlantic herring fishermen may be required to bear costs associated with any observers a plan may mandate. And at one point, NMFS fully funded the observer coverage the New England Fishery Management Council required in its plan for the Atlantic herring fishery. In 2013, however, the council proposed amending its fishery management plans to empower it to require fishermen to pay for observers if federal funding became unavailable. Several years later, NMFS promulgated a rule approving the amendment.

With respect to the Atlantic herring fishery, the Rule created an industry funded program that aims to ensure observer coverage on 50 percent of trips undertaken by vessels with certain types of permits. Under that program, vessel representatives must "declare into" a fishery before beginning a trip by notifying NMFS of the trip and announcing the species the vessel intends to harvest. If NMFS determines that an observer is required, but declines to assign a Government-paid one, the vessel must contract with and pay for a Government-certified third-party observer. NMFS estimated that the cost of such an observer would be up to $710 per day, reducing annual returns to the vessel owner by up to 20 percent.

Petitioners Loper Bright Enterprises, Inc., H&L Axelsson, Inc., Lund Marr Trawlers LLC, and Scombrus One LLC are family businesses that operate in the Atlantic herring fishery. In February 2020, they challenged the Rule under the MSA. In relevant part, they argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan.

* * *

II

A

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. Cognizant of the limits of human language and foresight, they anticipated that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation," would be "more or less obscure and equivocal, until their meaning" was settled "by a series of particular discussions and adjudications." The Federalist No. 37, p. 236 (J. Cooke ed. 1961) (J. Madison).

The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." *Id.*, No. 78, at 525 (A. Hamilton). Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." *Id.*, at 523. To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. *Id.*, at 522.

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). And in the following decades, the Court understood "interpret[ing] the laws, in the last resort," to be a "solemn duty" of the Judiciary. *United States v. Dickson*, 15 Pet. 141, 162 (1841) (Story, J., for the Court). When the meaning of a statute was at issue, the judicial role was to "interpret the act of Congress, in order to ascertain the rights of the parties." *Decatur v. Paulding*, 14 Pet. 497, 515 (1840).

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, in *Edwards' Lessee v. Darby*, 12 Wheat. 206 (1827), the Court explained that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.".

Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. See *Dickson*, 15 Pet. at 161; *United States v. Alabama Great Southern R. Co.*, 142 U.S. 615, 621 (1892); *National Lead Co. v. United States*, 252 U.S. 140, 145-146 (1920). That is because "the longstanding 'practice of the government'"—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.'" *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (first quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); then quoting *Marbury*, 1 Cranch at 177). The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently ... the draftsmen of the laws they [were] afterwards called upon to interpret." *United States v. Moore*, 95 U.S. 760, 763 (1878).

"Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given

by the head of a department." *Decatur*, 14 Pet. at 515; see also *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932). Otherwise, judicial judgment would not be independent at all. * * *

B

The New Deal ushered in a "rapid expansion of the administrative process." *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950). But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment.

During this period, the Court often treated agency determinations of *fact* as binding on the courts, provided that there was "evidence to support the findings." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936). * * *

But the Court did not extend similar deference to agency resolutions of questions of *law*. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." *United States v. American Trucking Assns.*, Inc., 310 U.S. 534, 544 (1940); see also *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 681-682, n.1 (1944). The Court understood, in the words of Justice Brandeis, that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards*, 298 U.S. at 84 (concurring opinion). It also continued to note, as it long had, that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to "great weight." *American Trucking Assns.*, 310 U.S. at 549.

