Summer 2025 Update

Federal Administrative Law Cases and Materials (Fourth Edition)

by

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Administrative law is a dynamic field, and there are always interesting new cases being decided and new debates unfolding. The past two years have 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. We anticipate publishing a new Fifth Edition of the textbook in time for the 2026-27 academic year. In the meantime, 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 in 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. OVERVIEW REGARDING THE SECOND TRUMP ADMINISTRATION

CHAPTER 1.C.6: THE SECOND TRUMP ADMINISTRATION ACTION

In the first six months of his second term, President Trump took hundreds of actions that tested the boundaries of law in many ways. He took some of those actions indirectly through agencies, but he took a large number directly by relying on one of the 127 statutes that confer emergency power on the president. Petitioners seeking judicial review of government actions filed a record number of motions for preliminary injunctions—more than 200 in all—and the Supreme Court made a record number of decisions on its emergency docket in which it resolved some of those actions. Among the many motions filed were allegations that the emergency on which the action was based did not exist; that the emergency upon which President Trump relied did not justify the action that he took; that President Trump's action violated a statute; and that President Trump's action violated the constitutional rights of the petitioners. In some cases, the Trump administration acknowledged that its action was inconsistent with a statute but argued that the statute was inconsistent with the Vesting Clause of Article II of the Constitution. Petitioners filed their motions in the federal district courts that they believed would be most receptive to their arguments. They enjoyed a high degree of success in their efforts to obtain preliminary injunctions. As of the time of this writing, federal district courts have issued 197 preliminary injunctions, and cases continue to proliferate. In most cases, the Trump administration has sought expedited review of the grants of preliminary injunctions in a federal court of appeals, and it was successful in some of those cases. In some of the cases in which a district court issued a preliminary injunction and a circuit court upheld that action, the Trump administration has sought relief on the Supreme Court's emergency docket. As of the time of this writing, the Trump administration has succeeded in 20 of the 25 cases that the Supreme Court has decided. In some cases, the Court has provided no explanation for its action. In others, the Court has issued opinions in which it provided brief conclusory explanations for its action.

Teaching this material can be challenging. You might work it in piecemeal as you cover particular topics, like removal power. Alternatively, you might choose one or more of these actions as a case study of Trump administration boundary pushing. We offer the following to provide options.

Removal of Executive Branch Officers. The Supreme Court took an unusual action in *Bessent v. Dellinger*, 145 S. Ct. 515 (2025) (mem.). On February 7, 2025, President Trump removed Hampton Dellinger as head of the Office of Special Counsel, an office that Congress created to protect whistleblowers from reprisals. The statute that created the office limited the president's removal power by conditioning it with a requirement that the president can only remove the office head for cause. President Trump stated no cause for removing Dellinger in his one sentence notification of removal. A district court issued a temporary restraining order (TRO) that barred President Trump from removing Dellinger until February 26, 2025, to give the court time to hold a hearing. The D.C. Circuit upheld the TRO in a 2-1 divided decision. The administration filed a motion on the Supreme Court's

emergency docket to overturn the district court decision and vacate the TRO. A five-Justice majority of the Court decided to hold the motion to vacate the TRO in abeyance—an action that the Court had never before taken. Two Justices would have upheld the TRO. Two Justices dissented. They argued that Dellinger probably had no cause of action and, even if he did, he had at most a cause of action for backpay. They noted that the Court had never compelled a president to reinstate a removed officer. For more discussion of this ongoing litigation, see §2.9.3.

In *Trump v. Wilcox*, 145 S. Ct. 1415 (2025), the Supreme Court considered President Trump's removal of a member of the National Labor Relations Board (NLRB) and a member of the Merit Systems Protection Board (MSPB). In removing those officials from office, President Trump did not offer any cause for the removals, notwithstanding that statutes expressly prohibited the president from removing either officer without cause. The district court issued a preliminary injunction in which it prohibited the president from removing the two officers, and the D.C. Circuit upheld that order. Both courts concluded that the orders of removal were inconsistent with the Supreme Court's decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The Supreme Court stayed the preliminary injunction and explained its action in a remarkably terse opinion. "The stay reflects our judgment that the government is likely to show that both the NLRB and MSPB exercise considerable executive power." The Court suggested that it might come to a different conclusion after full briefing and oral argument, but it is hard to take that suggestion seriously. The Court has only rarely, if ever, reached a decision on the merits that differs from its decision on the emergency docket. The Court went on in *Wilcox* to distinguish the Federal Reserve Board, an agency not at issue in the case, because that agency as "is a uniquely structured quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States." Justice Kagan's dissent criticized the Court for overruling *Humphrey's Executor* on the Court's emergency docket without full briefing, oral argument, and an opinion that explains the action. She could have also noted that the Supreme Court necessarily also overruled *Wiener v. United States*, 357 U.S. 349 (1958), since MSPB, like the War Claims Tribunal at issue in that case, performs only adjudicative functions.

Immigration Matters. *Noem v. National TPS Alliance*, __ S. Ct. __, 2025 WL 1427560 (2025), was one of several cases in which the Supreme Court acted on preliminary injunctions that were issued in the immigration context. In this case, the Department of Homeland Security terminated protected status for Venezuelan nationals. A federal district court issued a temporary injunction based on its belief that petitioners were likely to prevail on the merits that the action violated both the Administrative Procedure Act (APA) and the Equal Protection Clause. The Ninth Circuit upheld the injunction. The Supreme Court stayed the injunction without giving any reason for the stay. Justice Jackson's dissent criticized the Court for allowing the government to take an action that has life-altering consequences for thousands of people without first allowing the action to be fully reviewed.

In another immigration case—*Trump v. J.G.G.*, 145 S. Ct. 1003 (2025) (per curiam)—the Supreme Court vacated temporary restraining orders in which district courts temporarily prohibited the Trump administration from implementing President Trump's order directing the immediate removal of Venezuelan citizens who were believed to be members of a criminal gang called Tren de Aragua. The Court concluded that the individuals' only potential avenue for relief from removal was a petition for writ of habeas corpus.

On the other hand, in yet another immigration case, *Noem v. Abrego Garcia*, 145 S. Ct. 1017 (2025), the Supreme Court ordered the government to "facilitate" the return of an

individual, allegedly a member of another criminal gang, MS-13, who was wrongfully removed to El Salvador in violation of a court order. The government finally complied with the Court's order several months later.

In *A.A.R.P. v. Trump*, 145 S. Ct. 1034 (2025) (mem.), the Supreme Court upheld a temporary restraining order in which a federal district court temporarily prohibited the Trump administration from summarily removing a group of individuals who were believed to be members of Tren de Agua. The Court held that they had been removed without being provided due process.

In *Department of Homeland Security v. D.V.D.*, 145 S. Ct. 2153 (2025) (mem.), the Supreme Court issued an order that has the effect of allowing the government to deport undocumented residents, with no prior notice, to countries with which the deportee has no relationship, even if the country is known to house such people in prisons with inhumane conditions. President Trump began that practice by sending undocumented residents to countries like El Salvador, South Sudan, Libya, and Guatemala. The district court issued a preliminary injunction that prohibited the government from engaging in the practice without providing the undocumented residents ten days' notice and an opportunity to prove that they would be tortured or subjected to inhumane treatment. The First Circuit upheld the preliminary injunction. The Supreme Court stayed the preliminary injunction without providing any explanation for its action. Justice Sotomayor began her lengthy dissent with this sentence: "In matters of life and death it is best to proceed with caution." She went on to note that the government had already violated two court orders issued previously in the case and to argue that both the equities and the law favor the parties who filed the motion for the preliminary injunction.

Department of Government Efficiency (DOGE). *Office of Personnel Management v. American Federation of Government Employees*, 145 S. Ct. 2153 (2025) (mem.), was one of several cases in which the Supreme Court acted on preliminary injunctions or stays related to the actions of the Department of Government Efficiency (DOGE)—an entity within the Executive Office of the President that was created by President Trump and that attempted to terminate tens of thousands of employees. President Trump issued an Executive Order directing major reductions in the federal workforce and requiring agencies to seek approval from DOGE before hiring any replacements. In response to that executive order, the Office of Personnel Management (OPM) instructed six agencies to terminate thousands of employees for alleged incompetence. The American Federation of Government Employees and several nonprofit organizations sought review of that order and argued that OPM lacked the power to terminate the employees and that their termination violated the APA and due process. The district court agreed and ordered the immediate reinstatement of the employees. OPM filed an application for a stay on the Supreme Court's emergency docket. The Court granted the stay on the basis that the moving parties lacked standing. Several Justices dissented.

Social Security Administration v. American Federation of State, County & Municipal Employees, 145 S. Ct. 1626 (2025) (mem.), was another dispute involving DOGE. Several unions and organizations of retired people sought a preliminary injunction that would bar DOGE from having access to unredacted Social Security Administration (SSA) records. They argued that SSA's decision to allow DOGE access violated the Privacy Act and the APA. The district court agreed and issued the preliminary injunction. The en banc Fourth Circuit denied the government's motion to stay the preliminary injunction. The Supreme Court reversed and granted the stay based on its conclusion that the government was likely to

prevail on the merits. Several Justices dissented in an opinion in which they referred to the extreme risks to privacy created by the SSA action and criticized the majority for its excessive use of the emergency docket to resolve important disputes without the benefits of a record, full briefing, and oral argument.

Military Matters. In *United States v. Shilling*, __ S. Ct. __, 2025 WL 1300282 (2025), the Supreme Court granted a stay of a preliminary injunction that required the temporary reinstatement of members of the military who suffered from gender dysphoria and who had been removed from the military pursuant to another executive order issued by President Trump. Three Justices dissented.

Supreme Court Rejects Universal Injunctions. Forty of the preliminary injunctions that district courts have issued against the second Trump administration were particularly controversial because they were "universal" or "nationwide" in scope. In *Trump v. CASA, Inc.*, 2025 WL 1773631 (2025), a six-Justice majority of the Supreme Court vacated universal preliminary injunctions issued by three different district courts enjoining application of President Trump's Executive Order 14160, which rejected birthright citizenship under two immigration scenarios. The Court held that district courts lack the power to issue a universal injunction regarding an executive branch action unless the court concludes that an injunction of that scope is "necessary to provide complete relief to each plaintiff with standing to sue." Justice Barrett wrote the opinion of the Court and focused extensively on history as the basis for the Court's holding. Because Congress did not explicitly grant courts the authority to issue universal injunctions, she framed the question as "whether, under the Judiciary Act of 1789, federal courts have equitable authority to issue universal injunctions." She found no cases in which courts granted universal injunctions at the time of, or prior to, the Judiciary Act's enactment. She also found that three quarters of all universal injunctions had been issued by 2024 were issued during the twenty years prior. Because (1) neither universal injunctions nor an analogous remedy existed in the High Court of Chancery in England at the time of the founding; (2) founding-era courts of equity in the United States did not "chart a different course"; and (3) courts did not grant universal injunctions "until sometime in the 20th century," she concluded that the Judiciary Act of 1789 did not authorize universal injunctions. She declined in her opinion to address whether Article III of the U.S. Constitution forecloses universal injunctions.

Much of Justice Barrett's opinion in *Trump v. CASA* responded to counterarguments raised in briefs and dissenting opinions. Justice Thomas, joined by Justice Gorsuch, concurred separately "to emphasize the majority's guidance regarding how courts should tailor remedies specific to the parties." Justice Thomas characterized the majority opinion's emphasis on "complete relief to each plaintiff" as "a ceiling" preventing courts from granting "relief beyond that necessary to redress the plaintiffs' injuries." He acknowledged that "what counts as complete relief can be a difficult question" (internal brackets and quotation marks omitted), and that third parties might sometimes benefit incidentally from more targeted injunctive relief. He suggested, however, that "such cases are by far the exception" and cautioned courts not to replicate "the problems of universal injunctions under the guise of granting complete relief." Justice Thomas also suggested that "serious constitutional questions would arise" if Congress were to authorize universal injunctions.

Justice Alito, joined by Justice Thomas, also wrote a concurring opinion in *Trump v. CASA* to address the implications of the Court's decision for third-party standing and class certification. He cautioned courts to honor the Court's decision by applying limitations on third-party standing "conscientiously, including against state plaintiffs" and by following

Rule 23 of the Federal Rules of Civil Procedure for class certification to avoid providing injunctive relief to nationwide classes.

Justice Kavanaugh wrote a concurring opinion in *Trump v. CASA* to highlight that the case at bar only focused on the availability of universal injunctions to district courts at the preliminary injunction stage. He stressed that, notwithstanding the Court's decision, the Supreme Court would still be able to and should evaluate and resolve the interim legal status of major new federal statutes and executive actions while the merits of challenges thereto make their way through the courts. He expressed concern for the problems of leaving "an unworkable or intolerable patchwork of federal law in place" if the Court failed to do so. He rejected the suggestion that the Court "should adopt a policy of presumptively denying applications for stays or injunctions" as "an abdication of [the] Court's proper role." He conceded, however, that the Court "should not insert itself into run-of-the-mill preliminary-injunction cases where [it is] not likely to grant certiorari down the road." Justice Kavanaugh also warned against using class action litigation as a means of obtaining "statewide, regionwide, or even nationwide" relief. Finally, he noted that universal preliminary injunctions are still available under the APA—and an issue the majority expressly did not address.

