The SEC in 2025

Panelists

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1. **Select Recent Supreme Court Decisions on Administrative Law**

a. The End of *Chevron* Deference:

Questions: How will the end of the *Chevron* doctrine affect agency rulemakings? Will it unsettle longstanding agency and market interpretations of statutory terms?

Background: Under the Supreme Court's 1984 *Chevron* holding, if a federal statute was ambiguous, federal courts would defer to an agency's reasonable interpretation of that statute. The 2024 Supreme Court decision in *Loper Bright* overturned this four decade old rule, but courts may still accord agency interpretations some deference under the older *Skidmore* standard.[1]

Reading: *Loper Bright Enterprises v. Raimondo* (603 U.S. 369 (2024))

https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf

b. Changing Statute of Limitations to Challenge Rules under the Administrative Procedure Act:

Question: How will agencies manage the fact that the Supreme Court has extended the period under which parties can challenge agency rulemakings under the Administrative Procedure Act?

Background: In the 2024 *Center Post* case, the Supreme Court ruled that the six year statute of limitations for when litigation may be brought challenging an agency action under the Administrative Procedure Act runs from when the plaintiff is harmed by the action not when the rules in question first became effective. This means that agencies may face administrative law challenges to rulemakings many years after rules are promulgated.

Reading: *Center Post Inc. v. Board of Governors* (603 U.S. 799 (2024))

https://www.supremecourt.gov/opinions/23pdf/22-1008_1b82.pdf

c. Limitations on Cases that SEC Can Bring Before Administrative Law Judges:

Question: How is the SEC adapting to limitations on which civil enforcement matters may be decided by the agency's administrative law judges?

Background: In the 2024 *Jarkesy* decision, the Supreme Court ruled that the SEC violated the Seventh Amendment's right to a jury trial by having securities fraud claims seeking civil penalties adjudicated by the agency's administrative law judges. Affected fraud cases brought by the Commission must now be brought in federal court.

Reading: *SEC v. Jarkesy* (Docket No. 22-859)

https://www.supremecourt.gov/opinions/23pdf/22-859_1924.pdf

2. <u>Other Select Administrative Law Decisions on Challenges to SEC Actions</u>

[1] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under this standard, federal courts defer to an agency's reading of a statute according to the persuasiveness of the reading, which will "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements." *Id.* at 140.

a. First Amendment:

Question: What is the likelihood of successful First Amendment challenges to SEC disclosure rules or even provisions of the Securities Act and Securities Exchange Act?

Background: Scholars and other commentators have long posited that federal securities laws and rules remain vulnerable to attack on First Amendment grounds. The D.C. Circuit invalidated the SEC's rule requiring conflict mineral disclosures and portions of the statute that mandated that rule on First Amendment grounds. Lawsuits challenging more recent SEC rules have also included First Amendment claims.

Readings: *National Ass'n of Manufacturers v. SEC* (800 F.3d 518 (D.C. Cir. 2015))

https://law.yale.edu/sites/default/files/area/center/isp/documents/2nd_session_nat_l_ass_n_of_mfrs._v._sec_800_f.3d_518.pdf

Helen Norton, *What Twenty-First-Century Free Speech Law Means for Securities Regulation*, 99 NOTRE DAME L. REV. 97 (2023).

https://scholarship.law.nd.edu/ndlr/vol99/iss1/3/

3. Select 1930s Supreme Court Decisions on Administrative Law

a. Power of the President to Fire Heads of Independent Agencies:

Question: Can the President fire members of independent agencies without cause?

Background: President Trump has fired Democratic commissioners and board members of independent agencies, including of the Federal Trade Commission and the National Credit Union Administration, despite statutes setting terms for those positions and mandating that a fixed number of members not be from the President's party. Will the Supreme Court permit this and overturn the rule from the 1935 case, *Humphrey's Executor*?

Reading: *Humphrey's Executor v. United States*, (295 U.S. 602 (1935))

https://www.law.cornell.edu/supremecourt/text/295/602

b. Non-delegation Doctrine:

Question: What is the likelihood that the Supreme Court will revive the non-delegation doctrine? If it does, what will be the impact on federal regulations and agencies?

Background: In the 1935 *Schechter Poultry* case, the Supreme Court invalidated provisions of the National Industrial Recovery Act as unconstitutional delegations by Congress of its legislative powers to an executive agency. Although the Supreme Court has rarely considered this doctrine in the intervening decades, it has been invoked in numerous recent lawsuits challenging federal regulations. Some scholars believe that a revival of the doctrine by the Court could significantly hinder the ability of federal agencies to regulate.

Reading: *A. L. A. Schechter Poultry Corp. v. United States*, (295 U.S. 495 (1935))

4. <u>Select Legal Scholarship on Supreme Court Decisions on Administrative Law</u>

Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

https://harvardlawreview.org/print/vol-131/1930s-redux-the-administrative-state-under-siege/

Mila Sohoni, *Response: A Bureaucracy — If You Can Keep It*, 131 HARV. L. REV. F. 13 (2017)

https://harvardlawreview.org/forum/vol-131/bureaucracy-if-you-can-keep-it/

Aaron L. Nielsen, *Confessions of an "Anti-Administrativist"*, 131 HARV. L. REV. F. 1 (2017)

https://harvardlawreview.org/forum/vol-131/confessions-of-an-anti-administrativist/

Leen Al-Alami, *Comment: Business Roundtable v. SEC: Rising Judicial Mistrust and the Onset of a New Era in Judicial Review of Securities Regulation*, 15 U. PENN. J. BUS. L. 541 (2013).

https://www.law.upenn.edu/live/files/1802-alalami15upajbusl5412013pdf

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LOPER BRIGHT ENTERPRISES ET AL. *v.* RAIMONDO, SECRETARY OF COMMERCE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22–451. Argued January 17, 2024—Decided June 28, 2024*

The Court granted certiorari in these cases limited to the question whether *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, should be overruled or clarified. Under the *Chevron* doctrine, courts have sometimes been required to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. *Id.*, at 843. In each case below, the reviewing courts applied *Chevron*'s framework to resolve in favor of the Government challenges by petitioners to a rule promulgated by the National Marine Fisheries Service pursuant to the Magnuson-Stevens Act, 16 U. S. C. §1801 *et seq.*, which incorporates the Administrative Procedure Act (APA), 5 U. S. C. §551 *et seq*.

Held: The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled. Pp. 7–35.

(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, but envisioned

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*Together with No. 22–1219, *Relentless, Inc., et al.* v. *Department of Commerce, et al.*, on certiorari to the United States Court of Appeals for the First Circuit.

that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." The Federalist No. 78, p. 525 (A. Hamilton). As Chief Justice Marshall declared in the foundational decision of *Marbury* v. *Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177. In the decades following *Marbury*, 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.

The Court recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. 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. 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 may well have drafted the laws at issue. *United States* v. *Moore*, 95 U. S. 760, 763. "Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. "[I]n cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." *United States* v. *Dickson*, 15 Pet. 141, 162.

During the "rapid expansion of the administrative process" that took place during the New Deal era, *United States* v. *Morton Salt Co.*, 338 U. S. 632, 644, 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. But the Court did not extend similar deference to agency resolutions of questions of *law*. "The interpretation of the meaning of statutes, as applied to justiciable controversies," remained "exclusively a judicial function." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 544. The Court also continued to note that the informed judgment of the Executive Branch could be entitled to "great weight." *Id.*, at 549. "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." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140.

Occasionally during this period, the Court applied deferential review after concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by

the agency. See *Gray* v. *Powell*, 314 U. S. 402; *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111. But such deferential review, which the Court was far from consistent in applying, was cabined to factbound determinations. And the Court did not purport to refashion the longstanding judicial approach to questions of law. It instead 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." *Id.*, at 130–131. 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 under *Chevron*. Pp. 7–13.

(b) 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. The APA prescribes procedures for agency action and delineates the basic contours of judicial review of such action. And it 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. As relevant here, the APA specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, 5 U. S. C. §706 (emphasis added)—even those involving ambiguous laws. It prescribes no deferential standard for courts to employ in answering those legal questions, despite mandating deferential judicial review of agency policymaking and factfinding. See §§706(2)(A), (E). And by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, §706, it makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. The APA's history and the contemporaneous views of various respected commentators underscore the plain meaning of its text.

Courts exercising independent judgment in determining the meaning of statutory provisions, consistent with the APA, may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. See *Skidmore*, 323 U. S., at 140. And 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, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in " 'reasoned decisionmaking' " within those boundaries. *Michigan* v. *EPA*, 576 U. S. 743, 750 (quoting *Allentown Mack Sales &*

Syllabus

Service, Inc. v. *NLRB*, 522 U. S. 359, 374). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts. Pp. 13–18.

(c) The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA. Pp. 18–29.

(1) *Chevron*, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional judicial approach of independently examining each statute to determine its meaning. The question in the case was whether an Environmental Protection Agency (EPA) regulation was consistent with the term "stationary source" as used in the Clean Air Act. 467 U. S., at 840. To answer that question, 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. But in 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." *Id.*, at 843 (footnote omitted). Instead, at *Chevron*'s second step, a court had to defer to the agency if it had offered "a permissible construction of the statute," *ibid.*, even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding," *ibid.*, n. 11. Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that EPA's interpretation was "entitled to deference." *Id.*, at 865.

Although the Court did not at first treat *Chevron* as the watershed decision it was fated to become, the Court and the courts of appeals were soon routinely invoking its framework as the governing standard in cases involving statutory questions of agency authority. The Court eventually 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. Pp. 18–20.

(2) Neither *Chevron* nor any subsequent decision of the Court attempted to reconcile its framework with the APA. *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. *Chevron* insists on more than the "respect" historically given to Executive Branch interpretations; it demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time, see *id.*, at 863, and even when a pre-existing judicial precedent holds that an ambiguous statute means something else, *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982. That regime is the antithesis of the time honored approach the APA prescribes.

Chevron cannot be reconciled with the APA by presuming that statutory ambiguities are implicit delegations to agencies. That presumption does not approximate reality. A statutory ambiguity does not necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. Many or perhaps most statutory ambiguities may be unintentional. And when courts confront statutory ambiguities in cases that do not involve agency interpretations or delegations of authority, they are not somehow relieved of their obligation to independently interpret the statutes. 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. But in an agency case as in any other, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U. S., at 843, n. 11. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. *Chevron* gravely erred in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction 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. Pp. 21–23.

(3) The Government responds that Congress must generally intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer;

because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. See Brief for Respondents in No. 22–1219, pp. 16–19. But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

As the Court recently noted, interpretive issues arising in connection with a regulatory scheme "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor* v. *Wilkie*, 588 U. S. 558, 578. Under *Chevron*'s broad rule of deference, though, ambiguities of all stripes trigger deference, even in cases having little to do with an agency's technical subject matter expertise. And even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions, and courts did so without issue in agency cases before *Chevron*. After all, in an agency case in particular, the reviewing court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U. S., at 140. An agency's interpretation of a statute "cannot bind a court," but may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 98, n. 8. Delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise.

Nor does a desire for the uniform construction of federal law justify *Chevron*. It is unclear how much the *Chevron* doctrine as a whole actually promotes such uniformity, and in any event, we see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

Finally, the view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken because it rests on a profound misconception of the judicial role. Resolution of statutory ambiguities involves legal interpretation, and that task does not suddenly become policymaking just because a court has an "agency to fall back on." *Kisor*, 588 U. S., at 575. Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. 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* prevents judges from judging. Pp. 23–26.

(4) Because *Chevron*'s justifying presumption is, as Members of the Court have often recognized, a fiction, the Court has spent the better part of four decades imposing one limitation on *Chevron* after another. Confronted with the byzantine set of preconditions and exceptions that has resulted, some courts have simply bypassed *Chevron* or failed to heed its various steps and nuances. The Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. But because *Chevron* remains on the books, litigants must continue to wrestle with it, and lower courts—bound by even the Court's crumbling precedents—understandably continue to apply it. At best, *Chevron* has been a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added). Pp. 26–29.

(d) *Stare decisis*, the doctrine governing judicial adherence to precedent, does not require the Court to persist in the *Chevron* project. The *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision," *Knick* v. *Township of Scott*, 588 U. S. 180, 203 (quoting *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917)—all weigh in favor of letting *Chevron* go.

Chevron has proved to be fundamentally misguided. It reshaped judicial review of agency action without grappling with the APA, the statute that lays out how such review works. And its flaws were apparent from the start, prompting the Court to revise its foundations and continually limit its application.

Experience has also shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, but the concept of ambiguity has always evaded meaningful definition. Such an impressionistic and malleable concept "cannot stand as an every-day test for allocating" interpretive authority between courts and agencies. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 125. The Court has also been forced to clarify the doctrine again and again, only adding to *Chevron*'s unworkability, and the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. And its continuing import is far from clear, as courts have often declined to engage with the doctrine, saying it makes no difference.

Nor has *Chevron* fostered meaningful reliance. Given the Court's constant tinkering with and eventual turn away from *Chevron*, it is

Syllabus

hard to see how anyone could reasonably expect a court to rely on *Chevron* in any particular case or expect it to produce readily foreseeable outcomes. And rather than safeguarding reliance interests, *Chevron* affirmatively destroys them by allowing agencies to change course even when Congress has given them no power to do so.

The only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez* v. *Hillery*, 474 U. S. 254, 265, is for the Court to leave *Chevron* behind. By overruling *Chevron*, though, the Court does 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 the Court's change in interpretive methodology. See *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 457. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (quoting *Dickerson* v. *United States*, 530 U. S. 428, 443). Pp. 29–35.

No. 22–451, 45 F. 4th 359 & No. 22–1219, 62 F. 4th 621, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., and GORSUCH, J., filed concurring opinions. KAGAN, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which JACKSON, J., joined as it applies to No. 22–1219. JACKSON, J., took no part in the consideration or decision of the case in No. 22–451.

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

Nos. 22–451 and 22–1219

LOPER BRIGHT ENTERPRISES, ET AL., PETITIONERS
22–451 *v.*
GINA RAIMONDO, SECRETARY OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELENTLESS, INC., ET AL., PETITIONERS
22–1219 *v.*
DEPARTMENT OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Since our decision in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we have sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

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." *Id.*, at 842. If, and only if, congressional intent is "clear," that is the end of the inquiry. *Ibid.* 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." *Id.*, at 843. The reviewing courts in each of the cases before us applied *Chevron*'s framework to resolve in favor of the Government challenges to the same agency rule.

A

Before 1976, unregulated foreign vessels dominated fishing in the international waters off the U. S. coast, which began just 12 nautical miles offshore. See, *e.g.*, S. Rep. No. 94–459, pp. 2–3 (1975). Recognizing the resultant overfishing and the need for sound management of fishery resources, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (MSA). See 90 Stat. 331 (codified as amended at 16 U. S. C. §1801 *et seq*.). The MSA and subsequent amendments extended the jurisdiction of the United States to 200 nautical miles beyond the U. S. territorial sea and claimed "exclusive fishery management authority over all fish" within that area, known as the "exclusive economic zone." §1811(a); see Presidential Proclamation No. 5030, 3 CFR 22 (1983 Comp.); §§101, 102, 90 Stat. 336. The National Marine Fisheries Service (NMFS) administers the 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. See 16 U. S. C.

§§1852(a), (b). The councils develop fishery management plans, which NMFS approves and promulgates as final regulations. See §§1852(h), 1854(a). In service of the statute's fishery conservation and management goals, see §1851(a), the MSA requires that certain provisions—such as "a mechanism for specifying annual catch limits . . . at a level such that overfishing does not occur," §1853(a)(15)—be included in these plans, see §1853(a). The plans may also include additional discretionary provisions. See §1853(b). For example, plans may "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment," §1853(b)(4); "reserve a portion of the allowable biological catch of the fishery for use in scientific research," §1853(b)(11); and "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery," §1853(b)(14).

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." §1853(b)(8). 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), see §§1821(h)(1)(A), (h)(4), (h)(6); (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, see §§1802(26), 1853a(c)(1)(H), (e)(2), 1854(d)(2); 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, see §1862(a). 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. See §§1854(d)(2)(B), 1862(b)(2)(E). And in general, it author-

izes 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." §1858(g)(1)(D).

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. See 79 Fed. Reg. 8792 (2014). 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. See 85 Fed. Reg. 7414 (2020).

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. See *id.*, at 7417–7418.

B

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, 16 U. S. C. §1855(f), which incorporates

the Administrative Procedure Act (APA), 5 U. S. C. §551 *et seq*. 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. The District Court granted summary judgment to the Government. It concluded that the MSA authorized the Rule, but noted that even if these petitioners' "arguments were enough to raise an ambiguity in the statutory text," deference to the agency's interpretation would be warranted under *Chevron*. 544 F. Supp. 3d 82, 107 (DC 2021); see *id.*, at 103–107.

A divided panel of the D. C. Circuit affirmed. See 45 F. 4th 359 (2022). The majority addressed various provisions of the MSA and concluded that it was not "wholly unambiguous" whether NMFS may require Atlantic herring fishermen to pay for observers. *Id.*, at 366. Because there remained "some question" as to Congress's intent, *id.*, at 369, the court proceeded to *Chevron*'s second step and deferred to the agency's interpretation as a "reasonable" construction of the MSA, 45 F. 4th, at 370. In dissent, Judge Walker concluded that Congress's silence on industry funded observers for the Atlantic herring fishery—coupled with the express provision for such observers in other fisheries and on foreign vessels—unambiguously indicated that NMFS lacked the authority to "require [Atlantic herring] fishermen to pay the wages of at-sea monitors." *Id.*, at 375.

C

Petitioners Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC own two vessels that operate in the Atlantic herring fishery: the F/V *Relentless* and the F/V *Persistence*.[1] These vessels use small-mesh bottom-trawl gear and can freeze fish at sea, so they can catch more species of fish and take longer trips than other vessels (about 10 to 14 days, as

[1] For any landlubbers, "F/V" is simply the designation for a fishing vessel.

opposed to the more typical 2 to 4). As a result, they generally declare into multiple fisheries per trip so they can catch whatever the ocean offers up. If the vessels declare into the Atlantic herring fishery for a particular trip, they must carry an observer for that trip if NMFS selects the trip for coverage, even if they end up harvesting fewer herring than other vessels—or no herring at all.

This set of petitioners, like those in the D. C. Circuit case, filed a suit challenging the Rule as unauthorized by the MSA. The District Court, like the D. C. Circuit, deferred to NMFS's contrary interpretation under *Chevron* and thus granted summary judgment to the Government. See 561 F. Supp. 3d 226, 234–238 (RI 2021).

The First Circuit affirmed. See 62 F. 4th 621 (2023). It relied on a "default norm" that regulated entities must bear compliance costs, as well as the MSA's sanctions provision, Section 1858(g)(1)(D). See *id.*, at 629–631. And it rejected petitioners' argument that the express statutory authorization of three industry funding programs demonstrated that NMFS lacked the broad implicit authority it asserted to impose such a program for the Atlantic herring fishery. See *id.*, at 631–633. The court ultimately concluded that the "[a]gency's interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not 'exceed[] the bounds of the permissible.'" *Id.*, at 633–634 (quoting *Barnhart* v. *Walton*, 535 U. S. 212, 218 (2002); alteration in original). In reaching that conclusion, the First Circuit stated that it was applying *Chevron*'s two-step framework. 62 F. 4th, at 628. But it did not explain which aspects of its analysis were relevant to which of *Chevron*'s two steps. Similarly, it declined to decide whether the result was "a product of *Chevron* step one or step two." *Id.*, at 634.

We granted certiorari in both cases, limited to the question whether *Chevron* should be overruled or clarified. See

601 U. S. ___ (2023); 598 U. S. ___ (2023).[2]

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; see *id.*, at 522–524; *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011).

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,

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[2] Both petitions also presented questions regarding the consistency of the Rule with the MSA. See Pet. for Cert. in No. 22–451, p. i; Pet. for Cert. in No. 22–1219, p. ii. We did not grant certiorari with respect to those questions and thus do not reach them.

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." *Id.*, at 210; see also *United States* v. *Vowell*, 5 Cranch 368, 372 (1809) (Marshall, C. J., for the Court).

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); see also *Jacobs* v. *Prichard*, 223 U. S. 200, 214 (1912).

"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. As Justice Story put it, "in cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." *Dickson*, 15 Pet., at 162.

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). "When the legislature itself acts within the broad field of legislative discretion," the Court reasoned, "its determinations are conclusive." *Ibid.* Congress could therefore "appoint[] an agent to act within that sphere of legislative authority" and "endow the agent with power to make *findings of fact* which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily." *Ibid.* (emphasis added).

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. *Id.*, at 139–140. "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." *Id.*, at 140.

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. *Id.*, at 411. 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." *Id.*, at 412–413. 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.'" *Id.*, at 130. 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." *Id.*, at 131.

Such deferential review, though, was cabined to fact-bound 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. See 314 U. S., at 416–417. 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." 322 U. S., at 130–131. 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*"). In one illustrative example, the Court rejected the U. S. Price Administrator's determination that a particular warehouse was a "public utility" entitled to an exemption from the Administrator's General Maximum Price Regulation. Despite the striking resemblance of that administrative determination to those that triggered deference in *Gray* and *Hearst*, the Court declined to "accept the Administrator's view in deference to administrative construction." *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 156 (1944). The Administrator's view, the Court explained, had "hardly seasoned or broadened into a settled administrative practice," and thus did not "overweigh the considerations" the Court had "set forth as to the proper construction of the statute." *Ibid.*

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: the traditional understanding that *courts* must "decide all relevant questions of

law." 5 U. S. C. §706.[3]

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

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[3]The dissent plucks out *Gray*, *Hearst*, and—to "gild the lily," in its telling—three more 1940s decisions, claiming they reflect the relevant historical tradition of judicial review. *Post*, at 21–22, and n. 6 (opinion of KAGAN, J.). But it has no substantial response to the fact that *Gray* and *Hearst* themselves endorsed, implicitly in one case and explicitly in the next, the traditional rule that "questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight"—not outright deference—"to the judgment of those whose special duty is to administer the questioned statute." *Hearst*, 322 U. S., at 130–131. And it fails to recognize the deep roots that this rule has in our Nation's judicial tradition, to the limited extent it engages with that tradition at all. See *post*, at 20–21, n. 5. Instead, like the Government, it strains to equate the "respect" or "weight" traditionally afforded to Executive Branch interpretations with binding deference. See *ibid.*; Brief for Respondents in No. 22–1219, pp. 21–24. That supposed equivalence is a fiction. The dissent's cases establish that a "*contemporaneous* construction" shared by "not *only* . . . the courts" but also "the departments" could be "controlling," *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572 (1891) (emphasis added), and that courts might "lean in favor" of a "contemporaneous" and "continued" construction of the Executive Branch as strong evidence of a statute's meaning, *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892). They do not establish that Executive Branch interpretations of ambiguous statutes—no matter how inconsistent, late breaking, or flawed—always *bound* the courts. In reality, a judge was never "bound to adopt the construction given by the head of a department." *Decatur* v. *Paulding*, 14 Pet. 497, 515 (1840).