Perhaps most notably along those lines, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon ... specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. For example, in *Gray v. Powell*, 314 U.S. 402 (1941), the Court deferred to an administrative conclusion that a coal-burning railroad that had arrangements with several coal mines was not a coal "producer" under the Bituminous Coal Act of 1937. Congress had "specifically" granted the agency the authority to make that determination. The Court thus reasoned that "[w]here, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched" so long as the agency's decision constituted "a sensible exercise of judgment." Similarly, in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court deferred to the determination of the National Labor Relations Board that newsboys were "employee[s]" within the meaning of the National Labor Relations Act. The Act had, in the Court's judgment, "assigned primarily" to the Board the task of marking a "definitive limitation around the term 'employee.'" The Court accordingly viewed its own role as "limited" to assessing whether the Board's determination had a "'warrant in the record' and a reasonable basis in law."

Such deferential review, though, was cabined to factbound determinations like those at issue in *Gray* and *Hearst*. Neither *Gray* nor *Hearst* purported to refashion the longstanding judicial approach to questions of law. In *Gray*, after deferring to the agency's determination that a particular entity was not a "producer" of coal, the Court went on to discern, based on its own reading of the text, whether another statutory term—"other disposal" of coal—encompassed a transaction lacking a transfer of title. The Court evidently perceived no basis for deference to the agency with respect to that pure legal question. And in *Hearst*, the Court proclaimed that "[u]ndoubtedly questions of statutory interpretation ... are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." At least with respect to questions it regarded as involving "statutory interpretation," the Court thus did not disturb the traditional rule. It merely thought that a different approach should apply where application of a statutory term was sufficiently intertwined with the agency's factfinding.

In any event, the Court was far from consistent in reviewing deferentially even such factbound statutory determinations. Often the Court simply interpreted and applied the statute before it. See K. Davis, Administrative Law § 248, p. 893 (1951) ("The one statement that can be made with confidence about applicability of the doctrine of Gray v. Powell is that sometimes the Supreme Court applies it and sometimes it does not."); B. Schwartz, Gray vs. Powell and the Scope of Review, 54 Mich. L. Rev. 1, 68 (1955) (noting an "embarrassingly large number of Supreme Court decisions that do not adhere to the doctrine of *Gray v. Powell*"). * * *

Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. Instead, just five years after *Gray* and two after *Hearst*, Congress codified the opposite rule [in the APA]: the traditional understanding that *courts* must "decide all relevant questions of law." 5 U.S.C. § 706.

C

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Morton Salt*, 338 U.S. at 644. It was the culmination of a "comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-671 (1986).

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law." § 706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, § 706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial

review of agency policymaking and factfinding be deferential. See § 706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); § 706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

In a statute designed to "serve as the fundamental charter of the administrative state," *Kisor v. Wilkie*, 588 U.S. 558, 580 (2019) (plurality opinion), Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was "exclusively a judicial function," *American Trucking Assns.*, 310 U.S. at 544. But nothing in the APA hints at such a dramatic departure. On the contrary, by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus "remains the responsibility of the court to decide whether the law means what the agency says." *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in judgment).

* * *

The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U.S. at 140. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning. See *ibid.*; *American Trucking Assns.*, 310 U.S. at 549.

In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[ ]" to an agency the authority to give meaning to a particular statutory term. *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (emphasis deleted).[5] Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman v. Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan v. EPA*, 576 U.S. 743, 752 (2015), such as "appropriate" or "reasonable."[6]

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[5] See, *e.g.*, 29 U.S.C. § 213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)" (emphasis added)); 42 U.S.C. § 5846(e)(2) (requiring notification to Nuclear Regulatory Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*" (emphasis added)).

[6] See, *e.g.*, 33 U.S.C. § 1312(a) (requiring establishment of effluent limitations "[w]henever, in the judgment of the [Environmental Protection Agency (EPA)] Administrator ..., discharges of pollutants from a point source or group of point sources ... would interfere with the attainment or maintenance of that water quality ... which shall assure" various outcomes, such as the "protection of public health" and "public water supplies"); 42 U.S.C. § 7412(n)(1)(A) (directing EPA to regulate power plants "if the Administrator finds such regulation is appropriate and necessary").