Justice Sotomayor wrote the principal dissenting opinion in *Trump v. CASA*, joined by Justices Kagan and Jackson. She complained about the "gamesmanship" of the majority's failure to address the birthright citizenship question that gave rise to the litigation in its decision and focused much of her opinion to explaining why President Trump's executive order was unconstitutional. She further accused the majority of "distort[ing] well-established equitable principles several times over" and asserted that "universal injunctions are consistent with long-established principles of equity, once respected by this Court." Although "[t]he American legal system grew out of English law," Justice Sotomayor argued that "[a]daptability has always been a hallmark of equity, especially with regard to the scope of its remedies" and pointed to "more than a century" of federal courts extending universal injunctions. She also maintained that universal injunctive relief was necessary to provide complete relief to the plaintiffs in this case and that narrower injunctions would be unworkable as such. Justice Jackson wrote a separate dissent to emphasize that, in her view, "[t]he Court's decision to permit the Executive to violate the Constitution with respect to anyone who has not yet sued is an existential threat to the rule of law."

The Court's decision in *Trump v. CASA* will certainly have an impact on the relationship between the executive branch and the courts. Just how significant that impact will be is unclear. Immediately after the Court issued its decision, Attorney General Bondi announced her intention to try to vacate the forty universal injunctions then in effect against a wide variety of executive branch actions. Yet, the Court emphasized in its opinion that its holding was a narrow one. The Court relied entirely on statutory rather than constitutional interpretation. The Court disavowed any intention to interpret §706 of the Administrative Procedure Act, which specifically authorizes courts to "set aside agency action," which has long been interpreted to authorize reviewing courts, including district courts, to vacate agency actions. Vacatur has the same effect as a universal injunction. In other contexts, both Chief Justice Roberts and Justice Kavanaugh have strongly suggested that reviewing courts have the power to vacate agency actions. The holding in *Trump v. CASA* seems limited to actions taken directly by the president. The Court remanded the case so that the lower courts could determine whether a universal injunction was needed to provide the plaintiffs with "complete relief." How the lower courts will address that issue in the context of the states and

associations that are among the plaintiffs in the three birthright citizenship cases at issue will be particularly interesting.

In the Fifth Edition of the textbook (forthcoming in 2026), we will add a new chapter on administrative remedies, including the ordinary remand rule, remand without vacatur, nationwide injunctions, and universal relief under the APA, among other topics.

B. *FCC v. Consumers' Research* & Nondelegation

Chapter 2.A.1.e.: The End of the Nondelegation Revival?

This insert is a new subsection that should follow § 2.A.1.d:

In *FCC v. Consumers' Research*, 145 S. Ct. 2482 (2025), the Supreme Court rejected a nondelegation doctrine challenge to the constitutionality of the FCC's Universal Service Fund. Writing for the Court, Justice Kagan explained that under the Court's "nondelegation precedents, Congress sufficiently guided and constrained the discretion that it lodged with the FCC to implement the universal-service contribution scheme." Perhaps the biggest takeaway from this case is that the Court's interest in reinvigorating the nondelegation doctrine seems to be losing steam. That may be because no one has identified an administrable standard to replace the "intelligible principle" test. But the more likely explanation is that the Court has made other reforms to administrative law that address the majority's concerns about excessive congressional delegation: the elimination of *Chevron* deference and the rise of the new major questions doctrine. Those developments are covered in Sections F and G of this Summer 2025 Update as well as Section 6.F of the textbook.

Consumers' Research came to the Court from the Fifth Circuit, which had struck down the Universal Service Fund based on violating a combination of the nondelegation doctrine and the so-called private nondelegation doctrine, discussed later in this Chapter. The problem, in the Fifth Circuit's view, was the "double-layered delegation" that found "no foothold in history or tradition." In the briefing before the Supreme Court, the challengers separated out these two challenges as distinct and independent grounds for invalidating the Universal Service Fund. They called on the Court to abandon its longstanding "intelligible principle" test for the nondelegation doctrine and reinvigorate the nondelegation doctrine to further limit Congress's constitutional power to delegate lawmaking discretion.

Writing for the Court, Justice Kagan rejects the call to revisit the intelligible principle test, even in the unique context of revenue-raising or taxing legislation. Among other things, the Court notes that "[t]he alternative test Consumers' Research and the dissent propose … would throw a host of federal statutes into doubt. Relying on this Court's nondelegation precedents, Congress has often enacted statutes empowering agencies to raise revenue without specifying a numeric cap or tax rate." Applying the intelligible principle test and the Court's precedents, the Court easily concludes that the statutory delegation at issue is constitutional, finding that Congress "imposed ascertainable and meaningful guideposts for the FCC to follow when carrying out its delegated function of collecting and spending contributions from carriers." In particular, Congress provided guidance on "how much money can the FCC raise through contributions" and "on what things can it spend those funds."

In articulating the intelligible principle test, the Court recognizes at least four limits on statutory delegations: (1) the specificity of congressional guidance must be proportional to the degree of delegated authority; (2) Congress must have "made clear both the general policy

that the agency must pursue and the boundaries of its delegated authority"; (3) the congressional guidance must be "sufficient … to enable both the courts and the public to ascertain whether the agency has followed the law"; and (4) "statutory phrases [are not read] in isolation but instead [courts] looked to the broader statutory contexts, which informed their interpretation and supplied the content necessary to satisfy the intelligible-principle test." To be sure, all four of these guardrails are found in the Court's prior precedents, and as Justice Kagan observes, the Court has "almost always" found that Congress delegated within these limits. But the three main opinions in *Consumers' Research* all emphasize these principles—especially, proportionality and context—in ways that may lead to further development in the lower courts.

In *Gundy v. United States*, Justice Gorsuch's dissent that called for a reinvigoration of the nondelegation doctrine garnered three votes, including Chief Justice Roberts and Justice Thomas. Justice Alito concurred in the judgment because he didn't think *Gundy* presented a good vehicle to revisit the doctrine. But he expressed interest in revisiting the doctrine in the appropriate case. Justice Kavanaugh did not participate in the case (as he was not on the Court when oral argument took place), but he later expressed interest in revisiting the doctrine in *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement regarding denial of certiorari). Justice Barrett had not yet joined the Court. In other words, one could count to five—and maybe anticipate six, with Justice Barrett—to ditch the intelligible principle test and embrace a more-exacting nondelegation doctrine.

Things seem to have changed. While Justices Thomas and Alito join Justice Gorsuch's continued call to revisit the doctrine, the Chief Justice and Justices Kavanaugh and Barrett do not; indeed, all three join the majority. In his concurrence in *Consumers' Research*, Justice Kavanaugh suggests at least two potential reasons why this project seems to be losing steam.

First, Justice Kavanaugh suggests that "[t]he intelligible principle test has had staying power—perhaps because of the difficulty of agreeing on a workable and constitutionally principled alternative." Despite the Justices' calls for litigants, lower courts, and scholars to articulate an administrable nondelegation doctrine that is more searching than the intelligible principle test, none appears to have emerged. It may never happen. To be sure, Justice Gorsuch has not given up. "When it comes to other aspects of the separation of powers," he observes in his dissent in *Consumer's Research*, "we have found manageable ways to honor the Constitution's design. This one requires no less of us."

Second, Justice Kavanaugh suggests that other developments at the Supreme Court have "substantially mitigated" "many of the broader structural concerns about expansive delegations": "(i) the Court's rejection of so-called *Chevron* deference [in *Loper Bright*] and (ii) the Court's application of the major questions canon of statutory interpretation." Justice Kavanaugh elaborates:

> Although the nondelegation doctrine's intelligible principle test has historically not packed much punch in constricting Congress's authority to delegate, the President generally must act within the confines set by Congress when he implements legislation. So the President's actions when implementing legislation are constrained—namely, by the scope of Congress's authorization and by any restrictions set forth in that statutory text.
>
> On top of that, when interpreting a statute and determining the limits of the statutory text, courts presume that Congress, in the domestic sphere, has not delegated authority to the President to issue major rules—that is, rules of

> great political and economic significance—unless Congress clearly says as much. Courts "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." That major questions canon reflects both background separation of powers understandings and the commonsense interpretive maxim that Congress does not usually "hide elephants in mouseholes" when granting authority to the President.

Justice Gorsuch echoes this second explanation, observing that "the Court has sometimes mitigated its failure to police legislative delegations by deploying other tools, like the major questions doctrine and de novo review of statutory terms, to ensure the Executive acts within the confines set by Congress."

Do you think *Consumers' Research* puts to rest the current majority's call to revive the nondelegation doctrine? Do you think lower courts will strengthen the intelligible principle test by enforcing the four guardrails Justice Kagan mentions in the majority opinion? Our best guess is that the major questions doctrine and *Loper Bright* de novo review likely address most of the current majority's concerns about broad statutory delegations. Reinvigorating the nondelegation doctrine may not be worth the effort to address any remaining concerns. But developments in the lower courts are worth watching.

C. *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*, 107 F.4th 415 (5th Cir. 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).

In *FCC v. Consumers' Research*, 145 S. Ct. 2482 (2025), the Supreme Court considered a private delegation challenge against the statutory delegation to a private entity, the Universal Service Administrative Company, to help administer the FCC's Universal Service Fund. The Court rejected the challenge. Writing for the Court, Justice Kagan explained that "[i]n every way that matters to the constitutional inquiry, the Commission, not the Administrator, is in control." *Id.* at 2491. In September 2024, the Supreme Court granted a stay of the Fifth Circuit's decision in *National Horsemen's II*. In July 2025, shortly after it issued its decision in *Consumers' Research*, the Court sent the case back (i.e., "grant, vacated, and remanded" or GVR) to the Fifth Circuit to reconsider in light of the Supreme Court's decision in *Consumers' Research*. It will be interesting to see what the Fifth Circuit does on remand, especially as the private delegations in each case differ in some respects.

D. *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

* * *

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.

* * *

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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]

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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….

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 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."

* * *

■ 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.

* * *

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?

E. HARD LOOK REVIEW

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

1. *Ohio v. EPA*

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.

2. *FDA v. Wages & White Lion Investments, LLC*

This decision seemingly announces a more formalistic two-step test—"the change-in-agency position doctrine"—for an old proposition, that unexplained agency changes of policy are arbitrary and capricious. Instructors may wish to replace the excerpt from *FCC v. Fox Television Stations* in the Fourth Edition with this excerpt.

Food & Drug Administration v. Wages & White Lion Investments, LLC
145 S. Ct. 898 (2025)

■ Justice ALITO delivered the opinion of the Court.

This case concerns the efforts of the Food and Drug Administration (FDA) to regulate the sale of "e-cigarettes," a product that rapidly gained popularity during the past 20 years. * * * In this case, we consider whether the FDA lawfully denied authorization to market certain flavored e-cigarette products.

* * *

The Family Smoking Prevention and Tobacco Control Act of 2009 (TCA) vests the Secretary of Health and Human Services, acting through the FDA, with * * * the power to regulate the manufacturing, marketing, sale, and distribution of tobacco products. The TCA explicitly granted the FDA regulatory authority over "cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco." 21 U.S.C. § 387a(b). It also granted authority to regulate "any other tobacco products" that the FDA "by regulation deems" to meet the definition of a tobacco product. *Ibid.*

The TCA's reach was broad. While the Act barred the FDA from banning all regulated tobacco products outright or requiring manufacturers to reduce nicotine yields to zero, see § 387g(d)(3), it prohibited a manufacturer from marketing any "new tobacco product" without FDA authorization, see § 387j(a)(2)(A). A "new tobacco product" is one that was not marketed

in the United States before February 15, 2007, and the TCA subjected such products to a premarket authorization process. See §§ 387j(a)(1)(A), (a)(2).

One pathway to authorization of the sale of a new tobacco product is the submission of a premarket tobacco product application. § 387j(c)(1)(A)(i). These applications require, among other things, information about a product's components and additives, the method by which it is manufactured, any proposed labeling, and an assessment of its health risks. See § 387j(b)(1). There are many reasons why the FDA may deny marketing authorization to a "new tobacco product," but of main importance here, the agency *must* deny an application unless it is shown that the product "would be appropriate for the protection of the public health." § 387j(c)(2)(A).

To determine whether a product meets this standard, the FDA must consider "the risks and benefits to the population as a whole" and "tak[e] into account" the "increased or decreased likelihood" of two outcomes: first, that the new product will induce users of existing tobacco products such as conventional cigarettes to stop using those products and, second, that "those who do not use tobacco products will start using" them. § 387j(c)(4). The FDA's determination regarding the likely effects of a new product must, "when appropriate," be based on "well-controlled investigations" or other "valid scientific evidence" that is "sufficient to evaluate the tobacco product." § 387j(c)(5).

* * *

[I]n 2007 a new product hit the American market: electronic nicotine delivery systems, which are popularly known as electronic cigarettes, e-cigarettes, or vapes.

* * *

There is fierce public debate about the potential benefits and harms of e-cigarettes. On one hand, many view e-cigarettes as a harm-reduction tool. They enable current smokers who are addicted to nicotine to reduce exposure to some of the more harmful byproducts of traditional combustible cigarettes. * * * On the other hand, e-cigarettes, as noted, pose their own health risks, and there is concern that the use of e-cigarettes by non-smokers—and especially young non-smokers—may eventually lead them to smoke conventional cigarettes.