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) (internal quotation marks omitted), 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).[4]

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. According to both the House and Senate Reports on the legislation, Section 706 "provide[d] that questions of law are for courts *rather than agencies* to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946) (emphasis added); accord, S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). Some of the legislation's most prominent supporters articulated the same view. See 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter); P. McCarran, Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review, 32 A. B. A. J. 827, 831 (1946). Even the Department of Justice—an agency with every incentive to endorse a view of the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the

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[4]The dissent observes that Section 706 does not say expressly that courts are to decide legal questions using "a *de novo* standard of review." *Post*, at 16. That much is true. But statutes can be sensibly understood only "by reviewing text in context." *Pulsifer* v. *United States*, 601 U. S. 124, 133 (2024). Since the start of our Republic, courts have "decide[d] . . . questions of law" and "interpret[ed] constitutional and statutory provisions" by applying their own legal judgment. §706. Setting aside its misplaced reliance on *Gray* and *Hearst*, the dissent does not and could not deny that tradition. But it nonetheless insists that to codify that tradition, Congress needed to expressly reject a sort of deference the courts had never before applied—and would not apply for several decades to come. It did not. "The notion that some things 'go without saying' applies to legislation just as it does to everyday life." *Bond* v. *United States*, 572 U. S. 844, 857 (2014).

Administrative Procedure Act 108 (1947); see also *Kisor*, 588 U. S., at 582 (plurality opinion) (same). That "present law," as we have described, adhered to the traditional conception of the judicial function. See *supra*, at 9–13.

Various respected commentators contemporaneously maintained that the APA required reviewing courts to exercise independent judgment on questions of law. Professor John Dickinson, for example, read the APA to "impose a clear mandate that all [questions of law] shall be decided by the reviewing Court itself, and in the exercise of its own independent judgment." Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947). Professor Bernard Schwartz noted that §706 "would seem . . . to be merely a legislative restatement of the familiar review principle that questions of law are for the reviewing court, at the same time leaving to the courts the task of determining in each case what are questions of law." Mixed Questions of Law and Fact and the Administrative Procedure Act, 19 Ford. L. Rev. 73, 84–85 (1950). And Professor Louis Jaffe, who had served in several agencies at the advent of the New Deal, thought that §706 leaves it up to the reviewing "court" to "decide as a 'question of law' whether there is 'discretion' in the premises"—that is, whether the statute at issue delegates particular discretionary authority to an agency. Judicial Control of Administrative Action 570 (1965).

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

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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(a)(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").

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

III

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

A

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

Chevron, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. The question in the case was whether an EPA regulation "allow[ing] States to treat all of the pollution-

emitting devices within the same industrial grouping as though they were encased within a single 'bubble'" was consistent with the term "stationary source" as used in the Clean Air Act. 467 U. S., at 840. To answer that question of statutory interpretation, the Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action.

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

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." *Id.*, at 843. In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Ibid.* (footnote omitted). 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," *ibid.*, even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding," *ibid.*, n. 11. 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. *Id.*, at 843, 844, and n. 14, 865.

Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that EPA's interpretation was "entitled to deference." *Id.*, at 865. It did not matter *why* Congress, as the Court saw it, had not squarely addressed the question, see *ibid.*, or that "the agency ha[d] from time to time changed its interpretation," *id.*, at 863. The latest EPA interpretation was a permissible reading of the Clean Air Act, so under the Court's new rule, that reading controlled.

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. See *ibid.* 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. See *id.*, at 276–277. 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).

1

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, see, *e.g.*, *Edwards' Lessee*, 12 Wheat., at 210; *Skidmore*, 323 U. S., at 140, *Chevron* insists on much more. It demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time. See 467 U. S., at 863. 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. That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of "allow[ing]" a judicial interpretation of a statute "to override an agency's" in a dispute before a court, *ibid.*, *Chevron* turns the statutory scheme for judicial review of agency action upside down.

Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. See

Brief for Respondents in No. 22–1219, pp. 13, 37–38; *post*, at 4–15 (opinion of KAGAN, J.). 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). As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. 467 U. S., at 865. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. As the Framers recognized, ambiguities will inevitably follow from "the complexity of objects, . . . the imperfection of the human faculties," and the simple fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist No. 37, at 236.

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 in that situation do not throw up their hands because "Congress's instructions have" supposedly "run out," leaving a statutory "gap." *Post*, at 2 (opinion of KAGAN, J.). 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; "every statute's meaning is fixed at the time of enactment." *Wisconsin Cen-*

tral Ltd. v. *United States*, 585 U. S. 274, 284 (2018) (emphasis deleted). 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.

In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U. S., at 843, n. 11. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." *Id.*, at 843, and n. 9. *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. 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.

2

The Government responds that Congress must generally

intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. See Brief for Respondents in No. 22–1219, pp. 16–19. The dissent offers more of the same. See *post*, at 9–14. But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor*, 588 U. S., at 578 (opinion of the Court). We thus observed that "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Ibid.* *Chevron*'s broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. Indeed, the Government and, seemingly, the dissent continue to defend the proposition that *Chevron* applies even in cases having little to do with an agency's technical subject matter expertise. See Brief for Respondents in No. 22–1219, p. 17; *post*, at 10.

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. "[M]any statutory cases" call upon "courts [to] interpret the mass of technical detail that is the ordinary diet of the law," *Egelhoff* v. *Egelhoff*, 532 U. S. 141, 161 (2001) (Breyer, J., dissenting), and courts did so without issue in agency cases before *Chevron*, see *post*, at 30 (GORSUCH, J., concurring). Courts, after all, do not decide such questions blindly. The parties and

amici in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives. In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U. S., at 140. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 98, n. 8 (1983). Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U. S., at 140; see, *e.g.*, *County of Maui* v. *Hawaii Wildlife Fund*, 590 U. S. 165, 180 (2020); *Moore*, 95 U. S., at 763.

For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, see *infra*, at 30–33, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event, there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back on." *Kisor*, 588 U. S., at 575 (opinion of the Court). Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches. See The Federalist, No. 78, at 522–525. They were to construe the law with "[c]lear heads . . . and honest hearts," not with an eye to policy preferences that had not made it into the statute. 1 Works of James Wilson 363 (J. Andrews ed. 1896).

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.

3

In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction. See *Buffington* v. *McDonough*, 598 U. S. ___, ___ (2022) (GORSUCH,

J., dissenting from denial of certiorari) (slip op., at 11); *Cuozzo*, 579 U. S., at 286 (THOMAS, J., concurring); Scalia, 1989 Duke L. J., at 517; see also *post*, at 15 (opinion of KAGAN, J.). So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.'" *United States* v. *Mead Corp.*, 533 U. S. 218, 230 (2001) (quoting *Christensen* v. *Harris County*, 529 U. S. 576, 597 (2000) (Breyer, J., dissenting)); see also *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 649 (1990).

Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality. We have said that *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U. S., at 226–227. In practice, that threshold requirement—sometimes called *Chevron* "step zero"—largely limits *Chevron* to "the fruits of notice-and-comment rulemaking or formal adjudication." 533 U. S., at 230. But even when those processes are used, deference is still not warranted "where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 220 (2016) (quoting *Mead*, 533 U. S., at 227).

Even where those procedural hurdles are cleared, substantive ones remain. Most notably, *Chevron* does not apply if the question at issue is one of "deep 'economic and political significance.'" *King* v. *Burwell*, 576 U. S. 473, 486 (2015). We have instead expected Congress to delegate such authority "expressly" if at all, *ibid.*, for "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s],'"

West Virginia v. *EPA*, 597 U. S. 697, 723 (2022) (quoting *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); alteration in original). Nor have we applied *Chevron* to agency interpretations of judicial review provisions, see *Adams Fruit Co.*, 494 U. S., at 649–650, or to statutory schemes not administered by the agency seeking deference, see *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 519–520 (2018). And we have sent mixed signals on whether *Chevron* applies when a statute has criminal applications. Compare *Abramski* v. *United States*, 573 U. S. 169, 191 (2014), with *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 704, n. 18 (1995).

Confronted with this byzantine set of preconditions and exceptions, some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another.[7] And even when they do invoke *Chevron*, courts do not always heed the various steps and nuances of that evolving doctrine. In one of the cases before us today, for example, the First Circuit both skipped "step zero," see 62 F. 4th, at 628, and refused to "classify [its] conclusion as a product of *Chevron* step one or step two"—though it ultimately appears to have deferred under step two, *id.*, at 634.

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[7] See, *e.g.*, *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms and Explosives*, 45 F. 4th 306, 313–314 (CADC 2022), abrogated by *Garland* v. *Cargill*, 602 U. S. ___ (2024); *County of Amador* v. *United States Dept. of Interior*, 872 F. 3d 1012, 1021–1022 (CA9 2017); *Estrada-Rodriguez* v. *Lynch*, 825 F. 3d 397, 403–404 (CA8 2016); *Nielsen* v. *AECOM Tech. Corp.*, 762 F. 3d 214, 220 (CA2 2014); *Alaska Stock, LLC* v. *Houghton Mifflin Harcourt Publishing Co.*, 747 F. 3d 673, 685, n. 52 (CA9 2014); *Jurado-Delgado* v. *Attorney Gen. of U. S.*, 498 Fed. Appx. 107, 117 (CA3 2009); see also D. Brookins, Confusion in the Circuit Courts: How the Circuit Courts Are Solving the *Mead*-Puzzle by Avoiding It Altogether, 85 Geo. Wash. L. Rev. 1484, 1496–1499 (2017) (documenting *Chevron* avoidance by the lower courts); A. Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095, 1127–1129 (2009) (same); L. Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1464–1466 (2005) (same).

This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. See *Cuozzo*, 579 U. S., at 280 (most recent occasion). But *Chevron* remains on the books. So litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents, see *Agostini* v. *Felton*, 521 U. S. 203, 238 (1997)—understandably continue to apply it.

The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added).

IV

The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. *Stare decisis* is not an "inexorable command," *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), and the *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision," *Knick* v. *Township of Scott*, 588 U. S. 180, 203 (2019) (quoting *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018))—all weigh in favor of letting *Chevron* go.

Chevron has proved to be fundamentally misguided. Despite reshaping judicial review of agency action, neither it nor any case of ours applying it grappled with the APA—

the statute that lays out how such review works. Its flaws were nonetheless apparent from the start, prompting this Court to revise its foundations and continually limit its application. It has launched and sustained a cottage industry of scholars attempting to decipher its basis and meaning. And Members of this Court have long questioned its premises. See, *e.g.*, *Pereira* v. *Sessions*, 585 U. S. 198, 219–221 (2018) (Kennedy, J., concurring); *Michigan*, 576 U. S., at 760–764 (THOMAS, J., concurring); *Buffington*, 598 U. S. ___ (opinion of GORSUCH, J.); B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–2154 (2016). Even Justice Scalia, an early champion of *Chevron*, came to seriously doubt whether it could be reconciled with the APA. See *Perez*, 575 U. S., at 109–110 (opinion concurring in judgment). For its entire existence, *Chevron* has been a "rule in search of a justification," *Knick*, 588 U. S., at 204, if it was ever coherent enough to be called a rule at all.

Experience has also shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, which requires deference at the doctrine's second step. But the concept of ambiguity has always evaded meaningful definition. As Justice Scalia put the dilemma just five years after *Chevron* was decided: "How clear is clear?" 1989 Duke L. J., at 521.

We are no closer to an answer to that question than we were four decades ago. "'[A]mbiguity' is a term that may have different meanings for different judges." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 572 (2005) (Stevens, J., dissenting). One judge might see ambiguity everywhere; another might never encounter it. Compare L. Silberman, Chevron—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 822 (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). A rule of law that is so wholly "in the eye of the

beholder," *Exxon Mobil Corp.*, 545 U. S., at 572 (Stevens, J., dissenting), invites different results in like cases and is therefore "arbitrary in practice," *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 283 (1988). Such an impressionistic and malleable concept "cannot stand as an every-day test for allocating" interpretive authority between courts and agencies. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 125 (1965).

The dissent proves the point. It tells us that a court should reach *Chevron*'s second step when it finds, "at the end of its interpretive work," that "Congress has left an ambiguity or gap." *Post*, at 1–2. (The Government offers a similar test. See Brief for Respondents in No. 22–1219, pp. 7, 10, 14; Tr. of Oral Arg. 113–114, 116.) That is no guide at all. Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit. So for the dissent's test to have any meaning, it must think that in an agency case (unlike in any other), a court should give up on its "interpretive work" before it has identified that best meaning. But how does a court know when to do so? On that point, the dissent leaves a gap of its own. It protests only that some other interpretive tools—all with pedigrees more robust than *Chevron*'s, and all designed to help courts identify the meaning of a text rather than allow the Executive Branch to displace it—also apply to ambiguous texts. See *post*, at 27. That this is all the dissent can come up with, after four decades of judicial experience attempting to identify ambiguity under *Chevron*, reveals the futility of the

exercise.[8]

Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. Our attempts to do so have only added to *Chevron*'s unworkability, transforming the original two-step into a dizzying breakdance. See *Adams Fruit Co.*, 494 U. S., at 649–650; *Mead*, 533 U. S., at 226–227; *King*, 576 U. S., at 486; *Encino Motorcars*, 579 U. S., at 220; *Epic Systems*, 584 U. S., at 519–520; on and on. And the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. See, *e.g.*, *Cargill* v. *Garland*, 57 F. 4th 447, 465–468 (CA5 2023) (plurality opinion) (May the Government waive reliance on *Chevron*? Does *Chevron* apply to agency interpretations of statutes imposing criminal penalties? Does *Chevron* displace the rule of lenity?), aff'd, 602 U. S. ___ (2024).

Four decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of "say[ing] what the law is." *Marbury*, 1 Cranch, at 177. And its continuing import is far from clear. Courts have often declined to engage with the doctrine, saying it makes no difference. See n. 7, *supra*. And as noted, we have avoided deferring under *Chevron* since 2016. That trend is nothing new; for decades, we have often declined to invoke *Chevron* even in those cases where it might appear to be applicable. See W. Eskridge & L. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From *Chevron* to *Hamdan*, 96 Geo. L. J. 1083, 1125 (2008). At this point, all

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[8] Citing an empirical study, the dissent adds that *Chevron* "fosters *agreement* among judges." *Post*, at 28. It is hardly surprising that a study might find as much; *Chevron*'s second step is supposed to be hospitable to agency interpretations. So when judges get there, they tend to agree that the agency wins. That proves nothing about the supposed ease or predictability of identifying ambiguity in the first place.

that remains of *Chevron* is a decaying husk with bold pretensions.

Nor has *Chevron* been the sort of "'stable background' rule" that fosters meaningful reliance. *Post*, at 8, n. 1 (opinion of KAGAN, J.) (quoting *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 261 (2010)). Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case. And even if it were possible to predict accurately when courts will apply *Chevron*, the doctrine "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.'" *Janus*, 585 U. S., at 927 (quoting *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 186 (2018)). To plan on *Chevron* yielding a particular result is to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the stability that comes with them. History has proved neither bet to be a winning proposition.

Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistency" being "at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious." *Brand X*, 545 U. S., at 981. But statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.

Chevron accordingly has undermined the very "rule of law" values that *stare decisis* exists to secure. *Michigan* v.

Bay Mills Indian Community, 572 U. S. 782, 798 (2014). And it cannot be constrained by admonishing courts to be extra careful, or by tacking on a new batch of conditions. We would need to once again "revis[e] its theoretical basis . . . in order to cure its practical deficiencies." *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009). *Stare decisis* does not require us to do so, especially because any refinements we might make would only point courts back to their duties under the APA to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706. Nor is there any reason to wait helplessly for Congress to correct our mistake. The Court has jettisoned many precedents that Congress likewise could have legislatively overruled. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 485 U. S. 617, 618 (1988) (*per curiam*) (collecting cases). And part of "judicial humility," *post*, at 3, 25 (opinion of KAGAN, J.,), is admitting and in certain cases correcting our own mistakes, especially when those mistakes are serious, see *post*, at 8–9 (opinion of GORSUCH, J.).

This is one of those cases. *Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986), is for us to leave *Chevron* behind.

By doing so, however, we do 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. See *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 457 (2008). Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund,*

Inc., 573 U. S. 258, 266 (2014) (quoting *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000)). That is not enough to justify overruling a statutory precedent.

* * *

The dissent ends by quoting *Chevron*: "'Judges are not experts in the field.'" *Post*, at 31 (quoting 467 U. S., at 865). 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. The rest of the dissent's selected epigraph is that judges "'are not part of either political branch.'" *Post*, at 31 (quoting *Chevron*, 467 U. S., at 865). Indeed. Judges have always been expected to apply their "judgment" *independent* of the political branches when interpreting the laws those branches enact. The Federalist No. 78, at 523. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.

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.

Because the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 22–451 and 22–1219

LOPER BRIGHT ENTERPRISES, ET AL.,
PETITIONERS
22–451 *v.*
GINA RAIMONDO, SECRETARY OF
COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELENTLESS, INC., ET AL., PETITIONERS
22–1219 *v.*
DEPARTMENT OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

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; see also *ante,* at 18–23; *Baldwin* v. *United States*, 589 U. S. ___, ___–___ (2020) (THOMAS, J., dissenting from denial of certiorari) (slip op., at 4–5).

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*, 589 U. S., at ___–___ (dissenting opinion) (slip op., at 2–4); *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.* *Post*, at 15–20 (concurring opinion). 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.); accord, *post*, at 17–18 (opinion of GORSUCH, 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.); accord, *ante,* at 7–9. But, under *Chevron*, a judge must accept an agency's interpretation of an ambiguous law, even if he thinks another interpretation is correct. *Ante*, at 19. *Chevron* deference thus prevents judges from

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*There is much to be commended in JUSTICE GORSUCH's careful consideration from first principles of the weight we should afford to our precedent. I agree with the lion's share of his concurrence. See generally *Gamble* v. *United States*, 587 U. S. 678, 710 (2019) (THOMAS, J., concurring).

exercising their independent judgment to resolve ambiguities. *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 3); see also *Michigan*, 576 U. S., at 761 (opinion of THOMAS, J.); see also *Perez*, 575 U. S., at 123 (opinion of THOMAS, J.). 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*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 4); *Michigan*, 576 U. S., at 763, n. 1 (opinion of THOMAS, J.); see also *Perez*, 575 U. S., at 124 (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.); see also *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 4); *Michigan*, 576 U. S., at 761–762 (opinion of THOMAS, J.); *post*, at 18 (GORSUCH, J., concurring).

Chevron deference "cannot be salvaged" by recasting it as deference to an agency's "formulation of policy." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (internal quotation marks omitted) (slip op., at 3). If that were true, *Chevron*

would mean that "agencies are unconstitutionally exercising 'legislative Powers' vested in Congress." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 3) (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 deference was "not a harmless transfer of power." *Baldwin*, 589 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 3). "The Constitution carefully imposes structural constraints on all three branches, and the exercise of power free of those accompanying restraints subverts the design of the Constitution's ratifiers." *Ibid.* In particular, the Founders envisioned that "the courts [would] check the Executive by applying the correct interpretation of the law." *Id.*, at ___ (slip op., at 4). *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). Although the Court finally ends our 40-year misadventure with *Chevron* deference, its more profound problems should not be overlooked. Regardless of what a statute says, the type of deference required by *Chevron* violates the Constitution.

SUPREME COURT OF THE UNITED STATES

Nos. 22–451 and 22–1219

LOPER BRIGHT ENTERPRISES, ET AL.,
PETITIONERS
22–451 *v.*
GINA RAIMONDO, SECRETARY OF
COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELENTLESS, INC., ET AL., PETITIONERS
22–1219 *v.*
DEPARTMENT OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

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, 177 (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

A

Today, the phrase "common law judge" may call to mind a judicial titan of the past who brilliantly devised new legal rules on his own. The phrase "*stare decisis*" might conjure up a sense that judges who come later in time are strictly bound to follow the work of their predecessors. But neither of those intuitions fairly describes the traditional common-law understanding of the judge's role or the doctrine of *stare decisis*.

At common law, a judge's charge to decide cases was not usually understood as a license to make new law. For much of England's early history, different rulers and different legal systems prevailed in different regions. As England consolidated into a single kingdom governed by a single legal system, the judge's task was to examine those pre-existing legal traditions and apply in the disputes that came to him those legal rules that were "common to the whole land and to all Englishmen." F. Maitland, Equity, Also the Forms of Action at Common Law 2 (1929). That was "common law" judging.

This view of the judge's role had consequences for the authority due judicial decisions. Because a judge's job was to find and apply the law, not make it, the "opinion of the judge" and "the law" were not considered "one and the same thing." 1 W. Blackstone, Commentaries on the Laws of England 71 (1765) (Blackstone) (emphasis deleted). A judge's decision might bind the parties to the case at hand. M. Hale, The History and Analysis of the Common Law of England 68 (1713) (Hale). But none of that meant the judge had the power to "make a Law properly so called" for society

at large, "for that only the King and Parliament can do." *Ibid.*

Other consequences followed for the role precedent played in future judicial proceedings. Because past decisions represented something "less than a Law," they did not bind future judges. *Ibid.* At the same time, as Matthew Hale put it, a future judge could give a past decision "Weight" as "Evidence" of the law. *Ibid.* Expressing the same idea, William Blackstone conceived of judicial precedents as "evidence" of "the common law." 1 Blackstone 69, 71. And much like other forms of evidence, precedents at common law were thought to vary in the weight due them. Some past decisions might supply future courts with considerable guidance. But others might be entitled to lesser weight, not least because judges are no less prone to error than anyone else and they may sometimes "mistake" what the law demands. *Id.*, at 71 (emphasis deleted). In cases like that, both men thought, a future judge should not rotely repeat a past mistake but instead "vindicate" the law "from misrepresentation." *Id.*, at 70.