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983), and ensuring the agency has engaged in "'reasoned decisionmaking'" within those boundaries, *Michigan*, 576 U.S. at 750 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)); see also *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

III

The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.

A

In the decades between the enactment of the APA and this Court's decision in *Chevron*, courts generally continued to review agency interpretations of the statutes they administer by independently examining each statute to determine its meaning. Cf. T. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 972-975 (1992). As an early proponent (and later critic) of *Chevron* recounted, courts during this period thus identified delegations of discretionary authority to agencies on a "statute-by-statute basis." A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 516.

Chevron, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. The question in the case was whether an EPA regulation "allow[ing] States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble'" was consistent with the term "stationary source" as used in the Clean Air Act. 467 U.S. at 840. To answer that question of statutory interpretation, the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action.

The first step was to discern "whether Congress ha[d] directly spoken to the precise question at issue." *Id.*, at 842. The Court explained that "[i]f the intent of Congress is clear, that is the end of the matter," *ibid.*, and courts were therefore to "reject administrative constructions which are contrary to clear congressional intent," *id.*, at 843, n. 9. To discern such intent, the Court noted, a reviewing court was to "employ[ ] traditional tools of statutory construction." *Ibid.*

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." *Id.*, at 843. In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to

Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme, EPA's "detailed and reasoned" consideration, the policy-laden nature of the judgment supposedly required, and the agency's indirect accountability to the people through the President.

* * *

Initially, *Chevron* "seemed destined to obscurity." T. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, 66 Admin. L. Rev. 253, 276 (2014). The Court did not at first treat it as the watershed decision it was fated to become; it was hardly cited in cases involving statutory questions of agency authority. But within a few years, both this Court and the courts of appeals were routinely invoking its two-step framework as the governing standard in such cases. As the Court did so, it revisited the doctrine's justifications. Eventually, the Court decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996); see also, *e.g.*, *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261, 276-277 (2016); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 315 (2014); *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 982 (2005).

B

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The "law of deference" that this Court has built on the foundation laid in *Chevron* has instead been "[h]eedless of the original design" of the APA. *Perez*, 575 U.S. at 109 (Scalia, J., concurring in judgment).

* * *

Chevron defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide *all* relevant questions of law" and "interpret ... statutory provisions." § 706 (emphasis added). It requires a court to *ignore*, not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the APA. *Chevron*, 467 U.S. at 843, n.11. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, *Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." *Brand X*, 545 U.S. at 982. * * *

Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron*'s presumption does not, because "[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two." C. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 445 (1989). * * *

Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a

delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. * * * Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes * * *. So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.

* * *

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. * * * The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate.

* * *

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

* * *

IV

[Eds. In this section of the Court's opinion, it explained why its stare decisis jurisprudence allowed it to overturn *Chevron* as a flawed precedent. Nevertheless, the Court said that, by overturning *Chevron*, it did not "call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology."]

* * *

The dissent ends by quoting *Chevron*: "'Judges are not experts in the field.'" That depends, of course, on what the "field" is. If it is legal interpretation, that has been, "emphatically," "the province and duty of the judicial department" for at least 221 years. *Marbury*, 1 Cranch at 177. * * * Indeed. Judges have always been expected to apply their "judgment" *independent* of the political branches when interpreting the laws those branches enact. * * *

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

- *[The concurring opinion of Justice THOMAS is omitted. It argues that "*Chevron *deference also violate[d] our Constitution's constitutional separation of powers." Eds.]*
- *[The concurring opinion of Justice GORSUCH is omitted. It presents his views regarding "why the proper application of the doctrine of stare decisis support[ed]" overturning* Chevron *to "return[] judges to interpretive rules that have guided federal courts since the Nation's founding." Eds.]*
- *[The dissenting opinion of Justice KAGAN, joined by Justices SOTOMAYOR and JACKSON, is omitted. In many ways, the dissent echoes the themes and arguments from Justice Kagan's opinion in* Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which is excerpted in Chapter 6, Section G of the textbook. Eds.]*

Notes and Questions

1. In *Loper Bright*, the Court repeatedly says that the proper approach to reviewing agency statutory interpretations is for courts to "exercise independent judgment." Does that mean *de novo* review? What role should the agency's interpretation of the statute play? At oral argument, counsel for petitioners argued that *Skidmore* should replace *Chevron*. The Court cites and discuses *Skidmore* throughout the opinion, but it seems to consciously avoid calling *Skidmore* a "deference" doctrine. What role will *Skidmore* play going forward?