* * *

One particular feature of e-cigarette products appears to drive this youth demand: the panoply of e-liquid flavors. One nearly decade-old estimate found that there were 7,700 unique e-liquid flavors, including not only flavors that were familiar to cigarette smokers (tobacco and menthol) but also fruit, candy, and dessert flavors that were appealing to non-smokers. The kaleidoscope of flavor options adds to the allure of e-cigarettes and has thus contributed to the booming demand for such products among young Americans.

* * * [I]n 2016, the FDA issued a rule deeming e-cigarettes and e-liquids to be "tobacco products." 81 Fed. Reg. 29028 (2016). Since most e-cigarette products were "not commercially marketed in the United States as of February 15, 2007," the deeming rule retroactively rendered such products "new tobacco products" subject to the TCA's premarket-authorization regime. 21 U.S.C. § 387j(a)(1)(A). And because those products had not received premarket authorization, the effect of the rule was to make their continued sale illegal. Companies that proceeded to sell their products without such authorization would be subject to stiff penalties. See §§ 331(a), 333(a)(1), and (f)(9).

* * *

At the center of this case are the FDA's actions leading up to its adjudication of manufacturers' premarket tobacco product applications. The agency proposed a rule outlining application requirements, issued guidance to assist e-cigarette manufacturers, and crafted internal memoranda discussing how applications were to be reviewed. These voluminous and discursive documents paint a picture of an agency that was feeling its way toward a final stance and was unable or unwilling to say in clear and specific terms precisely what applicants would have to provide. Pervading these documents are four overarching topics that animate the dispute before us.

The first topic was the types of scientific evidence needed to show that an e-cigarette product is "appropriate for the protection of the public health." § 387j(c)(2)(A). Recall that the TCA states that "well-controlled investigations" may support such a showing "when appropriate," § 387j(c)(5)(A), as can other "valid scientific evidence" if found sufficient to evaluate the tobacco product. § 387j(c)(5)(B). At an October 23, 2018, public meeting, an FDA official opined that "[i]n most situations," the FDA would expect "some analytical testing specific to [a manufacturer's] product." But the FDA also assured manufacturers that no "specific studies," "youth behavioral data," or "new nonclinical or clinical studies" would be required. The FDA said much the same thing in a lengthy 2019 guidance document, noting that the "relatively new entrance" of e-cigarette products meant that "limited data may exist from scientific studies and analyses." So, according to this document, the FDA would not require "long-term studies," and manufacturers could instead rely on various alternatives, like observational studies, literature reviews, or evidence bridging their new tobacco product to "a studied tobacco product."

After manufacturers submitted millions of applications for flavored e-cigarette products, the FDA "develop[ed] a new plan to effectively manage" the scientific evidence underlying the onslaught of applications. In a July 9, 2021, internal memorandum, the FDA took a far less capacious view of the scientific evidence it would consider. Specifically, the FDA said that it would consider it a "fatal flaw" if an application lacked scientific evidence about a product based on either a randomized controlled trial or a longitudinal cohort study. A "fatal flaw" would lead to a manufacturer's "likely receiv[ing] a marketing denial order" for that product.

Over a month later on August 17, 2021, the FDA issued another internal memorandum that differed in some respects from the July memorandum. It stated that, in addition to randomized controlled trials and longitudinal cohort studies, the FDA "would also consider evidence from another study design, provided that it could reliably and robustly assess behavior change" and "compar[e] users of flavored products with those of tobacco-flavored products." Then, on August 25, 2021, just before denying respondents' applications, the FDA rescinded the August 17, 2021, memorandum and stated it would "not consider or rely" on it when evaluating premarket tobacco product applications.

The second topic was the need for manufacturers to compare their proposed products to other products. The TCA requires premarket tobacco product applications to provide "full reports of all information ... concerning investigations which have been made to show" that a new product "presents less risk than other tobacco products." 21 U.S.C. § 387j(b)(1)(A). Elaborating on that standard at a presentation on October 23, 2018, an FDA official encouraged applicants to provide comparisons between their products and a "representative sample of tobacco products on the market." And a 2019 guidance document similarly recommended comparisons of "the health risks of [a manufacturer's] product to both products within the same category and subcategory, as well as products in different categories as

appropriate." The 2019 guidance also gave manufacturers discretion to choose comparator products as long as the FDA could "understand [an] applicant's rationale and justification for [the] comparators chosen." Later that year at a public meeting, an FDA official offered the same general advice that a successful premarket tobacco product application "may include comparisons to other tobacco products in the same category or in other categories or subcategories."

In a lengthy April 2020 guidance document, the FDA elaborated on a third theme: its enforcement priorities based on device type. The agency said it would "prioritize enforcement of flavored, cartridge-based" e-cigarette products "other than tobacco- and menthol-flavored products." It claimed that "youth overwhelmingly prefer cartridge-based" products, which are "easy to conceal, can be used discreetly, may have a high nicotine content, and are manufactured on a large scale." And the document asserted that certain flavors, such as candy and fruit flavors, "are a strong driver for youth use." Although the FDA suggested that its focus on flavored, cartridge-based products "should have minimal impact on small manufacturers (*e.g.*, vape shops) that primarily sell non-cartridge-based" products, it noted that it would also prioritize enforcement against "all other e-cigarette products for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors' access," as well as "any e-cigarette product that is targeted to minors or whose marketing is likely to promote use of e-cigarettes by minors."

The final theme cutting across these documents is the FDA's unflinching advice that manufacturers should submit "marketing plans" as part of their applications. "Marketing plans" broadly refer to a manufacturer's "specific restrictions on sale and distribution" that could, for example, "decrease the likelihood that those who do not use tobacco products will start using tobacco products." In its 2019 guidance, the FDA urged manufacturers to "share" their "marketing plans to enable FDA to better understand the potential consumer demographic" of their products. The 2020 enforcement guidance hit the same note, suggesting the FDA "intended to consider" marketing plans and that such plans would be relevant to the agency's enforcement "prioritization." The FDA even offered examples of what marketing restrictions manufacturers might consider, including screening retailers, age-verification technology, mystery-shopper programs, controls over distributors, and quantity limits. It also cautioned that, based on its experience, "focusing on how the product was sold" and "age verification" "would not be sufficient to address youth use."

* * *

In 2019, the FDA proposed a rule setting out the requirements for premarket tobacco product applications. See 84 Fed. Reg. 50566 (2019). That proposed rule, in significant part, crystallized the four themes discussed above. It offered specifics on the "types of [scientific] investigations" that applications "would be required to contain." The proposed rule also required certain cross-product comparisons. And it underscored the importance of device type with respect to product testing. In addition, the proposed rule obligated manufacturers to submit marketing plans, which were described as "providing input that is critical" to the agency's review.

Notice-and-comment rulemaking takes time, and with a court-imposed deadline fast approaching, the FDA proceeded to adjudicate the first major wave of premarket tobacco product applications in August and September 2021 without a final rule and the standards it included. It was not until October 5, 2021, that the FDA adopted the final rule. See 86 Fed. Reg. 55300 (2021).

* * *

Respondents submitted premarket tobacco product applications on September 9, 2020, the final court-ordered deadline. As the FDA recommended in its guidance, their applications included marketing plans, which touted respondents' use of third-party age-verification technology, quantity limits, and requirements for retailers to develop compliance checks. To show the safety of their products, respondents "pool[ed] resources" with "other, similarly situated e-liquid companies" to "fund the development of certain, required non-product specific data," including what they characterized as a "comprehensive review of the scientific literature." One of the respondents, Vapetasia, also submitted the results of a cross-sectional survey of current and former adult e-cigarette smokers.

The FDA received applications from more than 500 companies in total, covering more than 6.5 million e-cigarette products. Almost a year after the court-ordered deadline, the FDA adjudicated its first slate of premarket tobacco product applications and issued marketing denial orders to three manufacturers whose applications covered 55,000 flavored e-cigarette products. The FDA concluded that the manufacturers failed to provide "sufficient product-specific scientific evidence to demonstrate enough of a benefit to adult smokers that would overcome the risk posed to youth." Such "scientific evidence," the agency said, "would likely be in the form of a randomized controlled trial or longitudinal cohort study," but the FDA promised that it remained open to "other types of evidence" that are "sufficiently robust and reliable."

Shortly thereafter, the FDA denied respondents' applications. It concluded that respondents had not provided sufficient scientific evidence to demonstrate that the marketing of their products would be appropriate for the protection of public health. Specifically, the FDA held respondents had not provided evidence from a randomized controlled trial, longitudinal cohort study, or another "reliabl[e] and robus[t]" method showing that their dessert-, candy-, and fruit-flavored products had benefits "over an appropriate comparator tobacco-flavored" product. With such evidence lacking, the FDA deemed respondents' products "misbranded" and "adulterated" under the FDCA.

To each denial order, the FDA appended a "Technical Project Lead (TPL) Review." These lengthy documents have several noteworthy features. To start, they offer a window into the FDA's evolving understanding of how flavor, regardless of e-cigarette device type, drives youth smoking initiation and nicotine addiction. The reviews canvass the scientific literature on youth e-cigarette use and explain that this literature had led the agency to conclude that flavors make e-cigarette smoking "more palatable for novice youth and young adults" and may "increase nicotine exposure by potentially influencing the rate of nicotine absorption." What is more, the FDA stated, young people are drawn to particular flavors, and the FDA anticipated that its crackdown on one type of e-cigarette device would lead youth to flock to a different type of device to continue using a desired flavor.

Despite the FDA's prior representations about the importance of marketing plans, the reviews stated that, "for the sake of efficiency," the FDA had decided not to evaluate respondents' marketing plans. The FDA acknowledged that it "is theoretically possible that significant mitigation efforts" could decrease the appeal of flavored e-cigarettes to a sufficient degree to counterbalance the documented risks of such products, but it found that none of the marketing plans the FDA had seen had managed to do that.

The FDA estimates that in its first wave of marketing orders, it issued denials to 320 applicants, who sought approval for approximately 1.2 million products.

* * *

II

The question we agreed to decide is whether the FDA acted arbitrarily and capriciously in denying respondents' applications for premarket approval of their tobacco products.

* * *

III

[The Fifth Circuit's] decision was multifaceted, but its analysis boils down to a central concern: it faulted the FDA for allegedly changing the requirements for premarket tobacco product applications between the time of its guidance and the denials of respondents' applications.

The feature of our current case law on arbitrary-and-capricious review that addresses that issue is our change-in-position doctrine. Under that doctrine, we must ask whether the FDA changed course and, if it did, whether it offered satisfactory reasons for the change. Analysis of the FDA's position prior to the denials at issue requires a close reading of nuanced statements in a body of guidance documents that evidence the agency's evolving assessment of the relevant issues. Affected parties may have come away with the impression that the agency would apply a less demanding standard of proof than is evident in the denial orders the FDA ultimately issued, but in the end, we cannot say that the FDA improperly changed its position with respect to scientific evidence, comparative efficacy, or device type. * * *

A

We begin with our change-in-position doctrine. The APA requires a reviewing court to "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Our well-worn arbitrary-and-capricious standard ensures that an administrative agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). The scope of this review "is narrow," and reviewing courts must exercise appropriate deference to agency decisionmaking and not substitute their own judgment for that of the agency. *Ibid.*

Our case law identifies numerous ways in which an agency may act arbitrarily and capriciously. The Fifth Circuit concluded that the FDA overstepped this standard in four such ways. In its view, the FDA (1) "invent[ed] *post hoc* justifications" for its failure to consider applicants' marketing plans; (2) failed to give "fair notice" of the evidentiary and comparative requirements that would be imposed at the application stage; (3) changed its position regarding scientific evidence and device type; and (4) faulted respondent "for relying in good faith on [its] previous" guidance.

All four of these principles orbit around the same basic concern: an agency should not mislead regulated entities. The essence of respondents' argument is that the FDA told them in guidance documents that it would do one thing and then turned around and did something different when it reviewed their applications.

The change-in-position doctrine is administrative law's answer to that problem. Under that doctrine, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change," "'display awareness that [they are] changing position,'"

and consider "'serious reliance interests.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–222 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

* * *

B

The change-in-position doctrine asks two questions. The first is whether an agency changed existing policy. And we have suggested that this occurs when an agency acts "inconsistent[ly]" with an "earlier position," *id.* at 224, performs "a reversal of [its] former views as to the proper course," *State Farm*, 463 U.S., at 41, or "disavow[s]" prior "inconsistent" agency action as "no longer good law," *Fox Television*, 556 U.S., at 517 (internal quotation marks omitted). For example, we have held that an agency changed its position when it rescinded a prior regulation, see *State Farm*, 463 U.S., at 41–42, "expand[ed] the scope of its enforcement activity," *Fox Television*, 556 U.S., at 517, and "abandon[ed a] decades-old practice" applied in enforcement actions, *Encino Motorcars*, 579 U.S., at 218.

Once a change in agency position is identified, the doctrine poses a second question: Did the agency "display awareness that it *is* changing position" and offer "good reasons for the new policy"? *Fox Television*, 556 U.S., at 515. At this second step, the agency does not need to show "that the reasons for the new policy are *better* than the reasons for the old one." *Ibid.* Nor must it "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Ibid.* But the agency must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars*, 579 U.S., at 221–222 (quoting *Fox Television*, 556 U.S., at 515).