When examining past decisions as evidence of the law, common law judges did not, broadly speaking, afford overwhelming weight to any "single precedent." J. Baker, An Introduction to English Legal History 209–210 (5th ed. 2019). Instead, a prior decision's persuasive force depended in large measure on its "Consonancy and Congruity with Resolutions and Decisions of former Times." Hale 68. An individual decision might reflect the views of one court at one moment in time, but a consistent line of decisions representing the wisdom of many minds across many generations was generally considered stronger evidence of the law's meaning. *Ibid.*

With this conception of precedent in mind, Lord Mansfield cautioned against elevating "particular cases" above the "general principles" that "run through the cases, and govern the decision of them." *Rust* v. *Cooper*, 2 Cowp. 629,

632, 98 Eng. Rep. 1277, 1279 (K. B. 1777). By discarding aberrational rulings and pursuing instead the mainstream of past decisions, he observed, the common law tended over time to "wor[k] itself pure." *Omychund* v. *Barker*, 1 Atk. 22, 33, 26 Eng. Rep. 15, 23 (Ch. 1744) (emphasis deleted). Reflecting similar thinking, Edmund Burke offered five principles for the evaluation of past judicial decisions: "They ought to be shewn; first, to be numerous and not scattered here and there;—secondly, concurrent and not contradictory and mutually destructive;—thirdly, to be made in good and constitutional times;—fourthly, not to be made to serve an occasion;—and fifthly, to be agreeable to the general tenor of legal principles." Speech of Dec. 23, 1790, in 3 The Speeches of the Right Honourable Edmund Burke 513 (1816).

Not only did different decisions carry different weight, so did different language within a decision. An opinion's holding and the reasoning essential to it (the *ratio decidendi*) merited careful attention. Dicta, stray remarks, and digressions warranted less weight. See N. Duxbury, The Intricacies of Dicta and Dissent 19–24 (2021) (Duxbury). These were no more than "the vapours and fumes of law." F. Bacon, The Lord Keeper's Speech in the Exchequer (1617), in 2 The Works of Francis Bacon 478 (B. Montagu ed. 1887) (Bacon).

That is not to say those "vapours" were worthless. Often dicta might provide the parties to a particular dispute a "fuller understanding of the court's decisional path or related areas of concern." B. Garner et al., The Law of Judicial Precedent 65 (2016) (Precedent). Dicta might also provide future courts with a source of "thoughtful advice." *Ibid.* But future courts had to be careful not to treat every "hasty expression . . . as a serious and deliberate opinion." *Steel* v. *Houghton*, 1 Bl. H. 51, 53, 126 Eng. Rep. 32, 33 (C. P. 1788). To do so would work an "injustice to [the] memory" of their predecessors who could not expect judicial

remarks issued in one context to apply perfectly in others, perhaps especially ones they could not foresee. *Ibid.* Also, the limits of the adversarial process, a distinctive feature of English law, had to be borne in mind. When a single judge or a small panel reached a decision in a case, they did so based on the factual record and legal arguments the parties at hand have chosen to develop. Attuned to those constraints, future judges had to proceed with an open mind to the possibility that different facts and different legal arguments might dictate different outcomes in later disputes. See Duxbury 19–24.

B

Necessarily, this represents just a quick sketch of traditional common-law understandings of the judge's role and the place of precedent in it. It focuses, too, on the horizontal, not vertical, force of judicial precedents. But there are good reasons to think that the common law's understandings of judges and precedent outlined above crossed the Atlantic and informed the nature of the "judicial Power" the Constitution vests in federal courts. Art. III, §1.

Not only was the Constitution adopted against the backdrop of these understandings and, in light of that alone, they may provide evidence of what the framers meant when they spoke of the "judicial Power." Many other, more specific provisions in the Constitution reflect much the same distinction between lawmaking and lawfinding functions the common law did. The Constitution provides that its terms may be amended only through certain prescribed democratic processes. Art. V. It vests the power to enact federal legislation exclusively in the people's elected representatives in Congress. Art. I, §1. Meanwhile, the Constitution describes the judicial power as the power to resolve cases and controversies. Art. III, §2, cl. 1. As well, it delegates that authority to life-tenured judges, see §1, an assignment that would have made little sense if judges could

usurp lawmaking powers vested in periodically elected representatives. But one that makes perfect sense if what is sought is a neutral party "to interpret and apply" the law without fear or favor in a dispute between others. 2 The Works of James Wilson 161 (J. Andrews ed. 1896) (Wilson); see *Osborn* v. *Bank of United States*, 9 Wheat. 738, 866 (1824).

The constrained view of the judicial power that runs through our Constitution carries with it familiar implications, ones the framers readily acknowledged. James Madison, for example, proclaimed that it would be a "fallacy" to suggest that judges or their precedents could "repeal or alter" the Constitution or the laws of the United States. Letter to N. Trist (Dec. 1831), in 9 The Writings of James Madison 477 (G. Hunt ed. 1910). A court's opinion, James Wilson added, may be thought of as "effective la[w]" "[a]s to the parties." Wilson 160–161. But as in England, Wilson said, a prior judicial decision could serve in a future dispute only as "evidence" of the law's proper construction. *Id.*, at 160; accord, 1 J. Kent, Commentaries on American Law 442–443 (1826).

The framers also recognized that the judicial power described in our Constitution implies, as the judicial power did in England, a power (and duty) of discrimination when it comes to assessing the "evidence" embodied in past decisions. So, for example, Madison observed that judicial rulings "*repeatedly confirmed*" may supply better evidence of the law's meaning than isolated or aberrant ones. Letter to C. Ingersoll (June 1831), in 4 Letters and Other Writings of James Madison 184 (1867) (emphasis added). Extending the thought, Thomas Jefferson believed it would often take "numerous decisions" for the meaning of new statutes to become truly "settled." Letter to S. Jones (July 1809), in 12 The Writings of Thomas Jefferson 299 (A. Bergh ed. 1907).

From the start, too, American courts recognized that not everything found in a prior decision was entitled to equal

weight. As Chief Justice Marshall warned, "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821). To the extent a past court offered views "beyond the case," those expressions "may be respected" in a later case "but ought not to control the judgment." *Ibid.* One "obvious" reason for this, Marshall continued, had to do with the limits of the adversarial process we inherited from England: Only "[t]he question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Id.*, at 399–400.

Abraham Lincoln championed these traditional understandings in his debates with Stephen Douglas. Douglas took the view that a single decision of this Court—no matter how flawed—could definitively resolve a contested issue for everyone and all time. Those who thought otherwise, he said, "aim[ed] a deadly blow to our whole Republican system of government." Speech at Springfield, Ill. (June 26, 1857), in 2 The Collected Works of Abraham Lincoln 401 (R. Basler ed. 1953) (Lincoln Speech). But Lincoln knew better. While accepting that judicial decisions "absolutely determine" the rights of the parties to a court's judgment, he refused to accept that any single judicial decision could "fully settl[e]" an issue, particularly when that decision departs from the Constitution. *Id.*, at 400–401. In cases such as these, Lincoln explained, "it is not resistance, it is not factious, it is not even disrespectful, to treat [the decision] as not having yet quite established a settled doctrine for the country." *Id.*, at 401.

After the Civil War, the Court echoed some of these same points. It stressed that every statement in a judicial opin-

ion "must be taken in connection with its immediate context," *In re Ayers*, 123 U. S. 443, 488 (1887), and stray "remarks" must not be elevated above the written law, see *The Belfast*, 7 Wall. 624, 641 (1869); see also, *e.g.*, *Trebilcock* v. *Wilson*, 12 Wall. 687, 692–693 (1872); *Mason* v. *Eldred*, 6 Wall. 231, 236–238 (1868). During Chief Justice Chase's tenure, it seems a Justice writing the Court's majority opinion would generally work alone and present his work orally and in summary form to his colleagues at conference, which meant that other Justices often did not even review the opinion prior to publication. 6 C. Fairman, History of the Supreme Court of the United States 69–70 (1971). The Court could proceed in this way because it understood that a single judicial opinion may resolve a "case or controversy," and in so doing it may make "effective law" for the parties, but it does not legislate for the whole of the country and is not to be confused with laws that do.

C

From all this, 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. Part I–B, *supra*.

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, 907 (2007).

Recent history illustrates all this. During the tenures of Chief Justices Warren and Burger, it seems this Court overruled an average of around three cases per Term, including roughly 50 statutory precedents between the 1960s and 1980s alone. See W. Eskridge, Overruling Statutory Precedents, 76 Geo. L. J. 1361, 1427–1434 (1988) (collecting cases). Many of these decisions came in settings no less consequential than today's. In recent years, we have not approached the pace set by our predecessors, overruling an average of just one or two prior decisions each Term.[1] But the point remains: Judicial decisions inconsistent with the written law do not inexorably control.

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

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[1] For relevant databases of decisions, see Congressional Research Service, Table of Supreme Court Decisions Overruled by Subsequent Decisions, Constitution Annotated, https://constitution.congress.gov/resources/decisions-overruled/; see also H. Spaeth et al., 2023 Supreme Court Database, http://supremecourtdatabase.org.

richer than what can be found in any single judge or panel of judges." Precedent 9.

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. See, *e.g.*, *id.*, at 108. 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.

When asking whether to follow or depart from a precedent, some judges deploy adverbs. They speak of whether or not a precedent qualifies as "demonstrably erroneous," *Gamble* v. *United States*, 587 U. S. 678, 711 (2019) (THOMAS, J., concurring), or "egregiously wrong," *Ramos*, 590 U. S., at 121 (KAVANAUGH, J., concurring in part). But the emphasis the adverb imparts is not meant for dramatic effect. It seeks to serve instead as a reminder of a more substantive lesson. The lesson that, in assessing the weight

due a past decision, a judge is not to be guided by his own impression alone, but must self-consciously test his views against those who have come before, open to the possibility that a precedent might be correct in ways not initially apparent to him.

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*, 6 Wheat., at 399.

These principles, too, have long guided this Court and others. As Judge Easterbrook has put it, an "opinion is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *United States* v. *Skoien*, 614 F. 3d 638, 640 (CA7 2010) (en banc); see also *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341 (1979) (stressing that an opinion is not "a statute," and its language should not "be parsed" as if it were); *Nevada* v. *Hicks*, 533 U. S. 353, 372 (2001) (same). If *stare decisis* counsels respect for the thinking of those who have come before, it also counsels against doing an "injustice to [their] memory" by

overreliance on their every word. *Steel*, 1 Bl. H., at 53, 126 Eng. Rep., at 33. As judges, "[w]e neither expect nor hope that our successors will comb" through our opinions, searching for delphic answers to matters we never fully explored. *Brown* v. *Davenport*, 596 U. S. 118, 141 (2022). To proceed otherwise risks "turn[ing] *stare decisis* from a tool of judicial humility into one of judicial hubris." *Ibid.*

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. *Ibid.* 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.*[2] 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. See, *e.g.*, *post*, at 9–11 (KAGAN, J., dissenting). But it is Congress's view of "good government," not ours, that controls.

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[2] See also A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 516–517 (1989) (describing *Chevron*'s theory that Congress "delegat[ed]" interpretive authority to agencies as "fictional"); S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986) (describing the notion that there exists a "'legislative intent to delegate the law-interpreting function' as a kind of legal fiction").

Much more could be said about *Chevron*'s inconsistency with the APA. But I have said it in the past. See *Buffington* v. *McDonough*, 598 U. S. ___, ___–___ (2022) (opinion dissenting from denial of certiorari) (slip op., at 5–6); *Gutierrez-Brizuela* v. *Lynch*, 834 F. 3d 1142, 1151–1153 (CA10 2016) (concurring opinion). And the Court makes many of the same points at length today. See *ante*, at 18–22. For present purposes, the short of it is that continuing to abide *Chevron* deference would require us to transgress the first lesson of *stare decisis*—the humility required of judges to recognize that our decisions must yield to the laws adopted by the people's elected representatives.[3]

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. See Part I, *supra*. Viewed by each of these lights, the case for *Chevron* deference only grows weaker still.

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[3]The dissent suggests that we need not take the APA's directions quite so seriously because the "finest administrative law scholars" from Harvard claim to see in them some wiggle room. *Post*, at 18 (opinion of KAGAN, J.). But nothing in the APA commands deference to the views of professors any more than it does the government. Nor is the dissent's list of Harvard's finest administrative law scholars entirely complete. See S. Breyer et al., Administrative Law and Regulatory Policy 288 (7th ed. 2011) (acknowledging that *Chevron* deference "seems in conflict with . . . the apparently contrary language of 706"); Kagan 212 (likewise acknowledging *Chevron* deference rests upon a "fictionalized statement of legislative desire").

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); see also *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819); *Stuart* v. *Laird*, 1 Cranch 299, 309 (1803).[4] But traditionally, that did not mean a court had to "defer" to any "reasonable"

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[4] Accord, *National Lead Co.* v. *United States*, 252 U. S. 140, 145–146 (1920) (affording "great weight" to a "contemporaneous construction" by the executive that had "been long continued"); *Jacobs* v. *Prichard*, 223 U. S. 200, 214 (1912) ("find[ing] no ambiguity in the act" but also finding "strength" for the Court's interpretation in the executive's "immediate and continued construction of the act"); *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572 (1891) (treating as "controlling" a "contemporaneous construction" of a law endorsed "not only [by] the courts but [also by] the departments").

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. Put simply, this Court was "not bound" by any and all reasonable "administrative construction[s]" of ambiguous statutes when resolving cases and controversies. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932). While the executive's consistent and contemporaneous views warranted respect, they "by no means control[led] the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them." *Irvine* v. *Marshall*, 20 How. 558, 567 (1858); see also A. Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L. J. 908, 987 (2017).

Sensing how jarringly inconsistent *Chevron* is with this Court's many longstanding precedents discussing the nature of the judicial role in disputes over the law's meaning, the government and dissent struggle for a response. The best they can muster is a handful of cases from the early 1940s in which, they say, this Court first "put [deference] principles into action." *Post*, at 21 (KAGAN, J., dissenting). And, admittedly, for a period this Court toyed with a form of deference akin to *Chevron*, at least for so-called mixed questions of law and fact. See, *e.g.*, *Gray* v. *Powell*, 314 U. S. 402, 411–412 (1941); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944). But, as the Court details, even that limited experiment did not last. See *ante*, at 10–12. Justice Roberts, in his *Gray* dissent, decried these decisions for "abdicat[ing our] function as a court of review" and "complete[ly] revers[ing] . . . the normal and usual method of construing a statute." 314 U. S., at 420–421. And just a few years later, in *Skidmore* v. *Swift & Co.*, 323

U. S. 134 (1944), the Court returned to its time-worn path.

Echoing themes that had run throughout our law from its start, Justice Robert H. Jackson wrote for the Court in *Skidmore*. There, he said, courts may extend respectful consideration to another branch's interpretation of the law, but the weight due those interpretations must always "depend upon the[ir] thoroughness . . . , the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade." *Id.*, at 140. In another case the same year, and again writing for the Court, Justice Jackson expressly rejected a call for a judge-made doctrine of deference much like *Chevron*, offering that, "[i]f Congress had deemed it necessary or even appropriate" for courts to "defe[r] to administrative construction[,] . . . it would not have been at a loss for words to say so." *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 156 (1944).

To the extent proper respect for precedent demands, as it always has, special respect for longstanding and mainstream decisions, *Chevron* scores badly. It represented not a continuation of a long line of decisions but a break from them. Worse, it did not merely depart from our precedents. More nearly, *Chevron* defied them.

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. *Ibid.* And they rejected any proposal that would subject judicial decisions to review by political actors. The Federalist No. 81, at 482;

United States v. *Hansen*, 599 U. S. 762, 786–791 (2023) (THOMAS, J., concurring). 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*, 598 U. S., at ___ (slip op., at 9). 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).

Chevron deference undermines other aspects of our settled law, too. In this country, we often boast that the Constitution's promise of due process of law, see Amdts. 5, 14, means that "'no man can be a judge in his own case.'" *Williams* v. *Pennsylvania*, 579 U. S. 1, 8–9 (2016); *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) (opinion of Chase, J.). That principle, of course, has even deeper roots, tracing far back into the common law where it was known by the Latin maxim *nemo iudex in causa sua*. See 1 E. Coke, Institutes

of the Laws of England §212, *141a. Yet, under the *Chevron* regime, all that means little, for executive agencies may effectively judge the scope of their own lawful powers. See, *e.g., Arlington* v. *FCC*, 569 U. S. 290, 296–297 (2013).

Traditionally, as well, courts have sought to construe statutes as a reasonable reader would "when the law was made." Blackstone 59; see *United States* v. *Fisher*, 2 Cranch 358, 386 (1805). Today, some call this "textualism." But really it's a very old idea, one that constrains judges to a lawfinding rather than lawmaking role by focusing their work on the statutory text, its linguistic context, and various canons of construction. In that way, textualism serves as an essential guardian of the due process promise of fair notice. If a judge could discard an old meaning and assign a new one to a law's terms, all without any legislative revision, how could people ever be sure of the rules that bind them? *New Prime Inc.* v. *Oliveira*, 586 U. S. 105, 113 (2019). Were the rules otherwise, Blackstone warned, the people would be rendered "slaves to their magistrates." 4 Blackstone 371.

Yet, replace "magistrates" with "bureaucrats," and Blackstone's fear becomes reality when courts employ *Chevron* deference. Whenever we confront an ambiguity in the law, judges do not seek to resolve it impartially according to the best evidence of the law's original meaning. Instead, we resort to a far cruder heuristic: "The reasonable bureaucrat always wins." And because the reasonable bureaucrat may change his mind year-to-year and election-to-election, the people can never know with certainty what new "interpretations" might be used against them. This "fluid" approach to statutory interpretation is "as much a trap for the innocent as the ancient laws of Caligula," which were posted so high up on the walls and in print so small that ordinary people could never be sure what they required. *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952).

The ancient rule of lenity is still another of *Chevron*'s victims. Since the founding, American courts have construed ambiguities in penal laws against the government and with lenity toward affected persons. *Wooden* v. *United States*, 595 U. S. 360, 388–390 (2022) (GORSUCH, J., concurring in judgment). That principle upholds due process by safeguarding individual liberty in the face of ambiguous laws. *Ibid.* And it fortifies the separation of powers by keeping the power of punishment firmly "'in the legislative, not in the judicial department.'" *Id.*, at 391 (quoting *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820)). But power begets power. And pressing *Chevron* deference as far as it can go, the government has sometimes managed to leverage "ambiguities" in the written law to penalize conduct Congress never clearly proscribed. Compare *Guedes* v. *ATF*, 920 F. 3d 1, 27–28, 31 (CADC 2019), with *Garland* v. *Cargill*, 602 U. S. 604 (2024).

In all these ways, *Chevron*'s fiction has led us to a strange place. One where authorities long thought reserved for Article III are transferred to Article II, where the scales of justice are tilted systematically in favor of the most powerful, where legal demands can change with every election even though the laws do not, and where the people are left to guess about their legal rights and responsibilities. So much tension with so many foundational features of our legal order is surely one more sign that we have "taken a wrong turn along the way." *Kisor* v. *Wilkie*, 588 U. S. 558, 607 (2019) (GORSUCH, J., concurring in judgment).[5]

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[5] The dissent suggests that *Chevron* deference bears at least something in common with surrounding law because it resembles a presumption or traditional canon of construction, and both "are common." *Post*, at 8, n. 1, 28–29 (opinion of KAGAN, J.). But even that thin reed wavers at a glance. Many of the presumptions and interpretive canons the dissent cites—including lenity, *contra proferentem*, and others besides—"'embod[y] . . . legal doctrine[s] centuries older than our Republic.'" *Opati* v. *Republic of Sudan*, 590 U. S. 418, 425 (2020). *Chevron* deference can make no such boast. Many of the presumptions and canons the dissent cites also

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, see Part I–C, *supra*, 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

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serve the Constitution, protecting the lines of authority it draws. Take just two examples: The federalism canon tells courts to presume federal statutes do not preempt state laws because of the sovereignty States enjoy under the Constitution. *Bond* v. *United States*, 572 U. S. 844, 858 (2014). The presumption against retroactivity serves as guardian of the Constitution's promise of due process and its ban on *ex post facto* laws, *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265 (1994). Once more, however, *Chevron* deference can make no similar claim. Rather than serve the Constitution's usual rule that litigants are entitled to have an independent judge interpret disputed legal terms, *Chevron* deference works to undermine that promise. As explored above, too, *Chevron* deference sits in tension with many traditional legal presumptions and interpretive principles, representing nearly the *inverse* of the rules of lenity, *nemo iudex*, and *contra proferentem*.

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. See, *e.g.*, Tr. of Oral Arg. in *American Hospital Assn.* v. *Becerra*, O. T. 2021, No. 20–1114, pp. 71–72. 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).

Today's cases exemplify some of these problems. We have before us two circuit decisions, three opinions, and at least as many interpretive options on the *Chevron* menu. On the one hand, we have the D. C. Circuit majority, which deemed the Magnuson-Stevens Act "ambiguous" and upheld the

agency's regulation as "'permissible.'" 45 F. 4th 359, 365 (2022). On the other hand, we have the D. C. Circuit dissent, which argues the statute is "unambiguou[s]" and that it plainly forecloses the agency's new rule. *Id.*, at 372 (opinion of Walker, J.). And on yet a third hand, we have the First Circuit, which claimed to have identified "clear textual support" for the regulation, yet refused to say whether it would "classify [its] conclusion as a product of *Chevron* step one or step two." 62 F. 4th 621, 631, 634 (2023). As these cases illustrate, *Chevron* has turned statutory interpretation into a game of bingo under blindfold, with parties guessing at how many boxes there are and which one their case might ultimately fall in.

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*, 598 U. S., at ___ (slip op., at 12).