2. If you worked in the general counsel's office of a federal agency, how would you advise the agency general counsel and political leadership on how to approach drafting regulations after *Loper Bright*? Would the agency need to change its approach?

3. If you worked in Congress as a legislative counsel, how would you advise your boss on how to draft statutes going forward? In particular, if your boss wanted to make sure that the agency is delegated authority to decide how to implement the statute, how would you draft the legislative to ensure that? The Court suggested three potential paths forward for Congress to do in legislation: (1) expressly delegate to give meaning to particular statutory terms; (3) provide for rulemaking authority to "fill up the details" of a statutory scheme; and (3) include flexible, open-ended statutory language, such as "appropriate" or "reasonable." How would Congress use each of those approaches? Could Congress, instead, just codify *Chevron* deference in the APA, or in a specific agency's governing statute?

4. With respect to that third approach to statutory drafting, how would such open-ended statutory language interact with the nondelegation doctrine?

E. *BIDEN V. NEBRASKA* & MAJOR QUESTIONS DOCTRINE

CHAPTER 6, SECTION F: MAJOR QUESTIONS DOCTRINE

In *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), the Supreme Court again applied the major questions doctrine to invalidate agency action. This case concerned proposed regulations, and a preliminary injunction regarding the same, that would have canceled approximately $430 billion in student loan debt principal owed by roughly 43 million borrowers based on a Department of Education interpretation of a provision of the HEROES Act authorizing the agency to "waive or modify" student loans "as the Secretary deems necessary in connection with a … national emergency." The majority opinion, authored by Chief Justice Roberts on behalf of a six-justice majority, held that the power to waive or modify did not authorize "basic and fundamental changes" in the statutory scheme, and thus that the HEROES Act did not give the Secretary authority to cancel $430 billion in student loan debt principal. The

majority opinion relied heavily on past major questions cases and, in many respects, resembled the opinion of the Court in *West Virginia v. EPA*, which also was authored by Chief Justice Roberts and which is excerpted in Chapter 6 of the textbook. The majority opinion noted that the economic and political significance of the agency's proposed regulations was "staggering by any measure" and accused the agency of "seizing the power of the Legislature." Statutory language directing the agency to publish a notice "includ[ing] the terms and conditions to be applied in lieu of" provisions waived or modified by the Secretary was "a wafer-thin reed on which to rest such sweeping power." The Court was unpersuaded by appeals to agency latitude in a national emergency, saying that "[t]he question is not whether something should be done; it is who has the authority to do it."

Justice Barrett authored a concurring opinion in *Biden v. Nebraska* which is particularly notable by comparison with Justice Gorsuch's concurring opinion in *West Virginia v. EPA*, as it reflects a different perspective on major questions doctrine, including an effort to reconcile it with textualism.

Biden v. Nebraska

143 S. Ct. 2355 (2023)

■ JUSTICE BARRETT concurring.

* * *

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

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

* * *

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

While one could walk away from our major questions cases with this impression, I do not read them this way. No doubt, many of our cases express an expectation of "clear

congressional authorization" to support sweeping agency action. See, *e.g., West Virginia*, 142 S. Ct. at 2609; *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). But none requires "an 'unequivocal declaration'" from Congress authorizing the *precise* agency action under review, as our clear-statement cases do in their respective domains. And none purports to depart from the best interpretation of the text—the hallmark of a true clear-statement rule.