Echoing the Fifth Circuit, respondents claim that the FDA violated the change-in-position doctrine with respect to the four principal themes discussed above. First, according to respondents, the FDA, after initially telling applicants that no specific kinds of scientific evidence were required, turned around and rejected all applications lacking evidence from a randomized controlled trial or longitudinal cohort study. Second, respondents claim, the FDA told applicants they had discretion to choose appropriate comparator products, but it ultimately denied applications on the ground that they failed to make specific comparisons between dessert-, candy-, and fruit-flavored products, on the one hand, and tobacco-flavored products on the other. Third, respondents claim that the FDA abandoned earlier guidance about the importance of device type and instead denied authorization to all dessert-, candy-, and fruit-flavored e-cigarette products regardless of device type. And fourth, according to respondents, the FDA went back on its word by failing even to consider their marketing plans.

As to the first three issues, we conclude that the FDA's denial orders were sufficiently consistent with its predecisional guidance and thus did not run afoul of the change-in-position doctrine. * * *

1

We first address the FDA's position on scientific evidence. In respondents' view, the FDA initially stated that manufacturers would not need to provide specific kinds of studies like randomized controlled trials or longitudinal cohort studies but then treated such evidence as essential.

a

Respondents express frustration about the lack of clear prior notice regarding the type of scientific evidence that was essential for approval of an application, but we cannot agree with their argument that the FDA went back on any commitments made in the guidance it provided before ruling on respondents' applications.

Both the TCA itself and the FDA's guidance left the agency broad discretion to decide what sort of scientific evidence an applicant was required to submit. The TCA itself imposes only basic requirements on this matter. It says that the agency's determination of what "would be appropriate for the protection of the public health" must be made based on either "well-controlled investigations, which *may* include 1 or more clinical investigations by experts qualified by training and experience to evaluate the tobacco product," 21 U.S.C. §387j(c)(5)(A) (emphasis added), or—and this is the point that is critical here—other "valid scientific evidence" that "is sufficient to evaluate the tobacco product," §387j(c)(5)(B). The TCA leaves it to the FDA to decide what constitutes a "well-controlled investigatio[n]" or other "valid scientific evidence" that is "sufficient."

Before ruling on respondents' and other manufacturers' applications, the FDA addressed the issue of scientific evidence in a series of lengthy documents and oral presentations by agency officials, but it is hard to find in all this verbiage any specific commitments about exactly what sorts of scientific evidence an applicant would have to provide. * * *

For example, during an October 23, 2018, public meeting, an agency official said that *"[i]n most situations* it is *likely* that at least some [new] analytical testing specific to the product *would be* conducted to support an" application. The official then offered examples such as "randomized controlled clinical trials"; "alternatives" like "pharmacokinetic," "pharmacodynamic," "biomarker," "topography," or "focus group studies"; published peer-reviewed literature; and literature reviews more generally. But the official never stated that any particular type of study was necessary. On the contrary, the FDA acknowledged that it was open to evidence besides "new nonclinical or clinical studies." And the FDA promised that it would consider evidence "bridging" new tobacco products to already marketed products whose safety was backed by "existing clinical, nonclinical, or product information." None of this amounted to anything like a hard-and-fast commitment as to the minimum evidence the agency would require for marketing authorization.

A June 2019 guidance document was similarly noncommittal. After reiterating the statutory requirement of "well-controlled investigations," the document recognized that the "relatively new entrance" of e-cigarettes "on the U.S. market" meant that "limited data may exist from scientific studies and analyses." As a result, the document stated, the FDA would consider "other 'valid scientific evidence' if found sufficient." But it cautioned that "[n]onclinical studies alone are generally not sufficient."

The guidance document went on to give examples of "other evidence" that might suffice, but in doing so, it cautioned about the need for scientific rigor. For example, while stating that applicants could cite "data from the published literature or government-sponsored databases," it warned that such data must be "adequately bridged to your product" with "a scientific rationale." The document told manufacturers that they could also cite "[p]ublished literature reviews (including meta-analysis)," but that such evidence is "considered a less robust form of support." And applicants were advised that they could "conduc[t] independent analyses of published studies," but that "if critical study details are not submitted, the studies may not be useful in FDA's review."

A fair summary of the main point made in all this guidance is that (a) it was not essential for manufacturers to submit evidence based on "well-controlled investigations," such as randomized controlled trials or longitudinal cohort studies, but (b) if they did not do so, they would have to provide rigorous scientific evidence that the sale of their particular products would be appropriate for the protection of the public health. In this case, the applicants did not submit randomized controlled trials or longitudinal cohort studies, so the fate of their applications turned on whether they submitted "other evidence" that met the FDA's standard of scientific rigor and relevance to their product. The FDA rejected respondents' applications because it concluded that its "other evidence" test was not met, and the explanation in its denial orders echoed statements made at various points in its earlier guidance.

Both respondents relied on a "comprehensive review of the scientific literature." But respondents had notice from the 2019 guidance that the FDA considered literature reviews "a less robust form of support." The 2019 guidance also instructed that applicants submitting literature reviews should, among other things, "[i]nclude comparative assessments of the health risks associated with use of [a manufacturer's] new tobacco product compared to the risks associated with quitting tobacco product use, using other tobacco products, and never using tobacco products." Respondents' literature review did the opposite. It concluded that "there is not enough evidence ... to determine whether e-cigarette flavors aid in smoking cessation."

One of the respondents, Vapetasia, submitted results from a cross-sectional survey finding that "82.99% of survey respondents indicated that e-cigarettes helped them quit smoking combustible tobacco." But the FDA concluded the survey was not adequately tied to Vapetasia's flavored products. That requirement echoed the 2019 guidance's advice that manufacturers submitting evidence from "new nonclinical ... studies" should "explain why [a] study is relevant to use for the [manufacturer's] product (e.g., the similarities between the product, product use, or product market)."

Based on the FDA's largely noncommittal guidance on scientific evidence and its specific reasons for rejecting respondents' applications, we cannot say that the agency deviated "from a prior policy *sub silentio* or simply disregard[ed]" what it had previously said. *Fox Television*, 556 U.S., at 515. In line with the agency's prior guidance, each denial order was based on the applicant's failure to provide either evidence from well-controlled investigations, such as "a randomized controlled trial and/or longitudinal cohort study," or other evidence that was found to be "reliabl[e] and robus[t]." No change in position occurred in this respect.

b

Contrary to respondents' contention, this conclusion is not undermined by the FDA's scientific-review form, which contained checkboxes to indicate whether an applicant submitted a randomized controlled study (Criterion A), a longitudinal cohort study (Criterion B), or other evidence "related to potential benefit to adults" (Criterion C). Criterion C appears to defeat respondents' argument, but they contend that the FDA made it clear that this criterion demanded a study of the effect of flavored products on adult smokers "over time" and that this requirement duplicated Criterion B, which looked for a "longitudinal cohort study."

This argument fails because a "longitudinal cohort study" and evidence of a product's effects "over time" are not the same thing. The term "longitudinal study" is typically used to describe a particular kind of long-term study, namely, one that "employ[s] continuous or repeated measures to follow particular individuals over prolonged periods of time—often

years or decades." E. Caruana, M. Roman, J. Hernández-Sánchez, & P. Solli, Longitudinal Studies, 7 J. Thoracic Disease E537 (2015). Not every study that considers a product's effects "over time" falls within this understanding.

c

Based on the FDA's internal memoranda from the summer of 2021, respondents argue that the agency secretly enforced a new requirement that manufacturers must submit evidence from either a randomized control trial or longitudinal cohort study. Recall that the FDA's July 9, 2021, memorandum stated that the failure to submit such evidence would constitute a "fatal flaw" that would "likely" result in denial of an application. Even though this statement, like most of what the FDA said in its guidance, was not categorical, it certainly suggested a much harder stance than was implied by the FDA's public statements, which told applicants that "other evidence" might be capable of proving a new tobacco product's appropriateness for the protection of public health.

Respondents suggest that the FDA surreptitiously applied the "fatal flaw" memorandum, and as evidence, they note that until well after their applications were denied, the FDA rejected all applications for flavored products. But agencies are entitled to a presumption of regularity, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), and the record offers enough support for us to conclude that the FDA never enforced a rigid "fatal flaw" standard.

To start, a later internal memorandum dated August 17, 2021, appeared to contradict the "fatal flaw" memorandum. The new memorandum represented that the FDA "would also consider evidence from another study design" besides randomized controlled trials and longitudinal cohort studies, "provided that it could reliably and robustly assess behavior change" and "compar[e] users of " dessert-, candy-, and fruit-flavored "products with those of tobacco-flavored products." The FDA also acknowledged that "indirect evidence or bridged data from the literature might still be appropriate for many new products" too. Even though the FDA predicted these "other types of evidence" would "not likely be sufficiently robust or direct," the August 17, 2021, memorandum is unambiguous that the FDA would nevertheless consider such evidence.

This memo might be viewed as dooming any argument based on the earlier "fatal flaw" memorandum, but on August 25, 2021, the FDA rescinded the August 17, 2021, memorandum and represented that it would "not consider or rely on [it] as a supporting document."

Rescission of the August 17 memorandum raises the question whether that action effectively reinstated the July 9, 2021, "fatal flaw" memorandum or was a pretext to mask the FDA's adherence to secret criteria. But the FDA represents that these internal memoranda played no role in its review of applications, and for us to peel back the curtain on that representation would have required respondents to make a "strong showing of bad faith or improper behavior," *Overton Park*, 401 U.S., at 420; see also *Department of Commerce v. New York*, 588 U.S. 752, 781 (2019) ("[J]udicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided" (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 n. 18 (1977))). Respondents have not surmounted the high standard that must be met to warrant such a "substantial intrusion" into the Executive's functioning. *Id.*, at 268, n. 18 (internal quotation marks omitted).

We thus conclude that respondents failed to show that the FDA changed its position with respect to the scientific evidence supporting premarket tobacco product applications.

2

Next, we turn to the FDA's comparative-efficacy requirement, which called on manufacturers to compare the health effects of their dessert-, candy-, and fruit-flavored products to those of tobacco-flavored products. On respondents' reading of the record, the FDA initially gave applicants broad discretion to select appropriate comparators for their products, but it later categorically rejected applications that failed to show that "*flavored* e-cigarettes promote more switching than *unflavored*" or tobacco-flavored e-cigarettes.

a

The record does not suggest that the FDA contradicted its predecisional guidance by requiring certain cross-flavor comparisons. To start, the TCA expressly contemplates comparisons of different tobacco products. It requires an applicant to provide "full reports of all information ... concerning investigations which have been made to show ... whether [its] tobacco product *presents less risk than other tobacco products*." 21 U.S.C. § 387j(b)(1)(A) (emphasis added). Moreover, the FDA's determination that a new tobacco product is "appropriate for the protection of the public health" is an inherently comparative judgment. The FDA must account for the "increased or decreased likelihood that existing users of tobacco products will stop using such products" and the "increased or decreased likelihood that those who do not use tobacco products will start using such products." § 387j(c)(4). This balancing test calls out for various types of comparisons, including comparisons between new tobacco products and those that are already available, as well as between different types of new tobacco products that may attract new smokers.

Through its predecisional guidance, the FDA elaborated on the types of comparisons that would be helpful. Echoing the TCA, the June 2019 guidance document recommended that a manufacturer "compare the health risks of its product to both products within the same category and subcategory, as well as products in different categories as appropriate." The FDA went on to explain what it means for manufacturers to make comparisons to "similar, marketed tobacco products in the same category." "For example," it advised, "if your [application] is for an e-liquid, we recommend a comparison to other e-liquids with similar nicotine content, flavors, and other ingredients, used in the same manner and under similar conditions." The plain implication of this statement is that the FDA might consider whether an application for a flavored product included a comparison with other products in the flavored category.

Other parts of the 2019 guidance also underlined the FDA's concern about "the potential impact of flavors on product toxicity and appeal to youth and young adults." The FDA noted that it "considers the appeal and use of [e-cigarette] product flavors important in ascertaining the health risks of these products" and thus recommended "scientific reviews of flavors." Specifically, it called on manufacturers to "examine the impact of flavoring on consumer perception ... especially given the attractiveness of flavors to youth and young adults."

Further, in its 2020 enforcement guidance, the FDA telegraphed its view that dessert-, candy-, and fruit-flavored e-cigarette products are more likely than tobacco- and menthol-flavored products to appeal to the young. The FDA noted its intent to "prioritize enforcement of flavored" e-cigarette products "other than tobacco- and menthol-flavored products," and observed that "youth use of mint- and fruit-flavored [e-cigarette] products is higher than that

of menthol- and tobacco-flavored [e-cigarette] products." The FDA also relied on data that flavors like tobacco and menthol "were preferred more by adults than youth."