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*, 598 U. S., at ___, ___ (slip op., at 8, 13). But ordinary people can do none of those things. They are the ones who suffer the worst kind of regulatory whiplash *Chevron* invites.

Consider a couple of examples. Thomas Buffington, a veteran of the U. S. Air Force, was injured in the line of duty. For a time after he left the Air Force, the Department of Veterans Affairs (VA) paid disability benefits due him by law. But later the government called on Mr. Buffington to reenter active service. During that period, everyone agreed, the VA could (as it did) suspend his disability payments. After he left active service for a second time, however, the VA turned his patriotism against him. By law, Congress permitted the VA to suspend disability pay only "for any period for which [a servicemember] receives active service pay." 38 U. S. C. §5304(c). But the VA had adopted a self-serving regulation requiring veterans to file a form asking for the resumption of their disability pay after a second (or subsequent) stint in active service. 38 CFR §3.654(b)(2) (2021). Unaware of the regulation, Mr. Buffington failed to reapply immediately. When he finally figured out what had happened and reapplied, the VA agreed to resume payments going forward but refused to give Mr. Buffington all of the past disability payments it had withheld. *Buffington*, 598 U. S., at ___–___ (slip op., at 1–4).

Mr. Buffington challenged the agency's action as inconsistent with Congress's direction that the VA may suspend disability payments only for those periods when a veteran

returns to active service. But armed with *Chevron*, the agency defeated Mr. Buffington's claim. Maybe the self-serving regulation the VA cited as justification for its action was not premised on the best reading of the law, courts said, but it represented a "'permissible'" one. 598 U. S., at ___ (slip op., at 7). In that way, the Executive Branch was able to evade Congress's promises to someone who took the field repeatedly in the Nation's defense.

In another case, one which I heard as a court of appeals judge, *De Niz Robles* v. *Lynch*, 803 F. 3d 1165 (CA10 2015), the Board of Immigration Appeals invoked *Chevron* to overrule a judicial precedent on which many immigrants had relied, see *In re Briones*, 24 I. & N. Dec. 355, 370 (BIA 2007) (purporting to overrule *Padilla–Caldera* v. *Gonzales*, 426 F. 3d 1294 (CA10 2005)). The agency then sought to apply its new interpretation retroactively to punish those immigrants—including Alfonzo De Niz Robles, who had relied on that judicial precedent as authority to remain in this country with his U. S. wife and four children. See 803 F. 3d, at 1168–1169. Our court ruled that this retrospective application of the BIA's new interpretation of the law violated Mr. De Niz Robles's due process rights. *Id.*, at 1172. But as a lower court, we could treat only the symptom, not the disease. So *Chevron* permitted the agency going forward to overrule a judicial decision about the best reading of the law with its own different "reasonable" one and in that way deny relief to countless future immigrants.

Those are just two stories among so many that federal judges could tell (and have told) about what *Chevron* deference has meant for ordinary people interacting with the federal government. See, *e.g.*, *Lambert* v. *Saul*, 980 F. 3d 1266, 1268–1276 (CA9 2020); *Valent* v. *Commissioner of Social Security*, 918 F. 3d 516, 525–527 (CA6 2019) (Kethledge, J., dissenting); *Gonzalez* v. *United States Atty. Gen.*, 820 F. 3d 399, 402–405 (CA11 2016) (*per curiam*).

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." Tr. of Oral Arg. in No. 22–1219, p. 133 (Relentless Tr.). 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." Relentless Tr. 102. 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

How could a Court, guided for 200 years by Chief Justice Marshall's example, come to embrace a counter-*Marbury* revolution, one at war with the APA, time honored precedents, and so much surrounding law? To answer these questions, turn to Lesson 3 and witness the temptation to endow a stray passage in a judicial decision with extraordinary authority. Call it "power quoting."

Chevron was an unlikely place for a revolution to begin. The case concerned the Clean Air Act's requirement that States regulate "stationary sources" of air pollution in their borders. See 42 U. S. C. §7401 *et seq*. At the time, it was an open question whether entire industrial plants or their constituent polluting parts counted as "stationary sources." The Environmental Protection Agency had defined entire plants as sources, an approach that allowed companies to replace individual plant parts without automatically triggering the permitting requirements that apply to new sources. *Chevron*, 467 U. S., at 840.

This Court upheld the EPA's definition as consistent with the governing statute. *Id.*, at 866. The decision, issued by a bare quorum of the Court, without concurrence or dissent, purported to apply "well-settled principles." *Id.*, at 845. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue," *Chevron* provided, then "that intention is the law and must be given effect." *Id.*, at 843, n. 9. Many of the cases *Chevron* cited to support its judgment stood for the traditional proposition that courts afford respectful consideration, not deference, to executive interpretations of the law. See, *e.g.*, *Burnet*, 285 U. S., at 16; *United States* v. *Moore*, 95 U. S. 760, 763 (1878). And the decision's sole citation to legal scholarship was to Roscoe Pound, who long championed *de novo* judicial review. 467 U. S., at 843, n. 10; see R. Pound, The Place of the Judiciary in a Democratic Polity, 27 A. B. A. J. 133, 136–137 (1941).

At the same time, of course, the opinion contained bits and pieces that spoke differently. The decision also said that, "if [a] statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U. S., at 843. But it seems the government didn't advance this formulation in its brief, so there was no adversarial engagement on it. T. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, 66 Admin. L. Rev. 253, 268 (2014) (Merrill). As we have seen, too, the Court did not pause to consider (or even mention) the APA. See Part II–A, *supra.* It did not discuss contrary precedents issued by the Court since the founding, let alone purport to overrule any of them. See Part II–B–1, *supra.* Nor did the Court seek to address how its novel rule of deference might be squared with so much surrounding law. See Part II–B–2, *supra.* As even its defenders have acknowledged, "*Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate

directions." Kagan 212–213. "[T]he quality of the reasoning," they acknowledge, "was not high," C. Sunstein, *Chevron* as Law, 107 Geo. L. J. 1613, 1669 (2019).

If *Chevron* meant to usher in a revolution in how judges interpret laws, no one appears to have realized it at the time. *Chevron*'s author, Justice Stevens, characterized the decision as a "simpl[e] . . . restatement of existing law, nothing more or less." Merrill 255, 275. In the "19 argued cases" in the following Term "that presented some kind of question about whether the Court should defer to an agency interpretation of statutory law," this Court cited *Chevron* just once. Merrill 276. By some accounts, the decision seemed "destined to obscurity." *Ibid.*

It was only three years later when Justice Scalia wrote a concurrence that a revolution began to take shape. *Buffington*, 598 U. S., at ___ (slip op., at 8). There, he argued for a new rule requiring courts to defer to executive agency interpretations of the law whenever a "'statute is silent or ambiguous.'" *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 133–134 (1987) (opinion of Scalia, J.). Eventually, a majority of the Court followed his lead. *Buffington*, 598 U. S., at ___ (slip op., at 8). But from the start, Justice Scalia made no secret about the scope of his ambitions. See Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 521 (1989) (Scalia). The rule he advocated for represented such a sharp break from prior practice, he explained, that many judges of his day didn't yet "understand" the "old criteria" were "no longer relevant." *Ibid.* Still, he said, overthrowing the past was worth it because a new deferential rule would be "easier to follow." *Ibid.*

Events proved otherwise. As the years wore on and the Court's new and aggressive reading of *Chevron* gradually exposed itself as unworkable, unfair, and at odds with our separation of powers, Justice Scalia could have doubled down on the project. But he didn't. He appreciated that

stare decisis is not a rule of "if I thought it yesterday, I must think it tomorrow." And rather than cling to the pride of personal precedent, the Justice began to express doubts over the very project that he had worked to build. See *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 109–110 (2015) (opinion concurring in judgment); cf. *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 617–618, 621 (2013) (opinion concurring in part and dissenting in part). If *Chevron*'s ascent is a testament to the Justice's ingenuity, its demise is an even greater tribute to his humility.[6]

Justice Scalia was not alone in his reconsideration. After years spent laboring under *Chevron*, trying to make sense of it and make it work, Member after Member of this Court came to question the project. See, *e.g.*, *Pereira* v. *Sessions*, 585 U. S. 198, 219–221 (2018) (Kennedy, J., concurring); *Michigan* v. *EPA*, 576 U. S. 743, 760–764 (2015) (THOMAS, J., concurring); *Kisor*, 588 U. S., at 591 (ROBERTS, C. J., concurring in part); *Gutierrez-Brizuela*, 834 F. 3d, at 1153; *Buffington*, 598 U. S., at ___–___ (slip op., at 14–15); Kavanaugh 2150–2154. Ultimately, the Court gave up. Despite repeated invitations, it has not applied *Chevron* deference since 2016. Relentless Tr. 81; App. to Brief for Respondents in No. 22–1219, p. 68a. So an experiment that began only in the mid-1980s effectively ended eight years ago. Along the way, an unusually large number of federal appellate judges voiced their own thoughtful and extensive

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[6] It should be recalled that, when Justice Scalia launched the *Chevron* revolution, there were many judges who "abhor[red] . . . 'plain meaning'" and preferred instead to elevate "legislative history" and their own curated accounts of a law's "purpose[s]" over enacted statutory text. Scalia 515, 521. *Chevron*, he predicted, would provide a new guardrail against that practice. Scalia 515, 521. As the Justice's later writings show, he had the right diagnosis, just the wrong cure. The answer for judges eliding statutory terms is not deference to agencies that may seek to do the same, but a demand that all return to a more faithful adherence to the written law. That was, of course, another project Justice Scalia championed. And as we like to say, "we're all textualists now."

criticisms of *Chevron*. *Buffington*, 598 U. S., at ___–___ (slip op., at 14–15) (collecting examples). A number of state courts did, too, refusing to import *Chevron* deference into their own administrative law jurisprudence. See 598 U. S., at ___ (slip op., at 15).

Even if all that and everything else laid out above is true, the 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." *Post*, at 9, 32 (dissenting opinion). 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.[7] 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. Others may see things differently, see *post*, at 26–27 (dissenting opinion), but the caution the

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[7] See, *e.g., Becerra* v. *Empire Health Foundation, for Valley Hospital Medical Center*, 597 U. S. 424, 434 (2022) (resolving intricate Medicare dispute by reference solely to "text," "context," and "structure"); see also *Sackett* v. *EPA*, 598 U. S. 651 (2023) (same in a complex Clean Water Act dispute); *Johnson* v. *Guzman Chavez*, 594 U. S. 523 (2021) (same in technical immigration case).

Court has exhibited before overruling *Chevron* may illustrate one of the reasons why the current Court has been slower to overrule precedents than some of its predecessors, see Part I–C, *supra*.

None of this, of course, discharges any Member of this Court from the task of deciding for himself or herself today whether *Chevron* deference itself warrants deference. But when so many past and current judicial colleagues in this Court and across the country tell us our doctrine is misguided, and when we ourselves managed without *Chevron* for centuries and manage to do so today, the humility at the core of *stare decisis* compels us to pause and reflect carefully on the wisdom embodied in that experience. And, in the end, to my mind the lessons of experience counsel wisely against continued reliance on *Chevron*'s stray and unconsidered digression. This Court's opinions fill over 500 volumes, and perhaps "some printed judicial word may be found to support almost any plausible proposition." R. Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944). It is not for us to pick and choose passages we happen to like and demand total obedience to them in perpetuity. That would turn *stare decisis* from a doctrine of humility into a tool for judicial opportunism. *Brown*, 596 U. S., at 141.

III

Proper respect for precedent helps "keep the scale of justice even and steady," by reinforcing decisional rules consistent with the law upon which all can rely. 1 Blackstone 69. But that respect does not require, nor does it readily tolerate, a steadfast refusal to correct mistakes. As early as 1810, this Court had already overruled one of its cases. See *Hudson* v. *Guestier*, 6 Cranch 281, 284 (overruling *Rose* v. *Himely*, 4 Cranch 241 (1808)). In recent years, the Court may have overruled precedents less frequently than it did during the Warren and Burger Courts. See Part I–C, *supra*.

But the job of reconsidering past decisions remains one every Member of this Court faces from time to time.[8]

Justice William O. Douglas served longer on this Court than any other person in the Nation's history. During his tenure, he observed how a new colleague might be inclined initially to "revere" every word written in an opinion issued before he arrived. W. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949). But, over time, Justice Douglas reflected, his new colleague would "remembe[r] . . . that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." *Ibid.* And "[s]o he [would] com[e] to formulate his own views, rejecting some earlier ones as false and embracing others." *Ibid.* This process of reexamination, Justice Douglas explained, is a "necessary consequence of our system" in which each judge takes an oath—both "personal" and binding—to discern the law's meaning for himself and apply it faithfully in the cases that come before him. *Id.*, at 736–737.

Justice Douglas saw, too, how appeals to precedent could be overstated and sometimes even overwrought. Judges, he reflected, would sometimes first issue "new and startling decision[s]," and then later spin around and "acquire an acute conservatism" in their aggressive defense of "their

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[8] Today's dissenters are no exceptions. They have voted to overrule precedents that they consider "wrong," *Hurst* v. *Florida*, 577 U. S. 92, 101 (2016) (opinion for the Court by SOTOMAYOR, J., joined by, *inter alios*, KAGAN, J.); *Obergefell* v. *Hodges*, 576 U. S. 644, 665, 675 (2015) (opinion for the Court, joined by, *inter alios*, SOTOMAYOR and KAGAN, JJ.); that conflict with the Constitution's "original meaning," *Alleyne* v. *United States*, 570 U. S. 99, 118 (2013) (SOTOMAYOR, J., joined by, *inter alias*, KAGAN, J., concurring); and that have proved "unworkable," *Johnson* v. *United States*, 576 U. S. 591, 605 (2015) (opinion for the Court, joined by, *inter alios*, SOTOMAYOR and KAGAN, JJ.); see also *Erlinger* v. *United States*, 602 U. S. ___, ___ (2024) (JACKSON, J., dissenting) (slip op., at 1) (arguing *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and the many cases applying it were all "wrongly decided").

new *status quo*." *Id.*, at 737. In that way, even the most novel and unlikely decisions became "coveted anchorage[s]," defended heatedly, if ironically, under the banner of "*stare decisis*." *Ibid.*; see also *Edwards* v. *Vannoy*, 593 U. S. 255, 294, n. 7 (2021) (GORSUCH, J., concurring).

That is *Chevron*'s story: A revolution masquerading as the status quo. And the defense of it follows the same course Justice Douglas described. Though our dissenting colleagues have not hesitated to question other precedents in the past, they today manifest what Justice Douglas called an "acute conservatism" for *Chevron*'s "startling" development, insisting that if this "coveted anchorage" is abandoned the heavens will fall. But the Nation managed to live with busy executive agencies of all sorts long before the *Chevron* revolution began to take shape in the mid-1980s. And all today's decision means is that, going forward, federal courts will do exactly as this Court has since 2016, exactly as it did before the mid-1980s, and exactly as it had done since the founding: resolve cases and controversies without any systemic bias in the government's favor.

Proper respect for precedent does not begin to suggest otherwise. Instead, it counsels respect for the written law, adherence to consistent teachings over aberrations, and resistance to the temptation of treating our own stray remarks as if they were statutes. And each of those lessons points toward the same conclusion today: *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.

SUPREME COURT OF THE UNITED STATES

Nos. 22–451 and 22–1219

LOPER BRIGHT ENTERPRISES, ET AL.,
PETITIONERS
22–451 *v.*
GINA RAIMONDO, SECRETARY OF
COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELENTLESS, INC., ET AL., PETITIONERS
22–1219 *v.*
DEPARTMENT OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 28, 2024]

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE 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

*JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 22–451 and joins this opinion only as it applies to the case in No. 22–1219.

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 recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies. The Court has substituted its own judgment on workplace health for that of the Occupational Safety and Health Administration; its own judgment on climate change for that of the Environmental Protection Agency; and its own judgment on student loans for that of the Department of Education. See, *e.g.*, *National Federation of Independent Business* v. *OSHA*, 595 U. S. 109 (2022); *West Virginia* v. *EPA*, 597 U. S. 697 (2022); *Biden* v. *Nebraska*, 600 U. S. 477 (2023). But evidently that was, for this Court, all too piecemeal. 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 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. It is a brake on the urge to convert "every new judge's opinion" into a new legal rule or regime. *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. 215, 388 (2022) (joint opinion of Breyer, SOTOMAYOR, and KAGAN, JJ., dissenting) (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (7th ed. 1775)). *Chevron* is entrenched precedent, entitled to the protection of *stare decisis*, as even the majority acknowledges. In fact, *Chevron* is entitled to the supercharged version of that doctrine because Congress could always overrule the decision, and because so many governmental and private actors have relied on it for so long. Because that is so, the majority needs a "particularly special justification" for its action. *Kisor* v. *Wilkie*, 588 U. S. 558, 588 (2019) (opinion of the Court). But the majority has nothing that would qualify. It barely tries to advance the usual factors this Court invokes for overruling precedent. Its justification comes down, in the end, to this: Courts must have more say over regulation—over the provision of health care, the protection of the environment, the safety of consumer products, the efficacy of transportation systems, and so on. A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. 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. Accord, *ante*, at 7, 22. "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 (DC 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, 1149 (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). *Ante*, at 22. 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. For the last 40 years, that doctrine has gone by the name of *Chevron* deference, after the 1984 decision that formalized and canonized it. In *Chevron*, the Court set out a simple two-part framework for reviewing an agency's interpretation of a statute that it administers. First, the reviewing court must determine whether Congress has "directly spoken to the precise question at issue." 467 U. S., at 842. That inquiry is rigorous: A court must exhaust all the "traditional tools of statutory construction" to divine statutory meaning. *Id.*, at 843, n. 9. And when it can find that meaning—a "single right answer"—that is "the end of the matter": The court cannot defer because it "must give effect to the unambiguously expressed intent of Congress." *Kisor*, 588 U. S., at 575 (opinion of the Court); *Chevron*, 467 U. S., at 842–843. But if the court, after using its whole legal toolkit, concludes that "the statute is silent or ambiguous with respect to the specific issue" in dispute—for any of the not-uncommon reasons discussed above—then the court must cede the primary interpretive role. *Ibid.*; see *supra*, at 4–5. At that second step, the court asks only whether the agency construction is within the sphere of "reasonable" readings. *Chevron*, 467 U. S., at 844. If it is, the agency's interpretation of the statute that it every day implements will control.

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. See *id.*, at 843–

845; *Smiley*, 517 U. S., at 740–741. An enacting Congress, as noted above, knows those uncertainties will arise, even if it does not know what they will turn out to be. See *supra*, at 4–5. And every once in a while, Congress provides an explicit instruction for dealing with that contingency—assigning primary responsibility to the courts, or else to an agency. But much more often, Congress does not say. Thus arises the need for a presumption—really, a default rule—for what should happen in that event. Does a statutory silence or ambiguity then go to a court for resolution? Or to an agency? This Court has long thought Congress would choose an agency, with courts serving only as a backstop to make sure the agency makes a reasonable choice among the possible readings. Or said otherwise, Congress would select the agency it has put in control of a regulatory scheme to exercise the "degree of discretion" that the statute's lack of clarity or completeness allows. *Smiley*, 517 U. S., at 741. 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.[1] The next question is why.

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[1] Note that presumptions of this kind are common in the law. In other contexts, too, the Court responds to a congressional lack of direction by adopting a presumption about what Congress wants, rather than trying to figure that out in every case. And then Congress can legislate, with "predictable effects," against that "stable background" rule. *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 261 (2010). Take the presumption against extraterritoriality: The Court assumes Congress means for its statutes to apply only within the United States, absent a "clear indication" to the contrary. *Id.*, at 255. Or the presumption against retroactivity: The Court assumes Congress wants its laws to apply only prospectively, unless it "unambiguously instruct[s]" something different. *Vartelas* v. *Holder*, 566 U. S. 257, 266 (2012). Or the presumption against repeal of statutes by implication: The Court assumes Congress does not intend a later statute to displace an earlier one unless it makes that intention "clear and manifest." *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 510 (2018). Or the (so far unnamed) presumption against treating a procedural requirement as "jurisdictional" unless "Congress

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"? See *supra*, at 5. 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. See *supra*, at 5–6. 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—

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clearly states that it is." *Boechler* v. *Commissioner*, 596 U. S. 199, 203 (2022). I could continue, except that this footnote is long enough. The *Chevron* deference rule is to the same effect: The Court generally assumes that Congress intends to confer discretion on agencies to handle statutory ambiguities or gaps, absent a direction to the contrary. The majority calls that presumption a "fiction," *ante*, at 26, but it is no more so than any of the presumptions listed above. They all are best guesses—and usually quite good guesses—by courts about congressional intent.

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. *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 153 (1991); see, *e.g.*, *Center for Biological Diversity* v. *Zinke*, 900 F. 3d 1053, 1060–1062 (CA9 2018) (arctic grayling); *Center for Biological Diversity* v. *Zinke*, 868 F. 3d 1054, 1056 (CA9 2017) (desert eagle). 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. Or consider, for another way regulatory familiarity matters, the example about adjusting Medicare reimbursement for geographic wage differences. See *supra*, at 6. According to a dictionary, the term "geographic area" could be as large as a multi-state region or as small as a census tract. How to choose? It would make sense to gather hard information about what reimbursement levels each approach will produce, to explore the ease of administering each on a nationwide basis, to survey how regulators have dealt with similar questions in the past, and to confer with the hospitals themselves about what makes sense. See *Kisor*, 588 U. S., at 571 (plurality opinion) (noting that agencies are able to "conduct factual investigations" and "consult with affected parties"). Congress knows the Department of Health and Human Services can do all those things—and that courts cannot.

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 6. 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. Or consider *Chevron* itself. As the Court there understood, the choice between defining a "stationary source" as a whole plant or as a pollution-emitting device is a choice about how to "reconcile" two "manifestly competing interests." 467 U. S., at 865. The plantwide definition relaxes the permitting requirement in the interest of promoting economic growth; the device-specific definition strengthens that requirement to better reduce air pollution. See *id.*, at 851, 863, 866. Again, that is a choice a judge should not be making, but one an agency properly can. Agencies are "subject to the supervision of the President, who in turn answers to the public." *Kisor*, 588 U. S., at 571–572 (plurality opinion). 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, *ante*, at 27, 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); *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 220 (2016). 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.