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

* * *

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

Context is not found exclusively within the four corners of a statute. Background legal conventions, for instance, are part of the statute's context. * * *

Context also includes common sense * * *. Case reporters and casebooks brim with illustrations of why literalism—the antithesis of context-driven interpretation—falls short. * * *

Why is any of this relevant to the major questions doctrine? Because context is also relevant to interpreting the scope of a delegation. * * * [I]magine that a grocer instructs a clerk to "go to the orchard and buy apples for the store." Though this grant of apple-purchasing authority sounds unqualified, a reasonable clerk would know that there are limits. For example, if the grocer usually keeps 200 apples on hand, the clerk does not have actual authority to buy 1,000—the grocer would have spoken more directly if she meant to authorize such an out-of-the-ordinary purchase. A clerk who disregards context and stretches the words to their fullest will not have a job for long.

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

But what if there is more to the story? Perhaps there is obvious contextual evidence that the babysitter's jaunt was permissible—for example, maybe the parent left tickets to the amusement park on the counter. Other clues, though less obvious, can also demonstrate that the babysitter took a reasonable view of the parent's instruction. Perhaps the parent showed

the babysitter where the suitcases are, in the event that she took the children somewhere overnight. Or maybe the parent mentioned that she had budgeted $2,000 for weekend entertainment. Indeed, some relevant points of context may not have been communicated by the parent at all. For instance, we might view the parent's statement differently if this babysitter had taken the children on such trips before or if the babysitter were a grandparent.

In my view, the major questions doctrine grows out of these same commonsense principles of communication. Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air*, 573 U.S. at 324. That clarity may come from specific words in the statute, but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency.

This expectation of clarity is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). Or, as Justice Breyer once observed, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration." S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986). That makes eminent sense in light of our constitutional structure, which is itself part of the legal context framing any delegation. Because the Constitution vests Congress with "[a]ll legislative Powers," Art. I, § 1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch. See *West Virginia*, 142 S. Ct., at 2609 (explaining that the major questions doctrine rests on "both separation of powers principles and a practical understanding of legislative intent").

Crucially, treating the Constitution's structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to overenforce Article I's nondelegation principle (which, again, is the rationale behind the substantive-canon view of the major questions doctrine). My point is simply that in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on "important subjects" while delegating away only "the details." *Wayman v. Southard*, 10 Wheat. 1 (1825). That is different from a normative rule that *discourages* Congress from empowering agencies. * * * In short, the balance of power between those in a relationship inevitably frames our understanding of their communications. And when it comes to the Nation's policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore.

Given these baseline assumptions, an interpreter should "typically greet" an agency's claim to "extravagant statutory power" with at least some "measure of skepticism." *Utility Air*, 573 U.S., at 324. * * *

Still, this skepticism does not mean that courts have an obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency's authority—and that marks a key difference between my view and the "clear statement" view of the major questions doctrine. * * * In some cases, the court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing. * * * If so, the court must adopt the agency's reading despite the

"majorness" of the question. In other cases, however, the court might conclude that the agency's expansive reading, even if "plausible," is not the best. *West Virginia*, 142 S. Ct., at 2609. In that event, the major questions doctrine plays a role, because it helps explain the court's conclusion that the agency overreached.

Consider *Brown & Williamson*, in which we rejected the Food and Drug Administration's (FDA's) determination that tobacco products were within its regulatory purview. 529 U.S., at 131. The agency's assertion of authority—which depended on the argument that nicotine is a "'drug'" and that cigarettes and smokeless tobacco are "'drug delivery devices'"—would have been plausible if the relevant statutory text were read in a vacuum. But a vacuum is no home for a textualist. Instead, we stressed that the "meaning" of a word or phrase "may only become evident when placed in *context*." And the critical context in *Brown & Williamson* was tobacco's "unique political history": the FDA's longstanding disavowal of authority to regulate it, Congress's creation of "a distinct regulatory scheme for tobacco products," and the tobacco industry's "significant" role in "the American economy." In light of those considerations, we concluded that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."