When it reviewed respondents' applications, the FDA did not contradict any previously announced position with respect to the comparative effects of differently flavored products. As respondents' marketing denial orders stated, their applications were unsuccessful because they failed to "demonstrat[e] the benefit of " their dessert-, candy-, and fruit-flavored e-cigarette "products over an appropriate comparator tobacco-flavored" e-cigarette product. Admittedly, the FDA has not pointed us to any portion of its predecisional guidance that said in so many words that manufacturers must draw that precise comparison. And, in fact, the 2019 guidance gave manufacturers some discretion in choosing appropriate comparators as long as the "FDA [could] understand [an] applicant's rationale and justification for comparators chosen." But the FDA's comparative-efficacy standard was a natural consequence of its predecisional guidance, which highlighted, among other things, (1) the need for robust cross-product comparisons (including on the dimension of flavor) and (2) the FDA's heightened concern with dessert-, candy-, and fruit- flavored products compared to tobacco- and menthol-flavored products. Such a predictable outgrowth from previous guidance is not an "[u]nexplained inconsistency" amounting to a "change" under the change-in-position doctrine. *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005); cf. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) ("The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be a logical outgrowth of the rule proposed" (internal quotation marks omitted)).

b

Respondents contend that the FDA "said nothing about comparing" dessert-, candy-, and fruit-flavored "products to tobacco-flavored products," and even suggested manufacturers could "freely select" comparators as long as they provided adequate "justification or rationale" for their comparator choice.

As we noted, respondents are correct that the FDA did not provide this precise instruction in its predecisional guidance. But, as an FDA official noted at the 2018 public presentation, manufacturers were encouraged throughout the application process to think hard about "what is or are the most appropriate comparators" to their products. And the agency's subsequent guidance emphasized the importance of cross-product comparators and the FDA's specific worry that dessert-, candy-, and fruit-flavored products would appeal to youth more than tobacco- and menthol-flavored products. The FDA is thus better understood as having extended, not reversed, its previous guidance.

Quite tellingly, respondents appear to have received the FDA's message on this front. Their applications are replete with statements attempting (albeit unsuccessfully) to draw comparisons between dessert-, candy-, and fruit-flavored and tobacco-flavored products—the same sort of comparisons for which the FDA allegedly provided no notice. All that is to say, respondents' applications are themselves strong evidence that regulated entities had adequate notice of the sort of comparative analysis the FDA anticipated.

Furthermore, even assuming the predecisional guidance did not perfectly predict the comparative-efficacy standard ultimately applied to applications, the FDA was not required to issue such guidance in the first place. Respondents do not argue that the TCA imposed an affirmative obligation on the FDA to spell out in detail how it expected applicants to compare a new tobacco product to other tobacco products. Rather, as we have explained, the FDA had

discretion to work out the meaning of the TCA's comparative standard when evaluating premarket tobacco product applications. See 21 U.S.C. §§ 387j(b)(1)(A), (c)(4). A contrary rule would be in tension with [the teaching of *SEC v. Chenery Corp.*, 332 U.S. 194, 202–203 (1947),] that, absent a statutory prohibition, agencies may generally develop regulatory standards through either adjudication or rulemaking.

3

Finally, we turn to the issue of device type. In respondents' view, the FDA's 2020 guidance saw a material distinction between cartridge-based and other flavored products, but when it came to ruling on applications, the FDA effectively imposed a flat ban on *all* flavored products.

a

We cannot agree with respondents that the denial orders' treatment of device type was "inconsistent" with any "earlier position." *Encino Motorcars*, 579 U.S., at 224. The 2020 guidance explained how the FDA "intend[ed] to prioritize [its] enforcement resources." Specifically, the agency planned to target three types of e-cigarette products: (1) "[f]lavored, cartridge-based" products; (2) "[a]ll other [e-cigarette] products for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors' access"; and (3) "[a]ny [e-cigarette] products targeted to, or whose marketing is likely to promote use by, minors." Admittedly, on any reading of this guidance document, the FDA's central concern was the first category because data suggested "youth are more likely to use certain flavored, cartridge-based [e-cigarette] products."

But nothing in the 2020 guidance suggested the FDA would decline to take enforcement action against other products that might be appealing to the young. In fact, the FDA's enumeration of the second and third enforcement priorities, which are not limited to flavored cartridge-based products, supports the contrary conclusion. So when the FDA ultimately denied authorization to respondents' flavored (though non-cartridge) products, it did not reverse course. Rather, it followed through on the 2020 guidance's warning that the agency would *also* prioritize enforcement against manufacturers "whose [products'] marketing is likely to promote use by ... minors." *Id.*, at 145. Indeed, the FDA's marketing denial orders stated that respondents' applications were "insufficient to demonstrate that the[ir] products would provide an added benefit that is adequate to outweigh the risks to youth." That is a consistent application of the 2020 guidance's enforcement framework or, at the very least, an application that did not "revers[e the FDA's] former views as to the proper course." *State Farm*, 463 U.S., at 41.

This case is unlike *Fox Television*, in which we held that an agency changed position by "expanding the scope of its enforcement activity." 556 U.S., at 517. That case concerned the Federal Communications Commission's (FCC) enforcement of the federal indecency ban against the use of offensive words on broadcast television. Initially, the FCC distinguished between literal and nonliteral uses of offensive words and determined that fleeting uses of nonliteral offensive words were not actionably indecent. See *id.*, at 508. But then, in a subsequent adjudication, the FCC eliminated that safe harbor for nonliteral expletives and explained that even a single use of an offensive word was actionably indecent. We deemed that shift in enforcement policy "a change" for purposes of the change-in-position doctrine. See *id.*, at 517.

Here, in contrast, the FDA's 2020 guidance did not establish "a safe harbor" for non-cartridge-based products. *Id.*, at 518. True, the 2020 guidance unmistakably emphasized cartridge-based products, but it said nothing to suggest dessert-, candy-, and fruit-flavored products for open-system e-cigarettes would escape regulatory scrutiny. And further distinguishing *Fox Television*, the FDA's actions here did not "br[eak] new ground." *Id.*, at 517. Indeed, there was no new ground to break because respondents' denial orders were part of the FDA's first major exercise of its new authority over tobacco products under the TCA. In other words, the FDA could not "expan[d] the scope of" previously nonexistent "enforcement activity." *Ibid.*

Even if the FDA had changed its position, it offered "good reasons" for looking beyond cartridge-based e-cigarette products, *id.*, at 515, namely, that there was evidence from national surveillance data that youth demand had moved from flavored *cartridge-based* products to flavored *disposable* products. From this, the FDA drew the conclusion that "across these different device types, the role of flavor is consistent." If one type of flavored product were removed from the market, the FDA concluded, youth would "migrate to another" type of flavored product. So the FDA decided to focus on the "role of flavors ... across tobacco product categories." The FDA made this "conscious change of course" because it "*believe[d]* it to be better," and the agency gave "good reasons" for the change. *Fox Television*, 556 U.S., at 515.

Respondents cannot claim that the FDA's revised enforcement priorities upset a "legitimate reliance" interest. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). At most, the 2020 guidance may have led respondents to *believe* that the FDA was more likely to authorize their open-system products than other manufacturers' cartridge-based products. But such a belief about how an agency is likely to exercise its enforcement discretion is not a "serious reliance interes[t]." *Fox Television*, 556 U.S., at 515. Our prior change-in-position cases have set a much higher bar, requiring, for example, "decades of industry reliance on [an agency's] prior policy." *Encino Motorcars*, 579 U.S., at 222. Here, in contrast, respondents could not have built up decades of reliance because they were part of the very first wave of marketing denials under the FDA's newly minted jurisdiction over tobacco products.

We thus hold that the FDA's treatment of device type, even if it evolved over time, did not violate the change-in-position doctrine.

* * *

C

[*In this section of its opinion, the Court noted that the FDA conceded that it changed position regarding the submission of marketing plans. The FDA argued that the error was harmless. The Court concluded that the Fifth Circuit applied the wrong standard in rejecting the FDA's harmless error argument, so remanded the case for reconsideration of that issue. We will return to this remedial issue in the new chapter in the Fifth Edition. Eds.*]

■ Justice SOTOMAYOR, concurring.

I join the Court's opinion, as it rightly rejects the contention that the FDA acted arbitrarily and capriciously in denying respondents' applications for premarket approval of their tobacco products. I write separately, however, to clarify one point.

I do not believe the FDA, in the lead up to denying respondents' applications, "was feeling its way toward a final stance and was unable or unwilling to say in clear and specific terms precisely what applicants would have to provide." Instead, the record shows the agency reasonably gave manufacturers some flexibility as to the forms of evidence that would suffice for premarket approval of their products, while hewing to (and never suggesting it would stray from) its statutory duty to approve only those products that would be "appropriate for the protection of the public health." 21 U.S.C. §387j(c)(2)(A). In light of the statutory text and the well-documented and serious risks flavored e-cigarette products pose to youth, it should have come as no surprise that applicants would need to submit rigorous scientific evidence showing that the benefits of their products would outweigh those risks. See §387j(c)(4).

Notes and Questions

1. Supreme Court jurisprudence has long held that courts should reject as arbitrary and capricious unexplained or inadequately explained changes in an agency's policies or precedents. The *Wages & White Lion* decision represents the first time, however, that the Court has articulated that jurisprudence in terms of a two-step test. What are those two steps? Do you think framing the standard in that way might change how courts apply it? If so, then what might that change look like?

2. In *Wages & White Lion*, the Court suggested that it would consider whether the agency adequately explained a change in position only after it first concluded that the agency did, in fact, change its existing policy. The Court dedicated much of its analysis in the case to explaining why the FDA did not, in fact, change its existing policy when it rejected hundreds of premarket tobacco product applications, notwithstanding inconsistencies in the guidance that the FDA provided to regulated parties. Based on the Court's opinion, can you describe how much change in agency guidance is needed to satisfy that first step in the Court's new two-part test?

F. *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.

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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]

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,*

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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").

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.

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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.

■ Justice Thomas, concurring.

I join the Court's opinion in full because it correctly concludes that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), must finally be overruled. Under *Chevron*, a judge was required to adopt an agency's interpretation of an ambiguous statute, so long as the agency had a "permissible construction of the statute." See *id.*, at 843. As the Court explains, that deference does not comport with the Administrative Procedure

Act, which requires judges to decide "all relevant questions of law" and "interpret constitutional and statutory provisions" when reviewing an agency action. 5 U.S.C. § 706.

I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers, as I have previously explained at length. See *Baldwin*, 140 S. Ct. at 691–92 (dissenting opinion); *Michigan v. EPA*, 576 U.S. 743, 761–763 (2015) (concurring opinion); see also *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 115–118 (2015) (opinion concurring in judgment). And, I agree with Justice Gorsuch that we should not overlook *Chevron*'s constitutional defects in overruling it. To provide "practical and real protections for individual liberty," the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. *Perez*, 575 U.S. at 118 (opinion of Thomas, J.). *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits.

Chevron compels judges to abdicate their Article III "judicial Power." § 1. "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez*, 575 U.S. at 119 (opinion of Thomas, J.). The Framers understood that "legal texts ... often contain ambiguities," and that the judicial power included "the power to resolve these ambiguities over time." *Perez*, 575 U.S. at 119 (opinion of Thomas, J.). But, under *Chevron*, a judge must accept an agency's interpretation of an ambiguous law, even if he thinks another interpretation is correct. *Chevron* deference thus prevents judges from exercising their independent judgment to resolve ambiguities. By tying a judge's hands, *Chevron* prevents the Judiciary from serving as a constitutional check on the Executive. It allows "the Executive ... to dictate the outcome of cases through erroneous interpretations." *Baldwin*, 140 S. Ct. at 692 (opinion of Thomas, J.). Because the judicial power requires judges to exercise their independent judgment, the deference that *Chevron* requires contravenes Article III's mandate.

Chevron deference also permits the Executive Branch to exercise powers not given to it. "When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring in judgment). Because the Constitution gives the Executive Branch only "[t]he executive Power," executive agencies may constitutionally exercise only that power. Art. II, § 1, cl. 1. But, *Chevron* gives agencies license to exercise judicial power. By allowing agencies to definitively interpret laws so long as they are ambiguous, *Chevron* "transfer[s]" the Judiciary's "interpretive judgment to the agency." *Perez*, 575 U.S. at 124 (opinion of Thomas, J.).

Chevron deference "cannot be salvaged" by recasting it as deference to an agency's "formulation of policy." *Baldwin*, 140 S. Ct. at 691 (opinion of Thomas, J.) (internal quotation marks omitted). If that were true, *Chevron* would mean that "agencies are unconstitutionally exercising 'legislative Powers' vested in Congress." *Baldwin*, 140 S. Ct. at 691 (opinion of Thomas, J.) (quoting Art. I, § 1). By "giv[ing] the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent," *Chevron* "permit[s] a body other than Congress to perform a function that requires an exercise of legislative power." *Michigan*, 576 U.S. at 762 (opinion of Thomas, J.) (internal quotation marks omitted). No matter the gloss put on it, *Chevron* expands agencies' power beyond the

bounds of Article II by permitting them to exercise powers reserved to another branch of Government.

* * * *Chevron* was thus a fundamental disruption of our separation of powers. It improperly strips courts of judicial power by simultaneously increasing the power of executive agencies. By overruling *Chevron*, we restore this aspect of our separation of powers. To safeguard individual liberty, "[s]tructure is everything." A. Scalia, Foreword: The Importance of Structure in Constitutional Interpretation, 83 Notre Dame L. Rev. 1417, 1418 (2008). * * *

■ Justice Gorsuch, concurring.