The majority makes two points in reply, neither convincing. First, it insists that "agencies have no special competence" in filling gaps or resolving ambiguities in regulatory statutes; rather, "[c]ourts do." *Ante*, at 23. Score one for self-confidence; maybe not so high for self-reflection or -knowledge. Of course courts often construe legal texts, hopefully well. And *Chevron*'s first step takes full advantage of that talent: There, a court tries to divine what Congress meant, even in the most complicated or abstruse statutory schemes. The deference comes in only if the court cannot do so—if the court must admit that standard legal tools will not avail to fill a statutory silence or give content to an ambiguous term. That is when the issues look like the ones I started off with: When does an alpha amino acid polymer qualify as a "protein"? How distinct is "distinct" for squirrel populations? What size "geographic area" will ensure appropriate hospital reimbursement? As between two equally feasible understandings of "stationary source," should one choose the one more protective of the environment or the one more favorable to economic growth? The idea that courts have "special competence" in deciding such questions whereas agencies have "no[ne]" is, if I may say, malarkey. Answering those questions right does not mainly demand the interpretive skills courts possess. Instead, it demands one or more of: subject-matter expertise,

long engagement with a regulatory scheme, and policy choice. It is courts (not agencies) that "have no special competence"—or even legitimacy—when those are the things a decision calls for.

Second, the majority complains that an ambiguity or gap does not "necessarily reflect a congressional intent that an agency" should have primary interpretive authority. *Ante*, at 22. On that score, I'll agree with the premise: It doesn't "necessarily" do so. *Chevron* is built on a *presumption*. The decision does not maintain that Congress in every case wants the agency, rather than a court, to fill in gaps. The decision maintains that when Congress does not expressly pick one or the other, we need a default rule; and the best default rule—agency or court?—is the one we think Congress would generally want. As to *why* Congress would generally want the agency: The answer lies in everything said above about Congress's delegation of regulatory power to the agency and the agency's special competencies. See *supra*, at 9–11. The majority appears to think it is a showstopping rejoinder to note that many statutory gaps and ambiguities are "unintentional." *Ante*, at 22. But to begin, many are not; the ratio between the two is uncertain. See *supra*, at 4–5. And to end, why should that matter in any event? Congress may not have deliberately introduced a gap or ambiguity into the statute; but it knows that pretty much everything it drafts will someday be found to contain such a "flaw." Given that knowledge, *Chevron* asks, what would Congress want? The presumed answer is again the same (for the same reasons): The agency. And as with any default rule, if Congress decides otherwise, all it need do is say.

In that respect, the proof really is in the pudding: Congress basically never says otherwise, suggesting that *Chevron* chose the presumption aligning with legislative intent (or, in the majority's words, "approximat[ing] reality," *ante*, at 22). Over the last four decades, Congress has authorized

or reauthorized hundreds of statutes. The drafters of those statutes knew all about *Chevron*. See A. Gluck & L. Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 928 (fig. 2), 994 (2013). So if they had wanted a different assignment of interpretive responsibility, they would have inserted a provision to that effect. With just a pair of exceptions I know of, they did not. See 12 U. S. C. §25b(b)(5)(A) (exception #1); 15 U. S. C. §8302(c)(3)(A) (exception #2). Similarly, Congress has declined to enact proposed legislation that would abolish *Chevron* across the board. See S. 909, 116th Cong., 1st Sess., §2 (2019) (still a bill, not a law); H. R. 5, 115th Cong., 1st Sess., §202 (2017) (same). So to the extent the majority is worried that the *Chevron* presumption is "fiction[al]," *ante*, at 26—as all legal presumptions in some sense are—it has gotten less and less so every day for 40 years. The congressional reaction shows as well as anything could that the *Chevron* Court read Congress right.

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." *Ante*, at 14–15 (emphasis in original). And that provision, the majority continues, codified the contemporaneous law, which likewise did not allow for deference. See *ante,* at 9–13, 15–16. 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. *Ante*, at 14. 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").[2]

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[2]The majority tries to buttress its argument with a stray sentence or two from the APA's legislative history, but the same response holds. As the majority notes, see *ante*, at 15, the House and Senate Reports each stated that Section 706 "provid[ed] that questions of law are for courts

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). See *ante*, at 14. 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" (*ante*, at 14) 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.[3]

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rather than agencies to decide in the last analysis." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945). But that statement also does not address the standard of review that courts should then use. When a court defers under *Chevron*, it reviews the agency's construction for reasonableness "in the last analysis." The views of Representative Walter, which the majority also cites, further demonstrate my point. He stated that the APA would require courts to "determine independently all relevant questions of law," but he also stated that courts would be required to "exercise . . . independent judgment" in applying the substantial-evidence standard (a deferential standard if ever there were one). 92 Cong. Rec. 5654 (1946). He therefore did not equate "independent" review with *de novo* review; he thought that a court could conduct independent review of agency action using a deferential standard.

[3] In a footnote responding to the last two paragraphs, the majority raises the white flag on Section 706's text. See *ante*, at 15, n. 4. Yes, it finally concedes, Section 706 does not *say* that *de novo* review is required for an agency's statutory construction. Rather, the majority says, "some things go without saying," and *de novo* review is such a thing. See *ibid.* But why? What extra-textual considerations force us to read Section 706 the majority's way? In its footnote, the majority repairs only to history.

And contra the majority, most "respected commentators" understood Section 706 in that way—as allowing, even if not requiring, deference. *Ante*, at 16. The finest administrative law scholars of the time (call them that generation's Manning, Sunstein, and Vermeule) certainly did. Professor Louis Jaffe described something very like the *Chevron* two-step as the preferred method of reviewing agency interpretations under the APA. A court, he said, first "must decide as a 'question of law' whether there is 'discretion' in the premises." Judicial Control of Administrative Action 570 (1965). That is akin to step 1: Did Congress speak to the issue, or did it leave openness? And if the latter, Jaffe continued, the agency's view "if 'reasonable' is free of control." *Ibid.* That of course looks like step 2: defer if reasonable. And just in case that description was too complicated, Jaffe conveyed his main point this way: The argument that courts "must decide all questions of law"—as if there were no agency in the picture—"is, in my opinion, unsound." *Id.*, at 569. Similarly, Professor Kenneth Culp Davis, author of the then-preeminent treatise on administrative law, noted with approval that "reasonableness" review of agency interpretations—in which courts "refused to substitute judgment"—had "survived the APA." Administrative Law 880, 883, 885 (1951) (Davis). Other contemporaneous scholars and experts agreed. See R. Levin, The APA and the Assault on Deference, 106 Minn. L. Rev. 125, 181–183 (2021) (Levin) (listing many of them). They did not see in their own time what the majority finds there today.[4]

But as I will explain below, the majority also gets wrong the most relevant history, pertaining to how judicial review of agency interpretations operated in the years before the APA was enacted. See *infra*, at 19–23.

[4] I concede one exception (whose view was "almost completely isolated," Levin 181), but his comments on Section 706 refute a different aspect of the majority's argument. Professor John Dickinson, as the majority notes, thought that Section 706 precluded courts from deferring to agency interpretations. See Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947)

Nor, evidently, did the Supreme Court. In the years after the APA was enacted, the Court "never indicated that section 706 rejected the idea that courts might defer to agency interpretations of law." Sunstein 1654. Indeed, not a single Justice so much as floated that view of the APA. To the contrary, the Court issued a number of decisions in those years deferring to an agency's statutory interpretation. See, *e.g.*, *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U. S. 143, 153–154 (1946); *NLRB* v. *E. C. Atkins & Co.*, 331 U. S. 398, 403 (1947); *Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U. S. 469, 478–479 (1947). And that continued right up until *Chevron*. See, *e.g.*, *Mitchell* v. *Budd*, 350 U. S. 473, 480 (1956); *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978). To be clear: Deference in those years was not always given to interpretations that would receive it under *Chevron*. The practice then was more inconsistent and less fully elaborated than it later became. The point here is only that the Court came nowhere close to accepting the majority's view of the APA. Take the language from Section 706 that the majority most relies on: "decide all relevant questions of law." See *ante*, at 14. In the decade after the APA's enactment, those words were used only four times in Supreme Court opinions (all in footnotes)—and never to suggest that courts could not defer to agency interpretations. See Sunstein 1656.

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."

(Dickinson); *ante*, at 16. But unlike the majority, he viewed that bar as "a change" to, not a restatement of, pre-APA law. Compare Dickinson 516 with *ante*, at 15–16. So if the majority really wants to rely on Professor Dickinson, it will have to give up the claim, which I address below, that the law before the APA forbade deference. See *infra*, at 19–23.

Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947); *ante*, at 15–16. 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.[5]

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[5] Because the APA was meant to "restate[] the present law," the judicial review practices of the 1940s are more important to understanding the statute than is any earlier tradition (such as the majority dwells on). But before I expand on those APA-contemporaneous practices, I pause to note that they were "not built on sand." *Kisor* v. *Wilkie*, 588 U. S. 558, 568–569 (2019) (plurality opinion). Since the early days of the Republic, this Court has given significant weight to official interpretations of "ambiguous law[s]." *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827). With the passage of time—and the growth of the administrative sphere—those "judicial expressions of deference increased." H. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 15 (1983). By

Two prominent Supreme Court decisions of the 1940s put those principles into action. *Gray* v. *Powell*, 314 U. S. 402 (1941), was then widely understood as "the leading case" on review of agency interpretations. Davis 882; see *ibid.* (noting that it "establish[ed] what is known as 'the doctrine of Gray v. Powell'"). There, the Court deferred to an agency construction of the term "producer" as used in a statutory exemption from price controls. Congress, the Court explained, had committed the scope of the exemption to the agency because its "experience in [the] field gave promise of a better informed, more equitable, adjustment of the conflicting interests." *Gray*, 314 U. S., at 412. Accordingly, the Court concluded that it was "not the province of a court" to "substitute its judgment" for the agency's. *Ibid.* Three years later, the Court decided *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944), another acknowledged "leading case." Davis 882; see *id.*, at 884. The Court again deferred, this time to an agency's construction of the term "employee" in the National Labor Relations Act. The scope of that term, the Court explained, "belong[ed] to" the agency to answer based on its "[e]veryday experience in the administration of the statute." *Hearst*, 322 U. S., at 130. The Court therefore "limited" its review to whether the agency's reading had "warrant in the record and a reasonable basis in

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the early 20th century, the Court stated that it would afford "great weight" to an agency construction in the face of statutory "uncertainty or ambiguity." *National Lead Co.* v. *United States*, 252 U. S. 140, 145 (1920); see *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572 (1891) ("controlling" weight in "all cases of ambiguity"); *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892) ("decisive" weight "in case of ambiguity"); *Jacobs* v. *Prichard*, 223 U. S. 200, 214 (1912) (referring to the "rule which gives strength" to official interpretations if "ambiguity exist[s]"). So even before the New Deal, a strand of this Court's cases exemplified deference to executive constructions of ambiguous statutes. And then, as I show in the text, the New Deal arrived and deference surged—creating the "present law" that the APA "restated."

law." *Id.*, at 131.[6] Recall here that even the majority accepts that Section 706 was meant to "restate[] the present law" as to judicial review. See *ante*, at 15–16; *supra*, at 19–20. Well then? It sure would seem that the provision allows a deference regime.

The majority has no way around those two noteworthy decisions. It first appears to distinguish between "pure legal question[s]" and the so-called mixed questions in *Gray* and *Hearst*, involving the application of a legal standard to a set of facts. *Ante*, at 11. If in drawing that distinction, the majority intends to confine its holding to the pure type of legal issue—thus enabling courts to defer when law and facts are entwined—I'd be glad. But I suspect the majority has no such intent, because that approach would preserve *Chevron* in a substantial part of its current domain. Cf. *Wilkinson* v. *Garland*, 601 U. S. 209, 230 (2024) (ALITO, J., dissenting) (noting, in the immigration context, that the universe of mixed questions swamps that of pure legal ones). It is frequently in the consideration of mixed questions that the scope of statutory terms is established and their meaning defined. See H. Monaghan, *Marbury* and the

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[6]The majority says that I have "pluck[ed] out" *Gray* and *Hearst*, impliedly from a vast number of not-so-helpful cases. *Ante*, at 13, n. 3. It would make as much sense to say that a judge "plucked out" *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), to discuss substantial-evidence review or "plucked out" *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983), to discuss arbitrary-and-capricious review. *Gray* and *Hearst*, as noted above, were the leading cases about agency interpretations in the years before the APA's enactment. But just to gild the lily, here are a number of other Supreme Court decisions from the five years prior to the APA's enactment that were of a piece: *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 536 (1946); *ICC* v. *Parker*, 326 U. S. 60, 65 (1945); *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 227–228 (1943). The real "pluck[ing]" offense is the majority's—for taking a stray sentence from *Hearst* (*ante*, at 13, n. 3) to suggest that both *Hearst* and *Gray* stand for the opposite of what they actually do.

Administrative State, 83 Colum. L. Rev. 1, 29 (1983) ("Administrative application of law is administrative formulation of law whenever it involves elaboration of the statutory norm"). How does a statutory interpreter decide, as in *Hearst*, what an "employee" is? In large part through cases asking whether the term covers people performing specific jobs, like (in that case) "newsboys." 322 U. S., at 120. Or consider one of the examples I offered above. How does an interpreter decide when one population segment of a species is "distinct" from another? Often by considering that requirement with respect to particular species, like western gray squirrels. So the distinction the majority offers makes no real-world (or even theoretical) sense. If the *Hearst* Court was deferring to an agency on whether the term "employee" covered newsboys, it was deferring to the agency on the scope and meaning of the term "employee."

The majority's next rejoinder—that "the Court was far from consistent" in deferring—falls equally flat. *Ante*, at 12. 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, see *ante*, at 11–12, and 13, n. 3). Even on that assumption, the majority's main argument—that Section 706 *prohibited* deferential review—collapses. Once again, the majority agrees that Section 706 was not meant to change the then-prevailing law. See *ante*, at 15–16. And even if inconsistent, that law cannot possibly be thought to have *prohibited* deference. Or otherwise said: "If Section 706 did not change the law of judicial review (as we have long recognized), then it did not proscribe a deferential standard then known and in use." *Kisor*, 588 U. S., at 583 (plurality opinion).

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 *stare decisis*'s strongest form of protection. The majority thus needs an exceptionally strong reason to overturn the decision, above and beyond thinking it wrong. And it has nothing approaching such a justification, proposing only a bewildering theory about *Chevron*'s "unworkability." *Ante*, at 32. Just five years ago, this Court in *Kisor* rejected a plea to overrule *Auer* v. *Robbins*, 519 U. S. 452 (1997), which requires judicial deference to agencies' interpretations of their own regulations. See 588 U. S., at 586–589 (opinion of the Court). The case against overruling *Chevron* is at least as strong. In particular, the majority's decision today will cause a massive shock to the legal system, "cast[ing] doubt on many settled constructions" of statutes and threatening the interests of many parties who have relied on them for years. 588 U. S., at 587 (opinion of the Court).

Adherence to precedent is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U. S., at 827. It enables people to order their lives in reliance on judicial decisions. And it "contributes to the actual and perceived integrity of the judicial process," by ensuring that those decisions are founded in the law, and not in the "personal preferences" of judges. *Id.*, at 828; *Dobbs*, 597 U. S., at 388 (dissenting opinion).

Perhaps above all else, *stare decisis* is a "doctrine of judicial modesty." *Id.*, at 363. In that, it shares something important with *Chevron*. Both tell judges that they do not know everything, and would do well to attend to the views of others. So today, the majority rejects what judicial humility counsels not just once but twice over.

And *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); see *Kisor*, 588 U. S., at 587 (opinion of the Court) (making the same point for *Auer* deference). 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." 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); see *supra*, at 14–15. 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. See *ante*, at 30. 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. See Brief for United States in No. 22–1219,

p. 27; App. to *id.*, at 68a–72a (collecting cases). 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). The *Kisor* Court observed, when upholding *Auer*, that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." 588 U. S., at 587 (opinion of the Court). So too does deference to reasonable agency interpretations of ambiguous statutes—except more so. *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." *Ante*, at 33. 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" (*ante*, at 32) 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" (*ante*, at 30); give the whole process a few years . . . and voila!—you have a justification for overruling the decision. *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 950 (2018) (KAGAN, J., dissenting) (discussing the overruling of *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977)); see also, *e.g.*, *Kennedy* v. *Bremerton School Dist.*, 597 U. S. 507, 571–572 (2022) (SOTOMAYOR, J., dissenting) (similar

for *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971)); *Shelby County* v. *Holder*, 570 U. S. 529, 587–588 (2013) (Ginsburg, J., dissenting) (similar for *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966)). I once remarked that this overruling-through-enfeeblement technique "mock[ed] *stare decisis*." *Janus*, 585 U. S., at 950 (dissenting opinion). 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." *Ante*, at 30. 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." *Ante*, at 30–31. But even if so, the legal system has for many years, in many contexts, dealt perfectly well with that variation. Take contract law. It is hornbook stuff that when (but only when) a contract is ambiguous, a court interpreting it can consult extrinsic evidence. See *CNH Industrial N.V.* v. *Reese*, 583 U. S. 133, 139 (2018) (*per curiam*). And when all interpretive tools still leave ambiguity, the contract is construed against the drafter. See *Lamps Plus, Inc.* v. *Varela*, 587 U. S. 176, 186–187 (2019). So I guess the contract rules of the 50 States are unworkable now. Or look closer to home, to doctrines this Court regularly applies. In deciding whether a government has waived sovereign immunity, we construe "[a]ny ambiguities in the statutory language" in "favor of immunity." *FAA* v. *Cooper*, 566 U. S. 284, 290 (2012). Similarly, the 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) (Barnett). More particularly, *Chevron* has a "powerful constraining effect on partisanship in judicial decisionmaking." Barnett 1463 (italics deleted); see Sunstein 1672 ("[A] predictable effect of overruling *Chevron* would be to ensure a far greater role for judicial policy preferences in statutory interpretation and far more common splits along ideological lines"). 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. *Ante*, at 32. 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. See *supra*, at 11–12; *ante*, at 27–28. 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. *Ante*, at 27; see *supra*, at 11–12. 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*, 597 U. S., at 721–724, 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," *ante*, at 32, 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. First, the majority makes clear that what is usually called *Skidmore* deference continues to apply. See *ante*, at 16–17. Under that decision, agency interpretations "constitute a body of experience and informed judgment" that may be "entitled to respect." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). If the majority thinks that the same judges who argue today about where "ambiguity" resides (see *ante*, at 30) are not going to argue tomorrow about what "respect" requires, I fear it will be gravely disappointed. Second, the majority directs courts to comply with the varied ways in which Congress in fact "delegates discretionary authority" to agencies. *Ante*, at 17–18. For example, Congress may authorize an agency to "define[]" or "delimit[]" statutory terms or concepts, or to "fill up the details" of a statutory scheme. *Ante*, at 17, and n. 5. Or Congress may use, in describing an agency's regulatory authority, inherently "flexib[le]" language like "appropriate" or "reasonable." *Ante*, at 17, and n. 6. Attending to every such delegation, as the majority says, is necessary in a world without *Chevron*. But that task involves complexities of its own. Indeed, one reason Justice Scalia supported *Chevron* was that it re-

placed 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.

On the other side of the balance, the most important *stare decisis* factor—call it the "jolt to the legal system" issue—weighs heavily against overruling *Chevron*. *Dobbs*, 597 U. S., at 357 (ROBERTS, C. J., concurring in judgment). Congress and agencies alike have relied on *Chevron*—have assumed its existence—in much of their work for the last 40 years. Statutes passed during that time reflect the expectation that *Chevron* would allocate interpretive authority between agencies and courts. Rules issued during the period likewise presuppose that statutory ambiguities were the agencies' to (reasonably) resolve. Those agency interpretations may have benefited regulated entities; or they may have protected members of the broader public. Either way, private parties have ordered their affairs—their business and financial decisions, their health-care decisions, their educational decisions—around agency actions that are suddenly now subject to challenge. In *Kisor*, this Court refused to overrule *Auer* because doing so would "cast doubt on" many longstanding constructions of rules, and thereby upset settled expectations. 588 U. S., at 587 (opinion of the Court). Overruling *Chevron*, and thus raising new doubts about agency constructions of statutes, will be far more disruptive.

The majority tries to alleviate concerns about a piece of that problem: It states that judicial decisions that have upheld agency action as reasonable under *Chevron* should not be overruled on that account alone. See *ante*, at 34–35. That is all to the good: There are thousands of such decisions, many settled for decades. See *supra*, at 26. But first,

reasonable reliance need not be predicated on a prior judicial decision. Some agency interpretations never challenged under *Chevron* now will be; expectations formed around those constructions thus could be upset, in a way the majority's assurance does not touch. And anyway, how good is that assurance, really? The majority says that a decision's "[m]ere reliance on *Chevron*" is not enough to counter the force of *stare decisis*; a challenger will need an additional "special justification." *Ante*, at 34. The majority is sanguine; I am not so much. Courts motivated to overrule an old *Chevron*-based decision can always come up with something to label a "special justification." Maybe a court will say "the quality of [the precedent's] reasoning" was poor. *Ante*, at 29. Or maybe the court will discover something "unworkable" in the decision—like some exception that has to be applied. *Ante*, at 30. All a court need do is look to today's opinion to see how it is done.

IV

> Judges are not experts in the field, and are not part of either political branch of the Government.
>
> —*Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865 (1984)

Those were the days, when we knew what we are not. When we knew that as between courts and agencies, Congress would usually think agencies the better choice to resolve the ambiguities and fill the gaps in regulatory statutes. Because agencies *are* "experts in the field." And because they *are* part of a political branch, with a claim to making interstitial policy. And because Congress has charged them, not us, with administering the statutes containing the open questions. At its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts.

Today, the majority does not respect that judgment. It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. (See *Chevron* itself.) It puts courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in regulatory statutes, and often of great import. What actions can be taken to address climate change or other environmental challenges? What will the Nation's health-care system look like in the coming decades? Or the financial or transportation systems? What rules are going to constrain the development of A.I.? In every sphere of current or future federal regulation, expect courts from now on to play a commanding role. It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges.