We have also been "[s]keptical of mismatches" between broad "invocations of power by agencies" and relatively narrow "statutes that purport to delegate that power." *In re MCP No. 165, OSHA, Interim Final Rule: Covid-19 Vaccination and Testing*, 20 F.4th 264, 272 (CA6 2021) (Sutton, C. J., dissenting from denial of initial hearing en banc). Just as an instruction to "pick up dessert" is not permission to buy a four-tier wedding cake, Congress's use of a "subtle device" is not authorization for agency action of "enormous importance." *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994); cf. *Whitman v. American Trucking Assns.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). This principle explains why the Centers for Disease Control and Prevention's (CDC's) general authority to "'prevent the ... spread of communicable diseases'" did not authorize a nationwide eviction moratorium. *Alabama Assn. of Realtors*, 141 S. Ct. 2486-87, 2488-89. The statute, we observed, was a "wafer-thin reed" that could not support the assertion of "such sweeping power." Likewise, in *West Virginia*, we held that a "little-used backwater" provision in the Clean Air Act could not justify an Environmental Protection Agency (EPA) rule that would "restructur[e] the Nation's overall mix of electricity generation." 142 S. Ct., at 2607, 2613.

Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse. For instance, in *Gonzales v. Oregon*, we rebuffed an interpretive rule from the Attorney General that restricted the use of controlled substances in physician-assisted suicide. 546 U.S. at 254, 275. This judgment, we explained, was a medical one that lay beyond the Attorney General's expertise, and so a sturdier source of statutory authority than "an implicit delegation" was required. Likewise, in *King v. Burwell*, we blocked the Internal Revenue Service's (IRS's) attempt to decide whether the Affordable Care Act's tax credits could be available on federally established exchanges. 576 U.S., at 485-486. Among other things, the IRS's lack of "expertise in crafting health insurance policy" made us think that "had Congress wished to assign that question to an agency, it surely would have done so expressly." Echoing the theme, our reasoning in *Alabama Association of Realtors* rested partly on the fact that the CDC's eviction moratorium "intrude[d] into ... the landlord-tenant relationship"—hardly the day-in, day-out work of a public-health agency. *National Federation of Independent Business v. OSHA* is of a piece. 142 S. Ct. 661 (2022) (*per curiam*). There, we held that the Occupational Safety and Health

Administration's (OSHA's) authority to ensure "'safe and healthful working conditions'" did not encompass the power to mandate the vaccination of employees; as we explained, the statute empowered the agency "to set *workplace* safety standards, not broad public health measures." The shared intuition behind these cases is that a reasonable speaker would not understand Congress to confer an unusual form of authority without saying more.

We have also pumped the brakes when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Utility Air*, 573 U.S., at 324. Of course, an agency's post-enactment conduct does not control the meaning of a statute, but "this Court has long said that courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court." *Bittner v. United States*, 598 U.S. 85, 97 (2023) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The agency's track record can be particularly probative in this context: A longstanding "want of assertion of power by those who presumably would be alert to exercise it" may provide some clue that the power was never conferred. *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941). Once again, *Brown & Williamson* is a good example. There, we balked at the FDA's novel attempt to regulate tobacco in part because this move was "[c]ontrary to its representations to Congress since 1914." And in *Utility Air*, we were dubious when the EPA discovered "newfound authority" in the Clean Air Act that would have allowed it to require greenhouse-gas permits for "millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches."