In disputes between individuals and the government about the meaning of a federal law, federal courts have traditionally sought to offer independent judgments about "what the law is" without favor to either side. *Marbury v. Madison*, 1 Cranch 137 (1803). Beginning in the mid-1980s, however, this Court experimented with a radically different approach. Applying *Chevron* deference, judges began deferring to the views of executive agency officials about the meaning of federal statutes. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). With time, the error of this approach became widely appreciated. So much so that this Court has refused to apply *Chevron* deference since 2016. Today, the Court places a tombstone on *Chevron* no one can miss. In doing so, the Court returns judges to interpretive rules that have guided federal courts since the Nation's founding. I write separately to address why the proper application of the doctrine of *stare decisis* supports that course.

I

* * *

I see at least three lessons about the doctrine of *stare decisis* relevant to the decision before us today. Each concerns a form of judicial humility.

First, a past decision may bind the parties to a dispute, but it provides this Court no authority in future cases to depart from what the Constitution or laws of the United States ordain. Instead, the Constitution promises, the American people are sovereign and they alone may, through democratically responsive processes, amend our foundational charter or revise federal legislation. Unelected judges enjoy no such power.

Recognizing as much, this Court has often said that *stare decisis* is not an "'inexorable command.'" *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). And from time to time it has found it necessary to correct its past mistakes. When it comes to correcting errors of constitutional interpretation, the Court has stressed the importance of doing so, for they can be corrected otherwise only through the amendment process. See, *e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 248 (2019). When it comes to fixing errors of statutory interpretation, the Court has proceeded perhaps more circumspectly. But in that field, too, it has overruled even longstanding but "flawed" decisions. See, *e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 904 (2007).

* * *

Second, another lesson tempers the first. While judicial decisions may not supersede or revise the Constitution or federal statutory law, they merit our "respect as embodying the considered views of those who have come before." *Ramos v. Louisiana*, 590 U.S. 83, 105 (2020). As a matter of professional responsibility, a judge must not only avoid confusing his

writings with the law. When a case comes before him, he must also weigh his view of what the law demands against the thoughtful views of his predecessors. After all, "[p]recedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges." B. Garner, et al., The Law of Judicial Precedent 9 (2016) (Precedent).

Doubtless, past judicial decisions may, as they always have, command "greater or less authority as precedents, according to circumstances." Lincoln Speech 401. But, like English judges before us, we have long turned to familiar considerations to guide our assessment of the weight due a past decision. So, for example, as this Court has put it, the weight due a precedent may depend on the quality of its reasoning, its consistency with related decisions, its workability, and reliance interests that have formed around it. See *Ramos*, 590 U.S. at 106. The first factor recognizes that the primary power of any precedent lies in its power to persuade—and poorly reasoned decisions may not provide reliable evidence of the law's meaning. The second factor reflects the fact that a precedent is more likely to be correct and worthy of respect when it reflects the time-tested wisdom of generations than when it sits "unmoored" from surrounding law. *Ibid.* The remaining factors, like workability and reliance, do not often supply reason enough on their own to abide a flawed decision, for almost any past decision is likely to benefit some group eager to keep things as they are and content with how things work. But these factors can sometimes serve functions similar to the others, by pointing to clues that may suggest a past decision is right in ways not immediately obvious to the individual judge.

* * *

Third, it would be a mistake to read judicial opinions like statutes. Adopted through a robust and democratic process, statutes often apply in all their particulars to all persons. By contrast, when judges reach a decision in our adversarial system, they render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop. A later court assessing a past decision must therefore appreciate the possibility that different facts and different legal arguments may dictate a different outcome. They must appreciate, too, that, like anyone else, judges are "innately digressive," and their opinions may sometimes offer stray asides about a wider topic that may sound nearly like legislative commands. Duxbury 4. Often, enterprising counsel seek to exploit such statements to maximum effect. See *id.*, at 25. But while these digressions may sometimes contain valuable counsel, they remain "vapours and fumes of law," Bacon 478, and cannot "control the judgment in a subsequent suit." *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821).

* * *

II

Turning now directly to the question what *stare decisis* effect *Chevron* deference warrants, each of these lessons seem to me to weigh firmly in favor of the course the Court charts today: Lesson 1, because *Chevron* deference contravenes the law Congress prescribed in the Administrative Procedure Act. Lesson 2, because *Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and centuries-old interpretive rules that fortify those constitutional commitments. And Lesson 3, because to hold otherwise would effectively require us to endow stray statements in *Chevron* with the authority of statutory language, all while ignoring more considered language in that same decision and the teachings of experience.

A

Start with Lesson 1. The Administrative Procedure Act of 1946 (APA) directs a "reviewing court" to "decide all relevant questions of law" and "interpret" relevant "constitutional and statutory provisions." 5 U.S.C. § 706. When applying *Chevron* deference, reviewing courts do not interpret all relevant statutory provisions and decide all relevant questions of law. Instead, judges abdicate a large measure of that responsibility in favor of agency officials. Their interpretations of "ambiguous" laws control even when those interpretations are at odds with the fairest reading of the law an independent "reviewing court" can muster. Agency officials, too, may change their minds about the law's meaning at any time, even when Congress has not amended the relevant statutory language in any way. *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 982–983 (2005). And those officials may even disagree with and effectively overrule not only their own past interpretations of a law but a court's past interpretation as well. None of that is consistent with the APA's clear mandate.

The hard fact is *Chevron* "did not even bother to cite" the APA, let alone seek to apply its terms. *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). Instead, as even its most ardent defenders have conceded, *Chevron* deference rests upon a "*fictionalized* statement of legislative desire," namely, a judicial supposition that Congress implicitly wishes judges to defer to executive agencies' interpretations of the law even when it has said nothing of the kind. D. Barron & E. Kagan, Chevron's Nondelegation Doctrine, 2001 S. Ct. Rev. 201, 212 (Kagan) (emphasis added). As proponents see it, that fiction represents a "policy judgmen[t] about what ... make[s] for good government." *Ibid.* But in our democracy unelected judges possess no authority to elevate their own fictions over the laws adopted by the Nation's elected representatives. Some might think the legal directive Congress provided in the APA unwise; some might think a different arrangement preferable. But it is Congress's view of "good government," not ours, that controls.

* * *

B

Lesson 2 cannot rescue *Chevron* deference. If *stare decisis* calls for judicial humility in the face of the written law, it also cautions us to test our present conclusions carefully against the work of our predecessors. At the same time and as we have seen, this second form of humility counsels us to remember that precedents that have won the endorsement of judges across many generations, demonstrated coherence with our broader law, and weathered the tests of time and experience are entitled to greater consideration than those that have not. Viewed by each of these lights, the case for *Chevron* deference only grows weaker still.

1

Start with a look to how our predecessors traditionally understood the judicial role in disputes over a law's meaning. From the Nation's founding, they considered "[t]he interpretation of the laws" in cases and controversies "the proper and peculiar province of the courts." The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton). Perhaps the Court's most famous early decision reflected exactly that view. There, Chief Justice Marshall declared it "emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch at 177. For judges "have neither FORCE nor WILL but merely judgment"—and an obligation to exercise that judgment independently. The Federalist No. 78, at 465. No matter how "disagreeable that duty may be," this Court has said, a judge "is

not at liberty to surrender, or to waive it." *United States v. Dickson*, 15 Pet. 141, 162 (1841) (Story, J.). This duty of independent judgment is perhaps "the defining characteristi[c] of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483 (2011).

To be sure, this Court has also long extended "great respect" to the "contemporaneous" and consistent views of the coordinate branches about the meaning of a statute's terms. *Edwards' Lessee v. Darby*, 12 Wheat. 206, 210 (1827). But traditionally, that did not mean a court had to "defer" to any "reasonable" construction of an "ambiguous" law that an executive agency might offer. It did not mean that the government could propound a "reasonable" view of the law's meaning one day, a different one the next, and bind the judiciary always to its latest word. Nor did it mean the executive could displace a pre-existing judicial construction of a statute's terms, replace it with its own, and effectively overrule a judicial precedent in the process.

* * *

2

Consider next how uneasily *Chevron* deference sits alongside so many other settled aspects of our law. Having witnessed first-hand King George's efforts to gain influence and control over colonial judges, see Declaration of Independence ¶ 11, the framers made a considered judgment to build judicial independence into the Constitution's design. They vested the judicial power in decisionmakers with life tenure. Art. III, § 1. They placed the judicial salary beyond political control during a judge's tenure. And they rejected any proposal that would subject judicial decisions to review by political actors. The Federalist No. 81, at 482. All of this served to ensure the same thing: "A fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955). One in which impartial judges, not those currently wielding power in the political branches, would "say what the law is" in cases coming to court. *Marbury*, 1 Cranch at 177.

Chevron deference undermines all that. It precludes courts from exercising the judicial power vested in them by Article III to say what the law is. It forces judges to abandon the best reading of the law in favor of views of those presently holding the reins of the Executive Branch. It requires judges to change, and change again, their interpretations of the law as and when the government demands. And that transfer of power has exactly the sort of consequences one might expect. Rather than insulate adjudication from power and politics to ensure a fair hearing "without respect to persons" as the federal judicial oath demands, 28 U.S.C. § 453, *Chevron* deference requires courts to "place a finger on the scales of justice in favor of the most powerful of litigants, the federal government." *Buffington v. McDonough*, 143 S. Ct. 14, 17 (2022) (opinion dissenting from denial of certiorari). Along the way, *Chevron* deference guarantees "systematic bias" in favor of whichever political party currently holds the levers of executive power. P. Hamburger, *Chevron* Bias, 84 Geo. Wash. L. Rev. 1187, 1212 (2016).

* * *

3

Finally, consider workability and reliance. If, as I have sought to suggest, these factors may sometimes serve as useful proxies for the question whether a precedent comports with the historic tide of judicial practice or represents an aberrational mistake, they certainly do here.

Take *Chevron*'s "workability." Throughout its short life, this Court has been forced to supplement and revise *Chevron* so many times that no one can agree on how many "steps" it requires, nor even what each of those "steps" entails. Some suggest that the analysis begins with "step zero" (perhaps itself a tell), an innovation that traces to *United States v. Mead Corp.*, 533 U.S. 218. *Mead* held that, before even considering whether *Chevron* applies, a court must determine whether Congress meant to delegate to the agency authority to interpret the law in a given field. 533 U.S. at 226–227. But that exercise faces an immediate challenge: Because *Chevron* depends on a judicially implied, rather than a legislatively expressed, delegation of interpretive authority to an executive agency, Part II–A, *supra*, when should the fiction apply and when not? *Mead* fashioned a multifactor test for judges to use. 533 U.S. at 229–231. But that test has proved as indeterminate in application as it was contrived in origin. Perhaps for these reasons, perhaps for others, this Court has sometimes applied *Mead* and often ignored it. See *Brand X*, 545 U.S. at 1014, n. 8 (Scalia, J., dissenting).

Things do not improve as we move up the *Chevron* ladder. At "step one," a judge must defer to an executive official's interpretation when the statute at hand is "ambiguous." But even today, *Chevron*'s principal beneficiary—the federal government—still cannot say when a statute is sufficiently ambiguous to trigger deference. Perhaps thanks to this particular confusion, the search for ambiguity has devolved into a sort of Snark hunt: Some judges claim to spot it almost everywhere, while other equally fine judges claim never to have seen it. Compare L. Silberman, *Chevron*—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 826 (1990), with R. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 323 (2017).

Nor do courts agree when it comes to "step two." There, a judge must assess whether an executive agency's interpretation of an ambiguous statute is "reasonable." But what does that inquiry demand? Some courts engage in a comparatively searching review; others almost reflexively defer to an agency's views. Here again, courts have pursued "wildly different" approaches and reached wildly different conclusions in similar cases. See B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2152 (2016) (Kavanaugh).

* * *

Turn now from workability to reliance. Far from engendering reliance interests, the whole point of *Chevron* deference is to upset them. Under *Chevron*, executive officials can replace one "reasonable" interpretation with another at any time, all without any change in the law itself. The result: Affected individuals "can never be sure of their legal rights and duties." *Buffington*, 143 S. Ct. at 20.

How bad is the problem? Take just one example. *Brand X* concerned a law regulating broadband internet services. There, the Court upheld an agency rule adopted by the administration of President George W. Bush because it was premised on a "reasonable" interpretation of the statute. Later, President Barack Obama's administration rescinded the rule and replaced it with another. Later still, during President Donald J. Trump's administration, officials replaced that rule with a different one, all before President Joseph R. Biden, Jr.'s administration declared its intention to reverse course for yet a fourth time. See Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048 (2023); *Brand X*, 545 U.S. at 981–982. Each time, the government claimed its new rule was just as "reasonable" as the last. Rather than promoting reliance by fixing the meaning of the law, *Chevron* deference engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged.

Nor are these antireliance harms distributed equally. Sophisticated entities and their lawyers may be able to keep pace with rule changes affecting their rights and responsibilities. They may be able to lobby for new "'reasonable'" agency interpretations and even capture the agencies that issue them. *Buffington*, 143 S. Ct. 14, 18, 20–21. But ordinary people can do none of those things. They are the ones who suffer the worst kind of regulatory whiplash *Chevron* invites.