And that claim requires disrespecting, too, this Court's precedent. There are no special reasons, of the kind usually invoked for overturning precedent, to eliminate *Chevron* deference. And given *Chevron*'s pervasiveness, the decision to do so is likely to produce large-scale disruption. All that backs today's decision is the majority's belief that *Chevron* was wrong—that it gave agencies too much power and courts not enough. But shifting views about the worth of regulatory actors and their work do not justify overhauling a cornerstone of administrative law. In that sense too, today's majority has lost sight of its proper role.

And it is impossible to pretend that today's decision is a one-off, in either its treatment of agencies or its treatment of precedent. As to the first, this very Term presents yet another example of the Court's resolve to roll back agency authority, despite congressional direction to the contrary. See *SEC* v. *Jarkesy*, 603 U. S. ___ (2024); see also *supra*, at 3. As to the second, just my own defenses of *stare decisis*—

my own dissents to this Court's reversals of settled law—by now fill a small volume. See *Dobbs*, 597 U. S., at 363–364 (joint opinion of Breyer, SOTOMAYOR, and KAGAN, JJ.); *Edwards* v. *Vannoy*, 593 U. S. 255, 296–297 (2021); *Knick* v. *Township of Scott*, 588 U. S. 180, 207–208 (2019); *Janus*, 585 U. S., at 931–932. Once again, with respect, I dissent.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CORNER POST, INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–1008. Argued February 20, 2024—Decided July 1, 2024

Since it opened for business in 2018, petitioner Corner Post, like most merchants, has accepted debit cards as a form of payment. Debit card transactions require merchants to pay an "interchange fee" to the bank that issued the card. The fee amount is set by the payment networks (such as Visa and MasterCard) that process the transaction. In 2010 Congress tasked the Federal Reserve Board with making sure that interchange fees were "reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U. S. C. §1693*o*–2(a)(3)(A). Discharging this duty, in 2011 the Board published Regulation II, which sets a maximum interchange fee of $0.21 per transaction plus .05% of the transaction's value.

In 2021, Corner Post joined a suit brought against the Board under the Administrative Procedure Act (APA). The complaint challenged Regulation II on the ground that it allows higher interchange fees than the statute permits. The District Court dismissed the suit as time-barred under 28 U. S. C. §2401(a), the default six-year statute of limitations applicable to suits against the United States. The Eighth Circuit affirmed.

Held: An APA claim does not accrue for purposes of §2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action. Pp. 4–23.

(a) The APA grants Corner Post a cause of action subject to certain conditions, see 5 U. S. C. §702 and §704, and 28 U. S. C. §2401(a) delineates the time period in which Corner Post may assert its claim. Section 702 authorizes persons injured by agency action to obtain judicial review by suing the United States or one of its agencies, officers,

or employees. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141. The Court has explained that §702 "requir[es] a litigant to show, at the outset of the case, that he is injured in fact by agency action." *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 127. A litigant therefore cannot bring an APA claim unless and until she suffers an injury. While §702 equips injured parties with a cause of action, §704 provides that judicial review is available in most cases only for "final agency action." *Bennett* v. *Spear*, 520 U. S. 154, 177–178. Reading §702 and §704 together, a plaintiff may bring an APA claim only after she is injured by final agency action.

To determine whether Corner Post's APA claim is timely, the Court must interpret §2401(a), which provides that civil actions against the United States "shall be barred unless the complaint is filed within six years after the right of action first accrues." The Board says an APA claim "accrues" under §2401(a) when agency action is "final" for purposes of §704; the claim can accrue for purposes of the statute of limitations even before the plaintiff suffers an injury. The Court disagrees. A right of action "accrues" when the plaintiff has a "complete and present cause of action," which is when she has the right to "file suit and obtain relief." *Green* v. *Brennan*, 578 U. S. 547, 554. Because an APA plaintiff may not file suit and obtain relief until she suffers an injury from final agency action, the statute of limitations does not begin to run until she is injured. Pp. 4–6.

(b) Congress enacted §2401(a) in 1948, two years after it enacted the APA. Section 2401(a)'s predecessor was the statute-of-limitations provision for the Little Tucker Act, which provided for district court jurisdiction over certain claims against the United States. When Congress revised and recodified the Judicial Code in 1948, it converted the Little Tucker Act's statute of limitations into §2401(a)'s general statute of limitations for all suits against the Government. But Congress continued to start the statute of limitations period when the right "accrues." Compare 36 Stat. 1093 ("after the right accrued for which the claim is made") with §2401(a) ("after the right of action first accrues").

"Accrue" had a well-settled meaning in 1948, as it does now: A "right accrues when it comes into existence," *United States* v. *Lindsay*, 346 U. S. 568, 569—*i.e.*, "when the plaintiff has a complete and present cause of action," *Gabelli* v. *SEC*, 568 U. S. 442, 448. This definition has appeared "in dictionaries from the 19th century up until today," which explain that a cause of action accrues when a suit may be maintained thereon. 568 U. S., at 448. Thus, a cause of action does not become complete and present—it does not *accrue*—"until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning*

Pension Trust Fund v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201. Contemporaneous legal dictionaries explained that a claim does not "accrue" as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court.

The Court's precedent treats this definition of accrual as the "standard rule for limitations periods," *Green*, 578 U. S., at 554, and the Court has "repeatedly recognized that Congress legislates against" this standard rule, *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, 418. Conversely, the Court has "reject[ed]" the possibility that a "limitations period commences at a time when the [plaintiff] could not yet file suit" as "inconsistent with basic limitations principles." *Bay Area Laundry*, 522 U. S., at 200. The Court will not reach such a conclusion "in the absence of any such indication in the text of the limitations period." *Green*, 578 U. S., at 554. Departing from the traditional rule is particularly inappropriate here because contemporaneous statutes demonstrate that Congress in 1948 knew how to create a limitations period that begins with the defendant's action instead of the plaintiff's injury.

The Board would have this Court interpret §2401(a) as a defendant-protective statute of repose that begins to run when agency action becomes final. A statute of repose "puts an outer limit on the right to bring a civil action" that is "measured. . . from the date of the last culpable act or omission of the defendant." *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 8. But §2401(a)'s plaintiff-focused language makes it a "statute of limitations," which—in contradistinction to statutes of repose—are "based on the date when the claim accrued." *Id.*, at 7–8. Pp. 6–10.

(c) The Board's arguments to the contrary lack merit. Pp. 10–23.

(1) The Board points to the many specific statutory review provisions that start the clock at finality, contending that such statutes reflect a standard administrative-law practice of starting the limitations period when "any proper plaintiff" can challenge the final agency action. But unlike the specific review provisions that the Board cites, §2401(a) does *not* refer to the date of the agency action's "entry" or "promulgat[ion]"; it says "right of action first accrues." That textual difference matters. The latter language reflects a statute of limitations and the former a statute of repose. Moreover, the specific review provisions illustrate that Congress has sometimes employed the Board's preferred final-agency-action rule—but did not do so in §2401(a). As the Court observed in *Rotkiske* v. *Klemm*, it is "particularly inappropriate" to read language into a statute of limitations "when, as here, Congress has shown that it knows how to adopt the omitted language or provision." 589 U. S. 8, 14. Moreover, most of the finality-focused statutes that the Board cites came *after* §2401(a) was enacted in 1948. These other, textually distinct statutes therefore do

not establish a background presumption that the limitations period for facial challenges to agency rules begins when the rule is final. Given the settled, plaintiff-centric meaning of "right of action first accrues" in 1948—not to mention in the Little Tucker Act before it—the Board cannot "displace" this "standard rule" for limitations periods. *Green*, 578 U. S., at 554.

While the Board argues that §2401(a) should not be interpreted to adopt a "challenger-by-challenger" approach, the standard accrual rule that §2401(a) exemplifies is *plaintiff specific*. The Board reads §2401(a) as if it says "the complaint is filed within six years after a right of action [*i.e.*, *anyone's* right of action] first accrues"—which it does not say. Rather, §2401(a)'s text focuses on when the specific plaintiff had the right to sue: It says "*the* complaint is filed within six years after *the* right of action first accrues." (Emphasis added). And the Court has explained that the traditional accrual rule looks to when *the* plaintiff—this particular plaintiff—has a complete and present cause of action. See *Green*, 578 U. S., at 554. No precedent supports the Board's hypothetical "when could someone else have sued" sort of inquiry.

Importing the Board's special administrative-law rule into §2401(a) would create a defendant-focused rule for agency suits while retaining the traditional challenger-specific accrual rule for other suits against the United States. That would give the same statutory text—"right of action first accrues"—different meanings in different contexts, even though those words had a single, well-settled meaning when Congress enacted §2401(a). The Court "will not infer such an odd result in the absence of any such indication in the text of the limitations period." *Green*, 578 U. S., at 554. Pp. 10–16.

(2) The Board maintains that §2401(a)'s tolling provision—which provides that "[t]he action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases"—"reflects Congress's understanding that a claim can 'accrue[]' for purposes of Section 2401(a)" even when a person is unable to sue. Brief for Respondent 24. While true, the tolling exception applies when the plaintiff *had* a complete and present cause of action after he was injured but his legal disability or absence from the country prevented him from bringing a timely suit. The exception sheds no light on when the clock started for Corner Post. P. 16.

(3) The Court's precedents in *Reading Co.* v. *Koons*, 271 U. S. 58, and *Crown Coat Front Co.* v. *United States*, 386 U. S. 503, do not support the Board's unusual interpretation of "accrual." In *Koons*, the Court held that a statutory wrongful-death claim accrued upon the

death of the employee, not on the appointment of an estate administrator, even though the latter was the "only person authorized by the statute to maintain the action." *Koons*, 271 U. S., at 60. The Board interprets *Koons* to hold that a claim accrued at a time when no plaintiff could sue, just as it says Corner Post's claim "accrued" before it could sue. But in *Koons*, the beneficiaries on whose behalf any administrator would seek relief—the "real parties in interest"—had the right to "procure the action" after the employee died. Given this unique context, *Koons* does not contradict the proposition that a claim generally accrues when the plaintiff has a complete and present cause of action. Next, the Board relies on dicta in *Crown Coat* to support its contention that the word "accrues" can take on different meanings in different contexts. But the Board misreads *Crown Coat*, which did not suggest that the words "right of action first accrues" *in a single statute* should mean different things in different contexts. Instead, the Court interpreted §2401(a)—the very statute at issue here—to embody the traditional rule that a claim accrues when the plaintiff has the right to bring suit in court. Pp. 16–20.

(4) Finally, the Board raises policy concerns. It emphasizes that agencies and regulated parties need the finality of a 6-year cutoff, and that successful facial challenges filed after six years upset the reliance interests of those that have long operated under existing rules. But "pleas of administrative inconvenience . . . never 'justify departing from the statute's clear text.'" *Niz-Chavez* v. *Garland*, 593 U. S. 155, 169 (quoting *Pereira* v. *Sessions*, 585 U. S. 198, 217). Congress could have chosen different language in §2401(a) or created a general statute of repose for agencies, but it did not. In any event, the Board's policy concerns are overstated because regulated parties may always challenge a regulation as exceeding the agency's statutory authority in enforcement proceedings against them. Moreover, there are significant interests supporting the plaintiff-centric accrual rule, including the APA's "basic presumption" of judicial review, *Abbott Labs.*, 387 U. S., at 140, and our "deep-rooted historic tradition that everyone should have his own day in court," *Richards* v. *Jefferson County*, 517 U. S. 793, 798. Pp. 20–23.

55 F. 4th 634, reversed and remanded.

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

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

No. 22–1008

CORNER POST, INC., PETITIONER *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 1, 2024]

JUSTICE BARRETT delivered the opinion of the Court.

The default statute of limitations for suits against the United States requires "the complaint [to be] filed within six years after the right of action first accrues." 28 U. S. C. §2401(a). We must decide when a claim brought under the Administrative Procedure Act "accrues" for purposes of this provision. The answer is straightforward. A claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action.

I

Corner Post is a truckstop and convenience store located in Watford City, North Dakota. It was incorporated in 2017, and in 2018, it opened for business. Like most merchants, Corner Post accepts debit cards as a form of payment. While convenient for customers, debit cards are costly for merchants: Every transaction requires them to pay an "interchange fee" to the bank that issued the card. The amount of the fee is set by the payment networks, like Visa and Mastercard, that process the transaction between

the banks of merchants and cardholders. The cost quickly adds up. Since it opened, Corner Post has paid hundreds of thousands of dollars in interchange fees—which has meant higher prices for its customers.

Interchange fees have long been a sore point for merchants. For many years, payment networks had free rein over the fee amount—and because they used the promise of per-transaction profit to compete for the banks' business, they had significant incentive to raise the fees. Merchants—who would lose customers if they declined debit cards—had little choice but to pay whatever the networks charged. Left unregulated, interchange fees ballooned.

Congress eventually stepped in. The Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 tasks the Federal Reserve Board with setting "standards for assessing whether the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 124 Stat. 2068, 15 U. S. C. §1693*o*–2(a)(3)(A). Discharging this duty, the Board promulgated Regulation II, which sets a maximum interchange fee of $0.21 per transaction plus .05% of the transaction's value. See Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43394, 43420 (2011). The Board published the rule on July 20, 2011.

Four months later, a group of retail-industry trade associations and individual retailers sued the Board, arguing that Regulation II allows costs that the statute does not. See *NACS* v. *Board of Governors of FRS*, 958 F. Supp. 2d 85, 95–96 (DC 2013). The District Court agreed, *id.*, at 99–109, but the D. C. Circuit reversed, concluding "that the Board's rules generally rest on reasonable constructions of the statute," *NACS* v. *Board of Governors of FRS*, 746 F. 3d 474, 477 (2014).

Corner Post, of course, did not exist when the Board

adopted Regulation II or even during the D. C. Circuit litigation. But after opening its doors, it too became frustrated by interchange fees, and in 2021, joined a suit brought against the Board under the Administrative Procedure Act (APA). The complaint alleges that Regulation II is unlawful because it allows payment networks to charge higher fees than the statute permits. See 5 U. S. C. §§706(2)(A), (C).

The District Court dismissed the suit as barred by 28 U. S. C. §2401(a), the applicable statute of limitations, 2022 WL 909317, *7–*9 (ND, Mar. 11, 2022), and the Eighth Circuit affirmed, *North Dakota Retail Assn.* v. *Board of Governors of FRS*, 55 F. 4th 634 (2022). Following other Circuits, it distinguished between "facial" challenges to a rule (like Corner Post's challenge to Regulation II) and challenges to a rule "as-applied" to a particular party. *Id.*, at 640–641. The Eighth Circuit held that "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." *Id.*, at 641. On this view, §2401(a)'s 6-year limitations period began in 2011, when the Board published Regulation II, and expired in 2017, before Corner Post swiped its first debit card. See *id.*, at 643. Corner Post's suit was therefore too late.

The Eighth Circuit's decision deepened a circuit split over when §2401(a)'s statute of limitations begins to run for APA suits challenging agency action. At least six Circuits now hold that the limitations period for "facial" APA challenges begins on the date of final agency action—*e.g.*, when the rule was promulgated—regardless of when the plaintiff was injured. See, *e.g.*, *id.*, at 641; *Wind River Min. Corp.* v. *United States*, 946 F. 2d 710, 715 (CA9 1991); *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F. 3d 1283, 1287 (CA5 1997); *Harris* v. *FAA*, 353 F. 3d 1006, 1009–1010 (CADC 2004); *Hire Order Ltd.* v. *Marianos*, 698 F. 3d 168, 170 (CA4 2012); *Odyssey Logistics & Tech. Corp.* v. *Iancu*, 959 F. 3d 1104, 1111–1112 (CA Fed.

2020). By contrast, the Sixth Circuit has stated a generally applicable rule that §2401(a)'s limitations period begins when the plaintiff is injured by agency action, even if that injury did not occur until many years after the action became final. *Herr* v. *United States Forest Serv.*, 803 F. 3d 809, 820–822 (2015) ("When a party first becomes aggrieved by a regulation that exceeds an agency's statutory authority more than six years after the regulation was promulgated, that party may challenge the regulation without waiting for enforcement proceedings" (emphasis deleted)). We granted certiorari to resolve the split. 600 U. S. ___ (2023).

II

Three statutory provisions control our analysis: 5 U. S. C. §702 and §704, the relevant APA provisions, and 28 U. S. C. §2401(a), the relevant statute of limitations. The APA provisions grant Corner Post a cause of action subject to certain conditions, and §2401(a) sets the window within which Corner Post can assert its claim.

Section 702 authorizes persons injured by agency action to obtain judicial review by suing the United States or one of its agencies, officers, or employees. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967). It provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U. S. C. §702. We have explained that §702 "requir[es] a litigant to show, at the outset of the case, that he is injured in fact by agency action." *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 127 (1995). Thus, a litigant cannot bring an APA claim unless and until she suffers an injury.[1]

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[1]The dissent asserts that §702 "restricts *who* may challenge agency

While §702 equips injured parties with a cause of action, §704 limits the agency actions that are subject to judicial review. Unless another statute makes the agency's action reviewable (and none does for Regulation II), judicial review is available only for "final agency action." §704. In most cases, then, a plaintiff can only challenge an action that "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U. S. 154, 177–178 (1997) (internal quotation marks omitted). Note that §702's injury requirement and §704's finality requirement work hand in hand: Each is a "necessary, but not by itself . . . sufficient, ground for stating a claim under the APA." *Herr*, 803 F. 3d, at 819.

The applicable statute of limitations, 28 U. S. C. §2401(a), contains the language we must interpret: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years *after the right of action first accrues*." (Emphasis added.) This provision applies generally to suits against the United States unless the timing provision of a more specific statute displaces it. See, *e.g.*, 33 U. S. C. §1369(b) (deadline to challenge certain agency actions under the Clean Water Act).

The Board contends that an APA claim "accrues" when agency action is "final" for purposes of §704—injury, it says,

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action," yet its injury requirement "says nothing about" the cause of action or elements of the claim. *Post*, at 16. But surely the dissent does not mean to suggest that an *uninjured* person may bring an APA claim. Whether one calls injury a restriction on who may sue or an element of the cause of action, the relevant, undisputed point is that a plaintiff cannot sue under the APA unless she is "injured in fact by agency action." *Newport News*, 514 U. S., at 127.

is necessary for the suit but irrelevant to the statute of limitations.[2] We disagree. A right of action "accrues" when the plaintiff has a "complete and present cause of action"—*i.e.*, when she has the right to "file suit and obtain relief." *Green* v. *Brennan*, 578 U. S. 547, 554 (2016) (internal quotation marks omitted). An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured.

III

Congress enacted §2401(a) in 1948, two years after it enacted the APA. See 62 Stat. 971. Section 2401(a)'s predecessor was the statute-of-limitations provision for the Little Tucker Act, which gave district courts jurisdiction over non-tort monetary claims not exceeding $10,000 against the United States. See §24, 36 Stat. 1093 ("That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made"); Brief for Professor Aditya Bamzai et al. as *Amici Curiae* 5–6. When Congress revised and recodified the Judicial Code in 1948, it converted the Little Tucker Act's statute of limitations into a general statute of limitations for all

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[2] The Board leaves open the possibility that someone could bring an as-applied challenge to a rule when the agency relies on that rule in enforcement proceedings against that person, even if more than six years have passed since the rule's promulgation. But Corner Post, as a merchant rather than a payment network, is not regulated by Regulation II—so it will never be the target of an enforcement action in which it could challenge that rule. JUSTICE KAVANAUGH asserts that "Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules." *Post*, at 1 (concurring opinion). Whether the APA authorizes vacatur has been subject to thoughtful debate by Members of this Court. See, *e.g.*, *United States* v. *Texas*, 599 U. S. 670, 693–702 (2023) (GORSUCH, J., concurring in judgment). We took this case only to decide how §2401(a)'s statute of limitations applies to APA claims. We therefore assume without deciding that vacatur is available under the APA.

suits against the Government—replacing "under this paragraph" with "every civil action against the United States." But Congress continued to start the 6-year limitations period when the right "accrues." Compare 36 Stat. 1093 ("after the right accrued for which the claim is made") with §2401(a) ("after the right of action first accrues").

In 1948, as now, "accrue" had a well-settled meaning: A "right accrues when it comes into existence," *United States* v. *Lindsay*, 346 U. S. 568, 569 (1954)—*i.e.*, "'when the plaintiff has a complete and present cause of action,'" *Gabelli* v. *SEC*, 568 U. S. 442, 448 (2013) (quoting *Wallace* v. *Kato*, 549 U. S. 384, 388 (2007)). This definition has appeared "in dictionaries from the 19th century up until today." *Gabelli*, 568 U. S., at 448. Legal dictionaries in the 1940s and 1950s uniformly explained that a cause of action "'accrues' when a suit may be maintained thereon." Black's Law Dictionary 37 (4th ed. 1951) (Black's); see also, *e.g.*, Ballentine's Law Dictionary 15–16 (2d ed. 1948) (Ballentine's) ("[A]ccrual of cause of action" defined as the "coming or springing into existence of a right to sue" (boldface deleted)). Thus, we have explained that a cause of action "does not become 'complete and present' for limitations purposes"—it does not *accrue*—"until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997).

Importantly, contemporaneous dictionaries also explained that a cause of action accrues "on [the] date that damage is sustained and not [the] date when causes are set in motion which ultimately produce injury." Black's 37. "[I]f an act is not legally injurious until certain consequences occur, it is not the mere doing of the act that gives rise to a cause of action, but the subsequent occurrence of damage or loss as the consequence of the act, and *in such case no cause of action accrues until the loss or damage occurs*." Ballentine's 16 (emphasis added). Thus, when Congress used the phrase "right of action first accrues" in

§2401(a), it was well understood that a claim does not "accrue" as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court.