If the major questions doctrine were a substantive canon, then the common thread in these cases would be that we "exchange[d] the most natural reading of a statute for a bearable one more protective of a judicially specified value." Barrett 111. But by my lights, the Court arrived at the most plausible reading of the statute in these cases. To be sure, "[a]ll of these regulatory assertions had a colorable textual basis." *West Virginia*, 142 S. Ct., at 2609. In each case, we could have "[p]ut on blinders" and confined ourselves to the four corners of the statute, and we might have reached a different outcome. *Sykes v. United States*, 564 U.S. 1, 43 (2011) (Kagan, J., dissenting). Instead, we took "off those blinders," "view[ed] the statute as a whole," and considered context that would be important to a reasonable observer. With the full picture in view, it became evident in each case that the agency's assertion of "highly consequential power" went "beyond what Congress could reasonably be understood to have granted." *West Virginia*, 142 S. Ct., at 2609.

* * *

The major questions doctrine has an important role to play when courts review agency action of "vast 'economic and political significance.'" *Utility Air*, 134 S. Ct. 2427. But the doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way.

Notes and Questions

In his concurring opinion in *West Virginia v. EPA*, Justice Gorsuch described the major questions doctrine as a substantive canon and a clear statement rule. Justice Barrett here rejects that characterization. Why? What is the difference? And why does that difference matter?

F. *CORNER POST V. BOARD OF GOVERNORS* & STATUTES OF LIMITATIONS

CHAPTER 7 GENERALLY

Although Chapter 7 covers a variety of justiciability limitations and topics, it does not discuss statutes of limitations. In recent years, however, statutes of limitations have emerged as an area of substantial litigation in the administrative law context. In a series of cases including *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013); *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015); *Boechler, PC v. Commissioner of Internal Revenue*, 142 S. Ct. 1493 (2022); and *Wilkins v. United States*, 143 S. Ct. 870 (2023), the Supreme Court has moved to identify statutory limitations provisions as claims processing rules rather than as jurisdictional, thus opening up those provisions to equitable tolling. These decisions have resulted in a wave of litigation asking the courts to characterize (or, in some instances, recharacterize) various statutory limitations provisions as nonjurisdictional.

Separately, for many years, courts have read 28 U.S.C. § 2401(a) as establishing a six-year limitations period for brining certain claims under the APA, although circumstances could toll the statute. In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024), the Supreme Court reached a pivotal conclusion regarding when a facial challenge to an agency rule or regulation under the APA accrues for purposes of the six-year limitations period of 28 U.S.C. § 2401. Before this decision, the courts of appeals were divided over whether such a claim would accrue when an agency issued the rule or regulation in question or when the party seeking to challenge the rule or regulation could demonstrate injury, and thus establish standing. In the case at bar, a retail business that was incorporated in 2017 and began operations in 2018 filed suit in 2021 challenging a Federal Reserve Board (FRB) regulation issued more than six years earlier in 2011. Consistent with decisions in most circuits, the government argued that the § 2401 six-year limitations period started when FRB issued its regulation in 2011 and expired, in the Court's words, "before Corner Post swiped its first debit card." Resolving the circuit split, the Court adopted a plaintiff-centered rather than an agency-centered interpretation, holding that an APA claim does not "accrue," thus the 28 U.S.C. § 2401 limitations period does not begin, until the challenging party is injured by final agency action. In reaching this conclusion, the Court focused closely on the terms of both § 2401 and the APA provisions governing judicial review. The Court rejected policy concerns raised by the government, "that agencies and regulated parties need the finality of a 6-year cutoff," saying that Congress was free to choose different language or create "a general statute of repose for agencies." The Court also found the government's policy concerns "overstated."

A dissenting opinion authored by Justice Jackson, joined by Justices Kagan and Sotomayor, argued that the "text and context of the relevant statutory provisions" supported a conclusion that the publication of a rule triggers the § 2401 six-year limitations period. They maintained that the Court's contrary holding "means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face." The dissenters also expressed the concern that the Court's decision would "wreak[] havoc on Government agencies, businesses, and society at large" by subjecting even "well-settled" agency regulations to judicial review and potential invalidation.