* * *

What does the federal government have to say about this? It acknowledges that *Chevron* sits as a heavy weight on the scale in favor of the government, "oppositional" to many "categories of individuals." But, according to the government, *Chevron* deference is too important an innovation to undo. In its brief reign, the government says, it has become a "fundamenta[l] ... ground rul[e] for how all three branches of the government are operating together." But, in truth, the Constitution, the APA, and our longstanding precedents set those ground rules some time ago. And under them, agencies cannot invoke a judge-made fiction to unsettle our Nation's promise to individuals that they are entitled to make their arguments about the law's demands on them in a fair hearing, one in which they stand on equal footing with the government before an independent judge.

C

*** * ***

[T]he government suggests we should retain *Chevron* deference because judges simply cannot live without it; some statutes are just too "technical" for courts to interpret "intelligently." But that objection is no answer to *Chevron*'s inconsistency with Congress's directions in the APA, so much surrounding law, or the challenges its multistep regime have posed in practice. Nor does history counsel such defeatism. Surely, it would be a mistake to suggest our predecessors before *Chevron*'s rise in the mid-1980s were unable to make their way intelligently through technical statutory disputes. Following their lead, over the past eight years this Court has managed to resolve even highly complex cases without *Chevron* deference, and done so even when the government sought deference. Nor, as far as I am aware, did any Member of the Court suggest *Chevron* deference was necessary to an intelligent resolution of any of those matters. If anything, by affording *Chevron* deference a period of repose before addressing whether it should be retained, the Court has enabled its Members to test the propriety of that precedent and reflect more deeply on how well it fits into the broader architecture of our law.

* * *

Chevron deference is inconsistent with the directions Congress gave us in the APA. It represents a grave anomaly when viewed against the sweep of historic judicial practice. The decision undermines core rule-of-law values ranging from the promise of fair notice to the promise of a fair hearing. Even on its own terms, it has proved unworkable and operated to undermine rather than advance reliance interests, often to the detriment of ordinary Americans. And from the start, the whole project has relied on the overaggressive use of snippets and stray remarks from an opinion that carried mixed messages. *Stare decisis*'s true lesson today is not that we are bound to respect *Chevron*'s "startling development," but bound to inter it.

■ Justice Kagan, with whom Justices Sotomayor and Jackson* join, dissenting.

For 40 years, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has served as a cornerstone of administrative law, allocating responsibility for statutory construction between courts and agencies. Under *Chevron*, a court uses all its normal interpretive tools to determine whether Congress has spoken to an issue. If the court finds Congress has done so, that is the end of the matter; the agency's views make no difference. But if the court finds, at the end of its interpretive work, that Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.

And the rule is right. This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority. We defer, the Court has explained, "because of a presumption that Congress" would have "desired the agency (rather than the courts)" to exercise "whatever degree of discretion" the statute allows. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–741 (1996).

Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. * * * In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar. It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act

* Justice JACKSON did not participate in the consideration or decision of the case in No. 22–451 [*Loper Bright Enterprises v. Raimondo*] and joins this opinion only as it applies to the case in No. 22–1219 [*Relentless, Inc. v. Department of Commerce*].

makes no such demand. Today's decision is not one Congress directed. It is entirely the majority's choice.

And the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second. (If opinions had titles, a good candidate for today's would be Hubris Squared.) *Stare decisis* is, among other things, a way to remind judges that wisdom often lies in what prior judges have done. * * * *Chevron* is entrenched precedent, entitled to the protection of *stare decisis*, as even the majority acknowledges. * * * The majority disdains restraint, and grasps for power.

I

Begin with the problem that gave rise to *Chevron* (and also to its older precursors): The regulatory statutes Congress passes often contain ambiguities and gaps. Sometimes they are intentional. Perhaps Congress "consciously desired" the administering agency to fill in aspects of the legislative scheme, believing that regulatory experts would be "in a better position" than legislators to do so. *Chevron*, 467 U.S. at 865. Or "perhaps Congress was unable to forge a coalition on either side" of a question, and the contending parties "decided to take their chances with" the agency's resolution. *Ibid.* Sometimes, though, the gaps or ambiguities are what might be thought of as predictable accidents. They may be the result of sloppy drafting, a not infrequent legislative occurrence. Or they may arise from the well-known limits of language or foresight. "The subject matter" of a statutory provision may be too "specialized and varying" to "capture in its every detail." *Kisor*, 588 U.S. at 566 (plurality opinion). Or the provision may give rise, years or decades down the road, to an issue the enacting Congress could not have anticipated. Whichever the case—whatever the reason—the result is to create uncertainty about some aspect of a provision's meaning.

Consider a few examples from the caselaw. They will help show what a typical *Chevron* question looks like—or really, what a typical *Chevron* question *is*. Because when choosing whether to send some class of questions mainly to a court, or mainly to an agency, abstract analysis can only go so far; indeed, it may obscure what matters most. So I begin with the concrete:

- Under the Public Health Service Act, the Food and Drug Administration (FDA) regulates "biological product[s]," including "protein[s]." 42 U.S.C. § 262(i)(1). When does an alpha amino acid polymer qualify as such a "protein"? Must it have a specific, defined sequence of amino acids? See *Teva Pharmaceuticals USA, Inc. v. FDA*, 514 F.Supp.3d 66, 79–80, 93–106 (D.D.C. 2020).
- Under the Endangered Species Act, the Fish and Wildlife Service must designate endangered "vertebrate fish or wildlife" species, including "distinct population segment[s]" of those species. 16 U.S.C. § 1532(16); see § 1533. What makes one population segment "distinct" from another? Must the Service treat the Washington State population of western gray squirrels as "distinct" because it is geographically separated from other western gray squirrels? Or can the Service take into account that the genetic makeup of the Washington population does not differ markedly from the rest? See *Northwest Ecosystem Alliance v. United States Fish and Wildlife Serv.*, 475 F.3d 1136, 1140–1145 (CA9 2007).
- Under the Medicare program, reimbursements to hospitals are adjusted to reflect "differences in hospital wage levels" across "geographic area[s]." 42 U.S.C. § 1395ww(d)(3)(E)(i). How should the Department of Health and Human Services measure

a "geographic area"? By city? By county? By metropolitan area? See *Bellevue Hospital Center v. Leavitt*, 443 F.3d 163, 174–176 (CA2 2006).

- Congress directed the Department of the Interior and the Federal Aviation Administration to reduce noise from aircraft flying over Grand Canyon National Park—specifically, to "provide for substantial restoration of the natural quiet." § 3(b)(1), 101 Stat. 676; see § 3(b)(2). How much noise is consistent with "the natural quiet"? And how much of the park, for how many hours a day, must be that quiet for the "substantial restoration" requirement to be met? See *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 466–467, 474–475 (CADC 1998).
- Or take *Chevron* itself. In amendments to the Clean Air Act, Congress told States to require permits for modifying or constructing "stationary sources" of air pollution. 42 U.S.C. § 7502(c)(5). Does the term "stationary source[ ]" refer to each pollution-emitting piece of equipment within a plant? Or does it refer to the entire plant, and thus allow escape from the permitting requirement when increased emissions from one piece of equipment are offset by reductions from another? See 467 U.S. at 857, 859.

In each case, a statutory phrase has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, "fixed" the "single, best meaning" at "the time of enactment" (to use the majority's phrase). A question thus arises: Who decides which of the possible readings should govern?

This Court has long thought that the choice should usually fall to agencies, with courts broadly deferring to their judgments. * * *

That rule, the Court has long explained, rests on a presumption about legislative intent—about what Congress wants when a statute it has charged an agency with implementing contains an ambiguity or a gap. * * * Of course, Congress can always refute that presumptive choice—can say that, really, it would prefer courts to wield that discretionary power. But until then, the presumption cuts in the agency's favor. The next question is why.

For one, because agencies often know things about a statute's subject matter that courts could not hope to. The point is especially stark when the statute is of a "scientific or technical nature." *Kisor*, 588 U.S. at 571 (plurality opinion). Agencies are staffed with "experts in the field" who can bring their training and knowledge to bear on open statutory questions. *Chevron*, 467 U.S. at 865. Consider, for example, the first bulleted case above. When does an alpha amino acid polymer qualify as a "protein"? I don't know many judges who would feel confident resolving that issue. (First question: What even *is* an alpha amino acid polymer?) But the FDA likely has scores of scientists on staff who can think intelligently about it, maybe collaborate with each other on its finer points, and arrive at a sensible answer. Or take the perhaps more accessible-sounding second case, involving the Endangered Species Act. Deciding when one squirrel population is "distinct" from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary. How much variation of what kind—geographic, genetic, morphological, or behavioral—should be required? A court could, if forced to, muddle through that issue and announce a result. But wouldn't the Fish and Wildlife Service, with all its specialized expertise, do a better job of the task—of saying what, in the context of species protection, the open-ended term "distinct" means? One idea behind the *Chevron* presumption is that Congress—the same Congress that charged the Service with implementing the Act—would answer that question with a resounding "yes."

A second idea is that Congress would value the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective. Let's stick with squirrels for a moment, except broaden the lens. In construing a term like "distinct" in a case about squirrels, the Service likely would benefit from its "historical familiarity" with how the term has covered the population segments of other species. * * * Just as a common-law court makes better decisions as it sees multiple variations on a theme, an agency's construction of a statutory term benefits from its unique exposure to all the related ways the term comes into play. * * *

Still more, *Chevron*'s presumption reflects that resolving statutory ambiguities, as Congress well knows, is "often more a question of policy than of law." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). The task is less one of construing a text than of balancing competing goals and values. Consider the statutory directive to achieve "substantial restoration of the [Grand Canyon's] natural quiet." See *supra*, at 2296. Someone is going to have to decide exactly what that statute means for air traffic over the canyon. How many flights, in what places and at what times, are consistent with restoring enough natural quiet on the ground? That is a policy trade-off of a kind familiar to agencies—but peculiarly unsuited to judges. * * * So when faced with a statutory ambiguity, "an agency to which Congress has delegated policymaking responsibilities" may rely on an accountable actor's "views of wise policy to inform its judgments." *Chevron*, 467 U.S. at 865.

None of this is to say that deference to agencies is always appropriate. The Court over time has fine-tuned the *Chevron* regime to deny deference in classes of cases in which Congress has no reason to prefer an agency to a court. The majority treats those "refinements" as a flaw in the scheme, but they are anything but. Consider the rule that an agency gets no deference when construing a statute it is not responsible for administering. See *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 519–520 (2018). Well, of course not—if Congress has not put an agency in charge of implementing a statute, Congress would not have given the agency a special role in its construction. Or take the rule that an agency will not receive deference if it has reached its decision without using—or without using properly—its rulemaking or adjudicatory authority. See *United States v. Mead Corp.*, 533 U.S. 218, 226–227 (2001). Again, that should not be surprising: Congress expects that authoritative pronouncements on a law's meaning will come from the procedures it has enacted to foster "fairness and deliberation" in agency decision-making. *Mead*, 533 U.S. at 230. Or finally, think of the "extraordinary cases" involving questions of vast "economic and political significance" in which the Court has declined to defer. *King v. Burwell*, 576 U.S. 473, 485–486 (2015). The theory is that Congress would not have left matters of such import to an agency, but would instead have insisted on maintaining control. So the *Chevron* refinements proceed from the same place as the original doctrine. Taken together, they give interpretive primacy to the agency when—but only when—it is acting, as Congress specified, in the heartland of its delegated authority.

That carefully calibrated framework "reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley*, 501 U.S. at 696. Where Congress has spoken, Congress has spoken; only its judgments matter. And courts alone determine when that has happened: Using all their normal interpretive tools, they decide whether Congress has addressed a given issue. But when courts have decided that Congress has not done so, a choice arises. Absent a legislative directive, either the administering agency or a court must take the lead. And the matter is more fit for the agency. The decision is likely to involve the agency's subject-matter expertise; to fall within its sphere of regulatory experience; and to

involve policy choices, including cost-benefit assessments and trade-offs between conflicting values. So a court without relevant expertise or experience, and without warrant to make policy calls, appropriately steps back. The court still has a role to play: It polices the agency to ensure that it acts within the zone of reasonable options. But the court does not insert itself into an agency's expertise-driven, policy-laden functions. That is the arrangement best suited to keep every actor in its proper lane. And it is the one best suited to ensure that Congress's statutes work in the way Congress intended.

* * *

II

The majority's principal arguments are in a different vein. Around 80 years after the APA was enacted and 40 years after *Chevron*, the majority has decided that the former precludes the latter. The APA's Section 706, the majority says, "makes clear" that agency interpretations of statutes "are *not* entitled to deference." And that provision, the majority continues, codified the contemporaneous law, which likewise did not allow for deference. But neither the APA nor the pre-APA state of the law does the work that the majority claims. Both are perfectly compatible with *Chevron* deference.

Section 706, enacted with the rest of the APA in 1946, provides for judicial review of agency action. It states: "To 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.

That text, contra the majority, "does not resolve the *Chevron* question." C. Sunstein, *Chevron* As Law, 107 Geo. L.J. 1613, 1642 (2019) (Sunstein). Or said a bit differently, Section 706 is "generally indeterminate" on the matter of deference. A. Vermeule, Judging Under Uncertainty 207 (2006) (Vermeule). The majority highlights the phrase "decide all relevant questions of law" (italicizing the "all"), and notes that the provision "prescribes no deferential standard" for answering those questions. But just as the provision does not prescribe a deferential standard of review, so too it does not prescribe a *de novo* standard of review (in which the court starts from scratch, without giving deference). In point of fact, Section 706 does not specify *any* standard of review for construing statutes. See *Kisor*, 588 U.S. at 581 (plurality opinion). And when a court uses a deferential standard—here, by deciding whether an agency reading is reasonable—it just as much "decide[s]" a "relevant question[ ] of law" as when it uses a *de novo* standard. § 706. The deferring court then conforms to Section 706 "by determining whether the agency has stayed within the bounds of its assigned discretion—that is, whether the agency has construed [the statute it administers] reasonably." J. Manning, *Chevron* and the Reasonable Legislator, 128 Harv. L. Rev. 457, 459 (2014); see *Arlington v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, C. J., dissenting) ("We do not ignore [Section 706's] command when we afford an agency's statutory interpretation *Chevron* deference; we respect it").