Our precedent treats this definition of accrual as the "standard rule for limitations periods." *Green*, 578 U. S., at 554. "We have repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, 418 (2005) (quoting *Bay Area Laundry*, 522 U. S., at 201). It is "unquestionably the traditional rule" that "[a]bsent other indication, a statute of limitations begins to run at the time the plaintiff 'has the right to apply to the court for relief.'" *TRW Inc.* v. *Andrews*, 534 U. S. 19, 37 (2001) (Scalia, J., concurring in judgment) (quoting 1 H. Wood, Limitation of Actions §122a, p. 684 (rev. 4th ed. 1916) (Wood)). Conversely, we have "reject[ed]" the possibility that a "limitations period commences at a time when the [plaintiff] could not yet file suit" as "inconsistent with basic limitations principles." *Bay Area Laundry*, 522 U. S., at 200.

This traditional rule constitutes a strong background presumption. While the "standard rule can be displaced such that the limitations period begins to run before a plaintiff can file a suit," we "'will not infer such an odd result in the absence of any such indication' in the text of the limitations period." *Green*, 578 U. S., at 554 (quoting *Reiter* v. *Cooper*, 507 U. S. 258, 267 (1993)). "Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U. S., at 201.

There is good reason to conclude that Congress codified the traditional accrual rule in §2401(a). Nothing "in the text of [§2401(a)'s] limitations period" gives any indication that it begins to run before the plaintiff has a complete and

present cause of action. *Green*, 578 U. S., at 554. Rather, §2401(a) uses standard language that had a well-settled meaning in 1948: "right of action first accrues." Moreover, Congress knew how to depart from the traditional rule to create a limitations period that begins with the defendant's action instead of the plaintiff's injury: Just six years before it enacted §2401(a), Congress passed the Emergency Price Control Act of 1942, which required challenges to Office of Price Administration actions to be filed "[w]ithin a period of sixty days *after the issuance of any regulation or order*." §203(a), 56 Stat. 31 (emphasis added); see also Administrative Orders Review Act (Hobbs Act), §4, 64 Stat. 1130 (1950) (allowing petitions for review "within sixty days after entry of" a "final order reviewable under this Act"). Section 2401(a), by contrast, stuck with the standard accrual language.

Section 2401(a) thus operates as a statute of limitations rather than a statute of repose. "[A] statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 7–8 (2014) (quoting Black's 1546 (9th ed. 2009)). That describes §2401(a), with its reference to when the right of action "accrues," to a tee. "A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action" that is "measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." 573 U. S., at 8. Such statutes bar "'any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury.'" *Ibid.* (quoting Black's 1546). That describes statutes like the Hobbs Act, which sets a filing deadline of 60 days from the "entry" of the agency order. 64 Stat. 1130. Statutes of limitations "require plaintiffs to pursue diligent prosecution of known claims"; statutes of repose reflect a "legislative judgment that a defendant should be free from liability after the

legislatively determined period of time." *CTS Corp.*, 573 U. S., at 8–9 (internal quotation marks omitted).[3] The Board asks us to interpret §2401(a) as a defendant-protective statute of repose that begins to run when agency action becomes final. But §2401(a)'s plaintiff-focused language makes it an accrual-based statute of limitations.

* * *

Section 2401(a) embodies the plaintiff-centric traditional rule that a statute of limitations begins to run only when the plaintiff has a complete and present cause of action. Because injury, not just finality, is required to sue under the APA, Corner Post's cause of action was not complete and present until it was injured by Regulation II. Therefore, its suit is not barred by the statute of limitations.

IV

The Board concedes that some claims accrue for purposes of §2401(a) when the plaintiff has a complete and present cause of action—in other words, it admits that "accrue" carries its usual meaning for some claims. But it argues that facial challenges to agency rules are different, accruing when agency action is final rather than when the plaintiff can assert her claim. See also *post*, at 5–6 (JACKSON, J., dissenting). The Board raises several arguments to support its position, but none work.

A

The Board puts the most weight on the many specific statutory review provisions that start the clock at finality. See also *post*, at 12–15 (JACKSON, J., dissenting). The

[3] Perplexingly, the dissent rejects this distinction, *post*, at 10–11, even though our precedent clearly recognizes it: *CTS Corp.* acknowledged the "substantial overlap between the policies of the two types of statute" but concluded nonetheless that "each has a distinct purpose and each is targeted at a different actor." 573 U. S., at 8.

Hobbs Act, for example, requires persons aggrieved by certain final orders and regulations of the Federal Communications Commission, Secretary of Agriculture, and Secretary of Transportation, among others, to petition for review "within 60 days after [the] entry" of the final agency action. 28 U. S. C. §§2342, 2344; see also, *e.g.*, 29 U. S. C. §655(f) (suits challenging Occupational Safety and Health Administration standards must be filed "prior to the sixtieth day after such standard is promulgated"). The Board contends that such statutes reflect a standard administrative-law practice of starting the limitations period when "any proper plaintiff" can challenge the final agency action. Brief for Respondent 9. There is "no sound basis," it insists, "for instead applying a challenger-by-challenger approach to calculate the limitations period on APA claims." *Ibid.*; see also *post*, at 9–10 (JACKSON, J., dissenting).

1

This argument hits the immutable obstacle of §2401(a)'s text. Unlike the specific review provisions that the Board cites, §2401(a) does *not* refer to the date of the agency action's "entry" or "promulgat[ion]"; it says "right of action first accrues." That textual difference matters. To begin, the latter language reflects a statute of limitations and the former a statute of repose. Moreover, the specific review provisions actually undercut the Board's argument, because they illustrate that Congress has sometimes employed the Board's preferred final-agency-action rule—but did not do so in §2401(a). As we observed in *Rotkiske* v. *Klemm*, it is "particularly inappropriate" to read language into a statute of limitations "when, as here, Congress has shown that it knows how to adopt the omitted language or provision." 589 U. S. 8, 14 (2019).

In arguing to the contrary, *post*, at 12–16, the dissent ignores the textual differences between §2401(a) and finality-

focused specific review provisions—flouting *Rotkiske*'s admonition to heed such distinctions. According to the dissent, we cannot expect "Congress to have explicitly stated that accrual in §2401(a) starts at the point of final agency action when §2401(a) is a residual provision" that applies generally. *Post*, at 15. But §2401(a)'s text reflects a choice: Congress took the Little Tucker Act's plaintiff-focused limitations period—which began when "the right accrued for which the claim is made," 36 Stat. 1093—and made it generally applicable to "every" suit against the United States, §2401(a); see Part III, *supra*. Congress could have created a separate residual provision for suits challenging agency action and pegged its limitations period to the moment of finality, using statutes like the Emergency Price Control Act as a model. It chose a different path.

Undeterred, the dissent insists that by the time §2401(a) was enacted, Congress had "uniformly expressed [a] judgment" that the limitations period for agency suits should be defendant-centric and start with finality. *Post*, at 14. Again, this argument disregards §2401(a)'s text in favor of alleged congressional intent divined from *other* statutes with very different language. "As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text"; the Court "may not 'replace the actual text with speculation as to Congress' intent.'" *Oklahoma* v. *Castro-Huerta*, 597 U. S. 629, 642 (2022) (quoting *Magwood* v. *Patterson*, 561 U. S. 320, 334 (2010)).

In any event, the dissent misunderstands the history. See *post*, at 14, and n. 6. (Notably, the Board itself does not make this argument.) While the Emergency Price Control Act of 1942 preceded the APA (1946) and §2401(a) (1948), most finality-focused limitations provisions, like the Hobbs Act (1950), came later. See *post*, at 12–13, and n. 5; *e.g.*, 5 U. S. C. §7703(b)(1) (added by 92 Stat. 1143 (1978)). To conjure its supposed backdrop, the dissent cites a hodgepodge

of other pre-1948 statutes that started the clock at finality. *Post*, at 14, n. 6. But these statutes generally governed challenges to orders adjudicating a party's own rights—what we today might call "as-applied" challenges. For example, 7 U. S. C. §194(a) provided a 30-day limitations period for a meatpacker to appeal an order finding that the packer "has violated or is violating any provision" of the statute regulating business practices in the meatpacking industry. 42 Stat. 161–162; see also, *e.g.*, 15 U. S. C. §45(c) (persons required by a Federal Trade Commission order to cease a business practice may obtain review of that order within 60 days). Statutes like these do not contradict the plaintiff-centric standard accrual rule, because a party subject to such an order suffers legally cognizable injury at the same time that the order becomes final.[4]

Thus, even if the "intention" Congress "expressed" in textually distinct statutes could overcome §2401(a)'s language, *post*, at 14, the dissent's history would not support its supposed background presumption—that the limitations period for facial challenges to regulations begins when the rule becomes final even if the plaintiff does not yet have a complete and present cause of action. Instead, the best course, as always, is to stick with the ordinary meaning of the text that actually applies, §2401(a). Given the settled, plaintiff-centric meaning of "right of action first accrues" in

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[4]There is another reason to doubt the dissent's supposed background limitations principle for facial challenges to agency rules: In the 1940s, "most administrative activity was adjudicative in nature"; agencies "rarely, if ever, adopted sweeping regulations." K. Hickman & R. Pierce, 1 Administrative Law §1.3, p. 26 (7th ed. 2024). The dissent errs by extrapolating a general congressional intent that all agency suits be subject to a finality-based limitations rule based on pre-1948 statutes that governed a subset of agency actions—adjudicative orders—and were enacted before facial challenges to regulations became common. It is hard to see how provisions governing when a party may challenge an order adjudicating her own rights could set any kind of background rule for facial APA challenges to generally applicable regulations.

1948—not to mention in the Little Tucker Act—the dissent cannot "displace" this "standard rule" with scattered citations to different, inapposite statutes. *Green*, 578 U. S., at 554.

2

The standard accrual rule that §2401(a)'s limitations period exemplifies is *plaintiff specific*—even if repose provisions like the Hobbs Act eschew a "challenger-by-challenger" approach. Brief for Respondent 9. The Board's rule would start the limitations period applicable to the plaintiff not when *she* had a complete and present cause of action but when the agency action was final and, theoretically, some *other* plaintiff was injured and could have sued. But §2401(a)'s text focuses on a specific plaintiff: "*the* complaint is filed within six years after *the* right of action first accrues." (Emphasis added.)

The dissent disputes §2401(a)'s plaintiff specificity by pointing out that it does not say "*the plaintiff's* right of action first accrues." *Post*, at 9. True, but it does use the definite article "the" to link "*the* complaint" with "*the* right of action." So the most natural interpretation is that its limitations period begins when *the cause of action associated with the complaint*—the plaintiff's cause of action—is complete. And while the dissent cites dictionary definitions of "accrue" that mention "'*a* right to sue,'" *ibid.*, the statute's use of the definite article "the" takes precedence. The Board and the dissent read §2401(a) as if it says "the complaint is filed within six years after a right of action [*i.e.*, *anyone's* right of action] first accrues"—which, of course, it does not.

In fact, we have explained that the traditional accrual rule looks to when "*the* plaintiff"—this particular plaintiff—"has a complete and present cause of action." *Green*, 578 U. S., at 554 (internal quotation marks omitted; emphasis added). No precedent suggests that the traditional rule contemplates the Board's hypothetical "when could

someone else have sued" sort of inquiry.[5] Rather, the "statute of limitations begins to run at the time *the plaintiff* has the right to apply to the court for relief." *TRW Inc.*, 534 U. S., at 37 (opinion of Scalia, J.) (internal quotation marks omitted; emphasis added).[6]

Importing the Board's special administrative-law rule into §2401(a) would create a defendant-focused rule for agency suits while retaining the traditional challenger-specific accrual rule for other suits against the United States. That would give the same statutory text—"right of action first accrues"—different meanings in different contexts, even though those words had a single, well-settled meaning when Congress enacted §2401(a). See Part III, *supra*. The Board's interpretation would thereby decouple the statute of limitations from any injury "such that the limitations period begins to run before a plaintiff can file a suit"—for *some*, *but not all*, suits governed by §2401(a). *Green*, 578 U. S., at 554. We "will not infer such an odd result in the

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[5] While the dissent attempts to cabin our precedent describing the plaintiff-specific standard accrual rule, nothing in those cases suggests that the rule is only plaintiff-specific for "plaintiff-specific causes of action." *Post*, at 10; see, *e.g.*, *Gabelli* v. *SEC*, 568 U. S. 442, 448 (2013) (The "'standard rule'" that a "claim accrues 'when the plaintiff has a complete and present cause of action'" has "governed since the 1830s" and "appears in dictionaries from the 19th century up until today"). And regardless, the dissent's assertion that "administrative-law claims" are *not* "plaintiff specific," *post*, at 6, is mystifying given that an APA plaintiff cannot sue until *she* suffers an injury, see 5 U. S. C. §702; n. 1, *supra*. By emphasizing the plaintiff-agnostic aspects of facial challenges to agency action, *post*, at 10, 16–18, the dissent conflates the defendant-focused *substance* of an APA claim with its plaintiff-specific *cause of action*.

[6] Moreover, there may be cases where *no one* is injured and able to sue at the time of final agency action—*e.g.*, if the agency delays a rule's enforcement—but the Board would still start the clock then. Cf. *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U. S. 158, 162–166 (1967) (agency rule was final but challenge was not yet ripe). So the Board's position cannot be reconciled even with a challenger-agnostic form of the traditional accrual rule, which at least would require that *someone* have a complete and present cause of action before the limitations period begins.

absence of any such indication in the text of the limitations period." *Ibid.* (internal quotation marks omitted).

B

Turning to §2401(a)'s text, the Board draws significance from this sentence: "The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." This language, the Board stresses, "necessarily reflects Congress's understanding that a claim can 'accrue[]' for purposes of Section 2401(a)" even when a person is unable to sue. Brief for Respondent 24. True enough. It is a mystery, however, why the Board finds this helpful. The tolling exception applies when the plaintiff *had* a complete and present cause of action after he was injured but his legal disability or absence from the country "prevent[ed] him from bringing a timely suit." *Goewey* v. *United States*, 222 Ct. Cl. 104, 113, 612 F. 2d 539, 544 (1979) (*per curiam*). What matters for accrual is when the plaintiff had "the *right* to apply to the court for relief," not whether some external impediment prevented her from doing so. Wood §122a, at 684 (emphasis added). The exception, therefore, sheds no light on when the clock started ticking for Corner Post—but it does show Congress's concern for plaintiffs who might lose a cause of action through no fault of their own.

C

The Board also leans on our precedent—namely, *Reading Co.* v. *Koons*, 271 U. S. 58 (1926), and *Crown Coat Front Co.* v. *United States*, 386 U. S. 503 (1967)—to support its unusual interpretation of "accrual." See also *post*, at 6–9 (JACKSON, J., dissenting). Again, the Board comes up empty.

In *Koons*, we interpreted the statute of limitations under the Federal Employers' Liability Act, which barred actions

brought more than two years after "'the cause of action accrued.'" 271 U. S., at 60 (quoting ch. 149, §6, 35 Stat. 66). We held that the plaintiff's wrongful-death claim accrued when the employee died, even though the estate's administrator was not appointed until later and the administrator was "the only person authorized by the statute to maintain the action." 271 U. S., at 60. The Board interprets *Koons* to hold that a claim accrued at a time when no plaintiff could sue. Thus, the Board reasons, it is consistent with the meaning of "accrue" to say that Corner Post's claim "accrued" before it could sue.

The Board's characterization of *Koons* is incomplete. *Koons* explained that the administrator "acts only for the benefit of persons specifically designated in the statute," and at the "time of death there are identified persons for whose benefit the liability exists and who can start the machinery of the law in motion to enforce it, by applying for the appointment of an administrator." *Id.*, at 62. If a beneficiary sued in her individual capacity immediately after the employee's death, she could amend her suit to describe herself as "executor or administrator of the decedent." *Ibid.* So "at the death of decedent, there are real parties in interest who may procure the action to be brought." *Id.*, at 62–63. While it is true that the claim accrued before any particular administrator was appointed, the beneficiaries on whose behalf any administrator would seek relief—the "real parties in interest"—had the right to "procure the action" after the employee died. Given this unique context, *Koons* does not contradict the proposition that a claim generally accrues when the plaintiff has a complete and present cause of action.

Nor does *Crown Coat*. That case concerned a contract dispute in which a Government contractor sought an equitable adjustment to the payment it received. 386 U. S., at 507. The contract required the contractor to present its claim to the contracting officer and Armed Services Board

of Contract Appeals; its claim was "not subject to adjudication in the courts" until it was denied by the Board. *Id.*, at 511. The question presented was whether §2401(a)'s statute of limitations began to run when the Board issued its final determination or at an earlier date. *Id.*, at 507.

We held that the right of action first accrued when the Board denied the contractor's claim, because the contractor had "the right to resort to the courts only upon the making of that administrative determination." *Id.*, at 512. We explained that §2401(a)'s phrase "right of action" refers to "the right to file a civil action in the courts against the United States." *Id.*, at 511. Given the contract's administrative-exhaustion requirement, "the contractor's claim was subject only to administrative, not judicial, determination in the first instance"; the plaintiff was "not legally entitled to ask the courts to adjudicate [its] claim as an original matter." *Id.*, at 511–512, 515. So its "claim or right to bring a civil action against the United States" did not "matur[e]" until the Board made its final decision. *Id.*, at 514. *Crown Coat* thus supports Corner Post: The Court interpreted §2401(a) to embody the traditional rule that a claim accrues when the plaintiff has the right to bring suit in court.

Notwithstanding *Crown Coat*'s holding, the Board and the dissent try to marshal support from its dicta. The Court noted that it is hazardous "to define for all purposes when a 'cause of action' first 'accrues'"; it cautioned that those words should be "'interpreted in the light of the general purposes of the statute and of its other provisions'" and the "'practical ends'" served by time limitations. *Id.*, at 517 (quoting *Koons*, 271 U. S., at 62). Seizing on this language, the Board insists that the word "accrues" is a chameleon, taking on different meanings in different contexts—and in the administrative-law context, a right of action "accrues" when a regulation is final, full stop. See also *post*, at 6 (JACKSON, J., dissenting) (citing *Crown Coat* for the proposition that "the word 'accrues' lacks any fixed meaning").

The Board and the dissent vastly overread—in fact, they misread—*Crown Coat*. The Court did not suggest that the same words "right of action first accrues" *in a single statute* should mean different things in different contexts—which is how the Board and the dissent would have us interpret §2401(a). Rather, the Court made its observation in the course of distinguishing §2401(a) from a statutory scheme that departed from the traditional accrual rule.[7] 386 U. S., at 516–517. Moreover, as we have already explained, the Court interpreted §2401(a)—the very statute at issue in this case—to start the clock when the plaintiff is "legally entitled" to file suit. *Id.*, at 515. It also specifically rejected the Government's position that the time can run even before a plaintiff's "civil action against the United States matures." *Id.*, at 514; see also *ibid.* (noting that the Government's position "would have unfortunate impact"). We therefore do not read *Crown Coat*'s "general purposes" language to contradict either its holding or the "'standard rule' for limitations periods." *Green*, 578 U. S., at 554.

Even if *Crown Coat*'s dicta supported sapping "accrues" of any "fixed meaning," *post*, at 6 (JACKSON, J., dissenting), this approach has been contravened by the weight of subse-

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[7]The Court distinguished the limitations scheme at issue in *McMahon* v. *United States*, 342 U. S. 25 (1951). That scheme involved two statutes: one requiring "actions to be brought within two years after 'the cause of action arises'" and another "permit[ting] court action only if the claim ha[d] been administratively disallowed, but set[ting] no time within which a claim must be presented to the administrative body." *Crown Coat*, 386 U. S., at 516–517. The *McMahon* Court held that the claim accrued not after the administrative disallowance that would enable the plaintiff to sue in court, but at the time of the plaintiff's earlier injury. 342 U. S., at 27. *Crown Coat* attributed this holding to the unique two-statute context: "[P]ostpon[ing] the usual time of accrual of the cause of action [*i.e.*, the time of injury] until the date of disallowance" would have "permit[ted] the claimant to postpone indefinitely the commencement of the running of the statutory period." 386 U. S., at 517; see *McMahon*, 342 U. S., at 27.

quent precedent. Our limitations cases from the last several decades have instead emphasized the strength of the traditional, plaintiff-centric accrual rule and demanded that departures be justified by the statutory "text of the limitations period." *Green*, 578 U. S., at 554; see also, *e.g.*, *Graham County*, 545 U. S., at 418–419 (explaining that in *Reiter* v. *Cooper*, 507 U. S., at 267, the Court "declin[ed] to countenance the 'odd result' that a federal cause of action and statute of limitations arise at different times 'absen[t] . . . any such indication in the statute'"); *Bay Area Laundry*, 522 U. S., at 201.

D

Finally, the Board raises policy concerns. It emphasizes that agencies and regulated parties need the finality of a 6-year cutoff. After that point, facial challenges impose significant burdens on agencies and courts. Moreover, if they are successful, such challenges upset the reliance interests of the agencies and regulated parties that have long operated under existing rules. See also *post*, at 18–24 (JACKSON, J., dissenting).

"[P]leas of administrative inconvenience . . . never 'justify departing from the statute's clear text.'" *Niz-Chavez* v. *Garland*, 593 U. S. 155, 169 (2021) (quoting *Pereira* v. *Sessions*, 585 U. S 198, 217 (2018)). Congress could have chosen different language in §2401(a) or created a general statute of repose for agencies. It did not.

That is enough to dispatch the Board's policy arguments, but we add that its concerns are overstated. Put aside facial challenges like Corner Post's. Regulated parties "may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them" or "petition an agency to reconsider a longstanding rule and then appeal the denial of that petition." *Herr*, 803 F. 3d, at 821–822. So even on the Board's preferred interpretation, "[a] federal regulation that makes it six years without being

contested does not enter a promised land free from legal challenge." *Id.*, at 821. Likewise, the dissent imagines an alternative reality of total finality that simply does not exist. See *post*, at 21–23.