Section 706's references to standards of review in other contexts only further undercut the majority's argument. The majority notes that Section 706 requires deferential review for agency fact-finding and policy-making (under, respectively, a substantial-evidence standard and an arbitrary-and-capricious standard). Congress, the majority claims, "surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart" from *de novo* review. *Ibid.* Surely? In another part of Section 706, Congress explicitly referred to *de novo* review. § 706(2)(F). With all those references to standards of review—both

deferential and not—running around Section 706, what is "telling" is the absence of any standard for reviewing an agency's statutory constructions. That silence left the matter, as noted above, "generally indeterminate": Section 706 neither mandates nor forbids *Chevron*-style deference. Vermeule 207.

* * *

The majority's view of Section 706 likewise gets no support from how judicial review operated in the years leading up to the APA. That prior history matters: As the majority recognizes, Section 706 was generally understood to "restate[ ] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947). The problem for the majority is that in the years preceding the APA, courts became ever more deferential to agencies. New Deal administrative programs had by that point come into their own. And this Court and others, in a fairly short time, had abandoned their initial resistance and gotten on board. Justice Breyer, wearing his administrative-law-scholar hat, characterized the pre-APA period this way: "[J]udicial review of administrative action was curtailed, and particular agency decisions were frequently sustained with judicial obeisance to the mysteries of administrative expertise." S. Breyer et al., Administrative Law and Regulatory Policy 21 (7th ed. 2011). And that description extends to review of an agency's statutory constructions. An influential study of administrative practice, published five years before the APA's enactment, described the state of play: Judicial "review may, in some instances at least, be limited to the inquiry whether the administrative construction is a permissible one." Final Report of Attorney General's Committee on Administrative Procedure (1941), reprinted in Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., 78 (1941). Or again: "[W]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body." *Id.*, at 90–91.

* * *

I am perfectly ready to acknowledge that in the pre-APA period, a deference regime had not yet taken complete hold. I'll go even further: Let's assume that deference was then an on-again, off-again function (as the majority seems to suggest). Even on that assumption, the majority's main argument—that Section 706 *prohibited* deferential review—collapses. * * *

The majority's whole argument for overturning *Chevron* relies on Section 706. But the text of Section 706 does not support that result. And neither does the contemporaneous practice, which that text was supposed to reflect. So today's decision has no basis in the only law the majority deems relevant. It is grounded on air.

III

And still there is worse, because abandoning *Chevron* subverts every known principle of *stare decisis*. Of course, respecting precedent is not an "inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). But overthrowing it requires far more than the majority has offered up here.

* * *

Chevron is entitled to a particularly strong form of *stare decisis*, for two separate reasons. First, it matters that "Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). In a constitutional case, the Court alone can correct an error. But that is not so here. "Our deference decisions are balls tossed into

Congress's court, for acceptance or not as that branch elects." *Kisor*, 588 U.S. at 587–588 (opinion of the Court). And for generations now, Congress has chosen acceptance. Throughout those years, Congress could have abolished *Chevron* across the board, most easily by amending the APA. Or it could have eliminated deferential review in discrete areas, by amending old laws or drafting new laws to include an anti-*Chevron* provision. Instead, Congress has "spurned multiple opportunities" to do a comprehensive rejection of *Chevron*, and has hardly ever done a targeted one. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456 (2015). Or to put the point more affirmatively, Congress has kept *Chevron* as is for 40 years. It maintained that position even as Members of this Court began to call *Chevron* into question. From all it appears, Congress has not agreed with the view of some Justices that they and other judges should have more power.

Second, *Chevron* is by now much more than a single decision. This Court alone, acting as *Chevron* allows, has upheld an agency's reasonable interpretation of a statute at least 70 times. Lower courts have applied the *Chevron* framework on thousands upon thousands of occasions. See K. Barnett & C. Walker, *Chevron* and Stare Decisis, 31 Geo. Mason L. Rev. 475, 477, and n.11 (2024) (noting that at last count, *Chevron* was cited in more than 18,000 federal-court decisions). * * * *Chevron* is as embedded as embedded gets in the law.

The majority says differently, because this Court has ignored *Chevron* lately; all that is left of the decision is a "decaying husk with bold pretensions." Tell that to the D. C. Circuit, the court that reviews a large share of agency interpretations, where *Chevron* remains alive and well. See, *e.g.*, *Lissack v. Commissioner*, 68 F.4th 1312, 1321–1322 (2023); *Solar Energy Industries Assn. v. FERC*, 59 F.4th 1287, 1291–1294 (2023). But more to the point: The majority's argument is a bootstrap. This Court has "avoided deferring under *Chevron* since 2016" because it has been preparing to overrule *Chevron* since around that time. That kind of self-help on the way to reversing precedent has become almost routine at this Court. Stop applying a decision where one should; "throw some gratuitous criticisms into a couple of opinions"; issue a few separate writings "question[ing the decision's] premises"; give the whole process a few years ... and voila!—you have a justification for overruling the decision. * * * I once remarked that this overruling-through-enfeeblement technique "mock[ed] *stare decisis*." *Janus v. State, County, and Municipal Employees*, 585 U.S. 878, 950 (2018) (Kagan, J., dissenting). I have seen no reason to change my mind.

The majority does no better in its main justification for overruling *Chevron*—that the decision is "unworkable." The majority's first theory on that score is that there is no single "answer" about what "ambiguity" means: Some judges turn out to see more of it than others do, leading to "different results." But even if so, the legal system has for many years, in many contexts, dealt perfectly well with that variation. * * * [T]he rule of lenity tells us to construe ambiguous statutes in favor of criminal defendants. See *United States v. Castleman*, 572 U.S. 157, 172–173 (2014). And the canon of constitutional avoidance instructs us to construe ambiguous laws to avoid difficult constitutional questions. See *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001). I could go on, but the point is made. There are ambiguity triggers all over the law. Somehow everyone seems to get by.

And *Chevron* is an especially puzzling decision to criticize on the ground of generating too much judicial divergence. There's good empirical—meaning, non-impressionistic—evidence on exactly that subject. And it shows that, as compared with *de novo* review, use of the *Chevron* two-step framework fosters *agreement* among judges. See K. Barnett, C. Boyd, & C. Walker, Administrative Law's Political Dynamics, 71 Vand. L. Rev. 1463, 1502 (2018). * * *

So if consistency among judges is the majority's lodestar, then the Court should not overrule *Chevron*, but return to using it.

The majority's second theory on workability is likewise a makeweight. *Chevron*, the majority complains, has some exceptions, which (so the majority says) are "difficult" and "complicate[d]" to apply. Recall that courts are not supposed to defer when the agency construing a statute (1) has not been charged with administering that law; (2) has not used deliberative procedures—*i.e.,* notice-and-comment rulemaking or adjudication; or (3) is intervening in a "major question," of great economic and political significance. As I've explained, those exceptions—the majority also aptly calls them "refinements"—fit with *Chevron*'s rationale: They define circumstances in which Congress is unlikely to have wanted agency views to govern. And on the difficulty scale, they are nothing much. Has Congress put the agency in charge of administering the statute? In 99 of 100 cases, everyone will agree on the answer with scarcely a moment's thought. Did the agency use notice-and-comment or an adjudication before rendering an interpretation? Once again, I could stretch my mind and think up a few edge cases, but for the most part, the answer is an easy yes or no. The major questions exception is, I acknowledge, different: There, many judges have indeed disputed its nature and scope. Compare, *e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 721–724 (2022), with *id.*, at 764–770 (Kagan, J., dissenting). But that disagreement concerns, on everyone's view, a tiny subset of all agency interpretations. For the most part, the exceptions that so upset the majority require merely a rote, check-the-box inquiry. If that is the majority's idea of a "dizzying breakdance," the majority needs to get out more.

And anyway, difficult as compared to what? The majority's prescribed way of proceeding is no walk in the park. * * * Indeed, one reason Justice Scalia supported *Chevron* was that it replaced such a "statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption." A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 516. As a lover of the predictability that rules create, Justice Scalia thought the latter "unquestionably better." *Id.*, at 517.

* * *

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?

G. *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

1. 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?

2. In *FCC v. Consumers' Research*, 145 S. Ct. 2482 (2025), the Court rejected a nondelegation doctrine challenge to the FCC's Universal Service Fund. In their separate opinions, Justices Gorsuch and Kavanaugh both observed that the major questions doctrine—coupled with *Loper Bright*'s de novo review of agency statutory interpretations—mitigate much of their concerns about excessive congressional delegations. As Justice Kavanaugh explained in his concurrence, "when interpreting a statute and determining the limits of the statutory text, courts presume that Congress … has not delegated authority to the President to issue major rules—that is, rules of great political and economic significance—unless Congress clearly says as much. Courts 'presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.' That major questions canon reflects both background separation of powers understandings and the commonsense interpretive maxim that Congress does not usually 'hide elephants in mouseholes' when granting authority to the President." Does the emergence of the major questions doctrine mean the Supreme Court is unlikely to revive the nondelegation doctrine in the near future? Are there statutory delegations that could fail the nondelegation doctrine but not the major questions doctrine?

H. *NATIONAL ASS'N OF IMMIGRATION JUDGES V. OWEN* & EXHAUSTION

CHAPTER 7.B.2. DUTY TO EXHAUST ADMINISTRATIVE REMEDIES

The Fourth Circuit's decision in *National Association of Immigration Judges v. Owen*, 139 F.4th 293 (4th Cir. 2025), has the potential to remove a major obstacle to judicial review for the tens of thousands of government employees who believe that they have been subjected to illegal treatment by the Trump administration. The case involved the rights of the 750 Immigration Judges (IJs) who work in the Executive Office of Immigration Review (EOIR). That office adopted a rule that prohibits IJs from speaking publicly on immigration matters without first obtaining permission from EOIR. It then implemented the rule in ways that almost completely precluded IJs from expressing their views.

The National Association of Immigration Judges (NAIJ) filed a complaint in a district court in which it argued that the EOIR rule violates the IJ's First Amendment free speech rights and their Fifth Amendment right not to be subject to unduly vague rules. The district court dismissed the action as not within its jurisdiction. It relied on a provision of the Civil Service Reform Act of 1978 (CSRA) that the Supreme Court had interpreted to require any civil servant who believes that she has been the subject of unlawful action by the government to file a complaint with the Merits Systems Protection Board (MSPB) and wait until after the MSPB addresses the complaint before she seeks relief from a court. The Fourth Circuit vacated that order and remanded the case to the district court for further consideration. The circuit court instructed the district court to reconsider its conclusion that Congress intended to preclude district courts from exercising jurisdiction over complaints by civil servants without first allowing the MSPB to act on the complaint in light of recent changes in the status and composition of the MSPB.

When Congress enacted the CSRA, it created the MSPB as a purely adjudicative agency that would be completely independent of the president. Congress assured the independence of the MSPB by specifying that it was to consist of three members who are nominated by the president and confirmed by the Senate, serve staggered seven-year terms, and can only be removed for "inefficiency, neglect of duty, or malfeasance in office." Asserting a constitutional authority to remove at will, President Trump did not comply with the CSRA when removing one of the three members of MSPB without stating any cause for removal. In May 2025, the Supreme Court allowed that action to become effective. The actions of the president and the Supreme Court create a situation in which the MSPB has no power to act because it lacks a quorum.

If President Trump declines to nominate anyone to be a member of the MSPB, it will continue to be powerless. If he nominates someone to serve as a member of the MSPB and the Senate confirms his nominee, all of the members will know that they can be removed and replaced by the president at any time for any reason. The MSPB would then bear no resemblance to the independent adjudicative body that Congress intended to create when it enacted the CSRA. It would be completely under the control of the president.

The Fourth Circuit quoted at length from a trio of opinions in which the Supreme Court had previously concluded that the CSRA deprived district courts of jurisdiction over complaints filed by civil servants by creating the MSPB as a potential administrative tribunal to consider those complaints. Each of those opinions was based on the assumption that the MSPB would be independent of the president and would have the power to act on the complaint. The court then explained why those conditions do not exist today. The Fourth Circuit noted that the first factor that the Court applies when it decides whether a statutory provision that creates an administrative remedy deprives a court of jurisdiction is whether the interpretation of the statute to require administrative exhaustion would completely deprive the complaining party of the right to access to court or would merely delay the party's access to court. When the Supreme Court held that the CSRA deprives district courts of jurisdiction to consider complaints by civil servants that the government is violating their rights until after the MSPB has acted on the complaint, the Court based its decision on its belief that MSPB had the power to act on those complaints and that MSPB was completely independent of the president. The Fourth Circuit noted that those predicates for the Court's decision no longer exist.

I. *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.