Moreover, the opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit. Given that major regulations are typically challenged immediately, courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent. If neither this Court nor the relevant court of appeals has weighed in, a court may be able to look to other circuits for persuasive authority. And if no other authority upholding the agency action is persuasive, the court may have more work to do, but there is all the more reason for it to consider the merits of the newcomer's challenge.[8]

Turning to the other side of the policy ledger, the Board slights the arguments supporting the plaintiff-centric accrual rule. In addition to being compelled by §2401(a)'s text, this rule vindicates the APA's "basic presumption" that anyone injured by agency action should have access to judicial review. *Abbott Labs.*, 387 U. S., at 140. It also respects our "deep-rooted historic tradition that everyone

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[8] It also may be that some injuries can only be suffered by entities that existed at the time of the challenged action. Corner Post suggests that only parties that existed during the rulemaking process can claim to have been injured by a "procedural" shortcoming, like a deficient notice of proposed rulemaking. Reply Brief 18–19. We need not resolve that issue here because there is no dispute that Corner Post proffered an injury that does not depend on its having existed when the Board promulgated Regulation II: the rule's alleged conflict with the Durbin Amendment. The dissent's observation that "the claims in this case *are* procedural," *post*, at 18, is confused. Even if some of Corner Post's claims might be procedural, its central claim—that the regulation violates the statute—is a prototypical substantive challenge.

should have his own day in court." *Richards* v. *Jefferson County*, 517 U. S. 793, 798 (1996) (internal quotation marks omitted). Under the Board's finality rule, only those fortunate enough to suffer an injury within six years of a rule's promulgation may bring an APA suit. Everyone else—no matter how serious the injury or how illegal the rule—has no recourse.[9]

The dissent also raises a host of policy arguments masquerading as "matter[s] of congressional intent." *Post*, at 18–24. And it warns that today's opinion will "devastate the functioning of the Federal Government." *Post*, at 23. This claim is baffling—indeed, bizarre—in a case about a statute of limitations. The Solicitor General, whose mandate is to protect the interests of the Federal Government, comes nowhere close to suggesting that a plaintiff-centric interpretation of §2401(a) spells the end of the United States as we know it. Perhaps the dissent believes that the Code of Federal Regulations is full of substantively illegal regulations vulnerable to meritorious challenges; or perhaps it believes that meritless challenges will flood federal courts that are too incompetent to reject them. We have more confidence in both the Executive Branch and the Judiciary. But we do agree with the dissent on one point: "'[T]he ball is in Congress' court.'" *Post*, at 24 (quoting *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618, 661 (2007) (Ginsburg, J., dissenting)). Section 2401(a) is 75 years old. If it is a poor fit for modern APA litigation, the

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[9] Corner Post has no other way to obtain meaningful review of Regulation II. Because Regulation II does not directly regulate it, it will never be subject to enforcement actions in which it may challenge the rule's legality. See n. 2, *supra.* Nor is the ability to petition the Board for rulemaking to change Regulation II a sufficient substitute for *de novo* judicial review of its lawfulness: The agency's "discretionary decision to decline to take new action" would be subject only to "deferential judicial review." *PDR Network, LLC* v. *Carlton & Harris Chiropractic, Inc.*, 588 U. S. 1, 25 (2019) (KAVANAUGH, J., concurring in judgment).

solution is for Congress to enact a distinct statute of limitations for the APA.

* * *

An APA claim does not accrue for purposes of §2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action. Because Corner Post filed suit within six years of its injury, §2401(a) did not bar its challenge to Regulation II. We reverse the Eighth Circuit's judgment to the contrary and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–1008

CORNER POST, INC., PETITIONER *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 1, 2024]

JUSTICE KAVANAUGH, concurring.

I agree with the Court that a claim under the Administrative Procedure Act accrues when the plaintiff is injured by the challenged agency rule. I also agree with the Court that today's decision vindicates the APA's "'basic presumption' that anyone injured by agency action should have access to judicial review." *Ante*, at 21 (quoting *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967)).

I write separately to explain a crucial additional point: Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules.

Corner Post challenged an agency rule that regulates the fees that banks may charge. But Corner Post is not a bank regulated by the rule. Rather, it is a business that must pay the fees charged by the banks who are regulated by the rule. Corner Post complains that the agency rule allows banks to charge fees that are unreasonably high.

Corner Post's suit is a typical APA suit. An unregulated plaintiff such as Corner Post often will sue under the APA to challenge an allegedly unlawful agency rule that regulates others but also has adverse downstream effects on the plaintiff. In those cases, an injunction barring the agency from enforcing the rule against the plaintiff would not help the plaintiff, because the plaintiff is not regulated

by the rule in the first place. Instead, the unregulated plaintiff can obtain meaningful relief only if the APA authorizes vacatur of the agency rule, thereby remedying the adverse downstream effects of the rule on the unregulated plaintiff.

The APA empowers federal courts to "hold unlawful and set aside agency action" that, as relevant here, is arbitrary and capricious or is contrary to law. 5 U. S. C. §706(2). The Federal Government and the federal courts have long understood §706(2) to authorize vacatur of unlawful agency rules, including in suits by unregulated plaintiffs who are adversely affected by an agency's regulation of others.

Recently, the Government has advanced a far-reaching argument that the APA does not allow vacatur. See Brief for Respondent 42; Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, pp. 40–44. Invoking a few law review articles, the Government contends that the APA's authorization to "set aside" agency action does not allow vacatur, but instead permits a court only to enjoin an agency from enforcing a rule against the plaintiff.

If the Government were correct on that point, Corner Post could not obtain any relief in this suit because, to reiterate, Corner Post is not regulated by the rule to begin with. And the APA would supply no remedy for most other *unregulated* but adversely affected parties who traditionally have brought, and regularly still bring, APA suits challenging agency rules.

The Government's position would revolutionize long-settled administrative law—shutting the door on entire classes of everyday administrative law cases. The Government's newly minted position is both novel and wrong. It "disregards a lot of history and a lot of law." M. Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J. 2305, 2311 (2024).

The APA authorizes vacatur of agency rules; therefore, Corner Post can obtain relief in this case.

I

Corner Post owns a truck stop and convenience store in rural North Dakota. When a customer uses a debit card at its business, Corner Post must pay a fee (known as an interchange fee) to the bank that processes the customer's transaction.

As the Court explains, the Dodd-Frank Act requires the Federal Reserve Board to "prescribe regulations" for assessing whether interchange fees are "reasonable and proportional to the cost incurred" in processing a debit-card transaction. 15 U. S. C. §1693*o*–2(a)(3)(A); see *ante*, at 2. Pursuant to the Act, the Board has issued a rule that sets a maximum fee of about 21 cents per transaction. 76 Fed. Reg. 43394, 43420 (2011). For convenience, I will refer to that rule as the fee rule.

Corner Post is not subject to the fee rule. Corner Post does not charge interchange fees to its customers, and Corner Post lacks any authority to set those fees. But because Corner Post must *pay* the fees to banks, it is affected by the agency's rule setting the maximum fees that banks may charge. In particular, Corner Post would be harmed by a fee rule that allows unreasonably high fees and would benefit from a fee rule that more strictly limits the fees that banks may charge.

The APA authorizes any person who has been "adversely affected or aggrieved" by a "final agency action" to obtain judicial review in federal district court. 5 U. S. C. §§702, 704. In an APA suit, the district court "shall" "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." §706(2)(A).

Corner Post filed this APA suit because it believes that the fee rule allows banks to charge unreasonably high fees. In particular, Corner Post argues that the Board's 21-cent fee cap is unreasonably high and therefore arbitrary and capricious under the APA. Corner Post asked the Federal

District Court to vacate the fee rule on the ground that the Board must more strictly regulate bank fees (in other words, that the Board must set a lower cap on the fees that banks may charge).

Corner Post would not be able to obtain relief in its lawsuit through any remedy other than vacatur. Corner Post could not obtain relief through an injunction forbidding the Board from enforcing the rule against it. That is because the rule does not regulate Corner Post and therefore is not and cannot be enforced against Corner Post in the first place. Nor could Corner Post secure relief through an injunction against banks; the APA does not authorize suits against private parties.

Corner Post instead needs a remedy that acts directly on the fee rule—specifically, by vacating it. Indeed, without vacatur, it is hard to imagine what kind of lawsuit Corner Post could file. At oral argument, the Government ultimately seemed to acknowledge that reality and the necessity of the vacatur remedy if Corner Post is to obtain any relief in this case. See Tr. of Oral Arg. 76 ("it's possible that the only way to provide this party relief would be vacatur").[1]

II

For Corner Post to obtain relief, an important question therefore is whether the APA authorizes vacatur of unlawful agency actions, including agency rules.

The answer is yes—in light of the text and history of the

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[1] A plaintiff could not challenge the fee rule by suing to "compel agency action" that is "unlawfully withheld or unreasonably delayed." 5 U. S. C. §706(1). The remedy of compelling agency action applies if an agency fails to issue a required rule. But here, the Board issued a rule, and the question is whether the rule set a reasonable fee cap. It would therefore make little sense to say that the fee rule has been "withheld" or "delayed." Indeed, it seems that §706(1) has almost never been used to challenge extant agency rules, as opposed to challenging the absence of required rules.

APA, the longstanding and settled precedent adhering to that text and history, and the radical consequences for administrative law and individual liberty that would ensue if vacatur were suddenly no longer available.

The text and history of the APA authorize vacatur. The text directs courts to "set aside" unlawful agency actions. 5 U. S. C. §706(2)(A). When Congress enacted the APA in 1946, the phrase "set aside" meant "cancel, annul, or revoke." Black's Law Dictionary 1612 (3d ed. 1933); see also Black's Law Dictionary 1537 (4th ed. 1951) (same); Bouvier's Law Dictionary 1103 (W. Baldwin ed. 1926) ("To annul; to make void; as, to set aside an award"). At that time, it was common for an appellate court that reversed the decision of a lower court to direct that the lower court's "judgment" be "set aside," meaning vacated. *E.g.*, *Shawkee Mfg. Co.* v. *Hartford-Empire Co.*, 322 U. S. 271, 274 (1944). Likewise, Congress used the phrase "set aside" in many pre-APA statutes that plainly contemplated the vacatur of agency actions.[2]

The APA incorporated that common and contemporaneous meaning of "set aside." When a federal court sets aside an agency action, the federal court vacates that order—in much the same way that an appellate court vacates the judgment of a trial court.

The APA prescribes the same "set aside" remedy for all categories of "agency action," including agency adjudicative orders and agency rules. §§551(13), 706(2). When a federal court concludes that an agency adjudicative order is

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[2] See, *e.g.*, Hepburn Act of 1906, ch. 3591, §5, 34 Stat. 584, 592 (courts could "enjoin, set aside, annul, or suspend any order or requirement of" the Interstate Commerce Commission); Securities Exchange Act of 1934, ch. 404, §25(a), 48 Stat. 881, 902 (authorizing courts "to affirm, modify, and enforce or set aside [an] order" of the SEC); Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, §701(f)(3), 52 Stat. 1040, 1055–1056 (authorizing a court to "affirm the order" of the FDA, "or to set it aside in whole or in part, temporarily or permanently").

unlawful, the court must vacate that order. Around the time when Congress enacted the APA, the phrase "set aside" the agency order meant vacate that order. See, *e.g.*, *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952). And because federal courts must "set aside" agency rules in the same way that they set aside agency orders, successful challenges to agency rules must award the same remedy. See M. Sohoni, The Power To Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1131–1134 (2020). In short, to "set aside" a rule is to vacate it.

Longstanding precedent reinforces the text. Over the decades, this Court has affirmed countless decisions that vacated agency actions, including agency rules. See, *e.g.*, *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U. S. 1, 36, and n. 7 (2020); *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 486 (2001); *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 364–365 (1986). Those decisions vacated the challenged agency rules rather than merely providing injunctive relief that enjoined enforcement of the rules against the specific plaintiffs. See, *e.g.*, *Regents of Univ. of Cal.*, 591 U. S., at 9 (holding that the rescission of a major federal program "must be vacated"). And the D. C. Circuit—which handles the lion's share of the country's administrative law cases—has likewise long recognized vacatur as the usual relief when a court holds that agency rules are unlawful. See, *e.g.*, *National Mining Assn.* v. *United States Army Corps of Engineers*, 145 F. 3d 1399, 1409 (CADC 1998). In the words of the D. C. Circuit: "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon* v. *Thornburgh*, 878 F. 2d 484, 495, n. 21 (CADC 1989).

Importantly, as Corner Post's lawsuit shows, the availability of vacatur determines not only the extent of the

relief that courts may award in APA suits by *regulated* parties, but also whether *unregulated* parties can obtain relief under the APA at all. In most APA litigation brought by unregulated but adversely affected parties, a plaintiff can obtain relief only through vacatur of the adverse agency action. Prohibiting courts from vacating agency actions would essentially close the courthouse doors on those unregulated plaintiffs—a radical change to administrative law that would insulate a broad swath of agency actions from any judicial review.[3]

Vacatur is therefore essential to fulfill the "basic presumption of judicial review" for parties who have been "adversely affected or aggrieved" by federal agency action. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (quotation marks omitted). The Court has long applied that "strong presumption" unless there is a "persuasive reason to believe" that Congress intended to bar review of certain actions. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986) (quotation marks omitted); see also, *e.g.*, *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 22–23 (2018); *Sackett* v. *EPA*, 566 U. S. 120, 128–131 (2012). Eliminating the vacatur remedy would contravene the strong *Abbott Laboratories* presumption by insulating many agency rules from meaningful judicial review (which perhaps is the Government's motivation for its recent campaign).

The absence of vacatur would also create an asymmetry. For example, without the vacatur remedy, a *bank* could still challenge the Board's regulation of interchange fees in a suit for injunctive relief. The bank might argue that the fee cap is too low and that the Board should be enjoined from enforcing the cap against the bank—a result that would

[3]Most of the recent academic and judicial discussion of this issue has addressed suits by regulated parties. That discussion has largely missed a major piece of the issue—suits by unregulated but adversely affected parties.

allow the bank to charge higher fees. But because Corner Post is not subject to the Board's regulation, it could not contend that the fee cap is too high and that the Board should be enjoined from keeping the cap so high. So Corner Post would be precluded from suing even though the allegedly unlawful regulation is causing it monetary injury.[4]

III

Eliminating vacatur as a remedy would terminate entire classes of administrative litigation that have traditionally been brought by unregulated parties.[5]

One example is the wide range of administrative law suits in which businesses target the allegedly unlawful under-regulation of other businesses, such as their

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[4] Absent vacatur, the remedy for a *regulated* plaintiff would not automatically extend to other regulated parties. For example, if a district court issued an injunction that prevents the Board from enforcing the fee rule against one bank, the Board would still be able to enforce the fee rule against other banks. For those other banks to obtain the same relief, they would need to either (i) file similar APA suits and request similar injunctions or (ii) wait and see if the fee rule is temporarily enjoined or held unlawful by either the relevant court of appeals or this Court. In that respect, eliminating the vacatur remedy would delay relief for many regulated parties. That said, in light of vertical *stare decisis*, the consequences for regulated parties of eliminating vacatur would not be as severe as the consequences for unregulated parties. See *Labrador* v. *Poe*, 601 U. S. ___, ___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 8–9); cf. W. Baude & S. Bray, Proper Parties, Proper Relief, 137 Harv. L. Rev. 153, 183 (2023) (when the Supreme Court "holds a statute to be unconstitutional or a rule to be unlawful, it may be *as good as* vacated").

[5] This opinion focuses primarily on administrative litigation that arises under the APA. But Congress has also enacted special statutory review provisions that similarly authorize federal courts to "set aside" specific agency actions. See, *e.g.*, 15 U. S. C. §78y(a) (orders of the SEC); 16 U. S. C. §825*l*(b) (FERC); 28 U. S. C. §2342 (the FCC, the Atomic Energy Commission, and other agencies). By arguing that the APA's use of "set aside" does not authorize vacatur, the Government implies that vacatur is also unavailable under those similar review provisions.

competitors. For example, in *National Credit Union Administration* v. *First National Bank & Trust Co.*, several banks challenged the decision of a federal agency to approve a series of amendments to the charter of a federal credit union, a competitor of the banks. 522 U. S. 479, 484–485 (1998). The amendments were controversial because they expanded the markets in which the credit union could operate, thereby increasing competition against the banks. The Court held that the banks could sue under the APA to challenge the agency's approval of those charter amendments, and also that the agency's approval of the amendments was unlawful. Of course, the District Court could remedy the banks' harm only by vacating the approval of the amendments. In short, for the plaintiff in *First National Bank* to have a remedy, the APA must have authorized vacatur.

Those competitor suits are ubiquitous in administrative law. Some plaintiffs have challenged the favorable classification of a competitor's drugs or medical products, see, *e.g.*, *American Bioscience, Inc.* v. *Thompson*, 269 F. 3d 1077 (CADC 2001); a research guideline that increased competition for federal grants, see, *e.g.*, *Sherley* v. *Sebelius*, 610 F. 3d 69 (CADC 2010); and a competitor's exemption from a generally applicable rule, see, *e.g.*, *Regular Common Carrier Conference* v. *United States*, 793 F. 2d 376 (CADC 1986) (arose under the review provision in 28 U. S. C. §2342). The Court has consistently held that the plaintiffs incurring those injuries are "adversely affected or aggrieved by agency action" within the meaning of the APA. 5 U. S. C. §702; see *First Nat. Bank*, 522 U. S., at 488, 499; *Investment Company Institute* v. *Camp*, 401 U. S. 617, 618–621 (1971); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 157 (1970). But such competitor suits would be largely if not entirely eradicated if the APA and similar statutory review provisions did not authorize vacatur.

Suits where one business challenges the under-regulation of another go well beyond competitor suits. One example is the Court's landmark decision in *Motor Vehicle Manufacturers Association of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29 (1983). That case arose when several insurance companies challenged a federal agency's rescission of safety standards for new motor vehicles. The Court held that the agency's decision to rescind those safety standards was subject to the same degree of judicial review as the decision to issue the standards in the first place. See *id.*, at 40–44. The Court also concluded that the rescission of the safety standards was arbitrary and capricious. See *id.*, at 44–57.

At no point in that landmark opinion on the judicial review of agency actions did the Court state (or need to state) the obvious: Because the agency did not regulate the insurers themselves, the insurers could obtain relief from the downstream effects of the agency's rescission of the safety standards only if the insurers could obtain vacatur of that rescission. The Court did not dwell on that remedial point because the availability of vacatur was presumably obvious to all involved. Only now—some 40 years later—does the Government imply that the premise of *State Farm* was mistaken.

The Government's new position would also largely eliminate the common form of environmental litigation where private citizens sue a federal agency based on the externalities that an agency action is likely to produce. Litigation often arises when a federal agency approves a development project with potential effects on the environment or on other property owners. Examples include the construction of a new pipeline, see *Delaware Riverkeeper Network* v. *FERC*, 753 F. 3d 1304 (CADC 2014), or the mining of federal land, see *WildEarth Guardians* v. *Jewell*, 738 F. 3d 298 (CADC 2013). In those cases, the plaintiff generally cannot bring an APA suit

against the developer, who is usually a private party. See §704 (authorizing review of "agency action"). Instead, the plaintiff typically sues the federal agency that approved the development and asks a federal court to vacate that approval.

Some of those suits proceed under the APA; others proceed under federal statutory review provisions that similarly authorize courts to "set aside" agency action. See, *e.g.*, 15 U. S. C. §717r(b) (Natural Gas Act); 16 U. S. C. §825*l*(b) (Federal Power Act). Regardless, all of those suits depend on the availability of vacatur.

Many APA suits similarly challenge federal emissions limits or efficiency standards for cars, trucks, and other sources of pollution. See, *e.g.*, *American Public Gas Assn.* v. *Department of Energy*, 72 F. 4th 1324 (CADC 2023). When a plaintiff alleges that an emissions limit does too little to stop third parties from polluting the environment, the plaintiff cannot bring an APA suit against the third party. Rather, the plaintiff must sue the agency that enacted the emissions limit. If the vacatur remedy were unavailable, the agency that enacted the emissions limit would never face litigation from unregulated parties seeking stricter limits; the agency could face litigation only from regulated parties seeking looser limits.

Workers and their unions also regularly challenge agency rules that rescind or loosen federal workplace safety standards. See, *e.g.*, *Transportation Div. of Int'l Assn. of Sheet Metal, Air, Rail, and Transp. Workers* v. *Federal Railroad Admin.*, 988 F. 3d 1170 (CA9 2021) (railroad industry); *United Steel* v. *Mine Safety and Health Admin.*, 925 F. 3d 1279 (CADC 2019) (mining industry). Those suits often arise under statutory review provisions that, like the APA, authorize courts to "set aside" agency actions. See, *e.g.*, 28 U. S. C. §2342(7) (railroad industry); 30 U. S. C. §816(a)(1) (mining industry). And the suits all depend on the availability of vacatur as a remedy. In particular, the

workers may prevail in those suits only through vacatur of the agency rules. So if "set aside" did not mean vacate, workplace safety rules could be challenged from only one direction—by employers who want less regulation, not by workers who want more regulation.

The examples of standard agency litigation that depend on the availability of vacatur are seemingly endless. Vacatur was essential when American workers challenged a Department of Labor rule that unlawfully allowed employers to access inexpensive foreign labor, with the effect of lowering American workers' wages. See *Mendoza* v. *Perez*, 754 F. 3d 1002 (CADC 2014). Vacatur was essential when a county challenged the Department of the Interior's allowance for Indian gaming on nearby land. See *Butte Cty.* v. *Hogen*, 613 F. 3d 190 (CADC 2010). Vacatur is often essential when a State challenges an agency action that does not regulate the State directly but has adverse downstream effects on the State. See, *e.g.*, *Department of Commerce* v. *New York*, 588 U. S. 752 (2019).[6]

I will stop there. But to be clear, I could go on all day (and then some) listing cases where vacatur was necessary for an unregulated but adversely affected plaintiff in an

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[6] In some circumstances, usually when a court rules that an agency must provide additional explanation for the challenged agency action or must regulate some entity or activity *more* extensively, some courts have remanded to the agency without vacatur. Remand without vacatur is essentially a shorthand way of vacating a rule and staying the vacatur pending the agency's completion of an additional required action, such as providing additional explanation or issuing a new, more stringent rule. I do not address that practice here, which has been the subject of some debate. See *Checkosky* v. *SEC*, 23 F. 3d 452, 462–465 (CADC 1994) (Silberman, J.) (explaining the practice); see also *id.*, at 493, n. 37 (Randolph, J.) (noting that courts and parties alternatively may avoid any "difficulties" associated with vacatur by "a stay of the mandate"). Importantly for present purposes, the view that vacatur is "*authorized* by the APA is a basic proposition shared by *both* sides of the debate over remand without vacatur." M. Sohoni, The Power To Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1178 (2020).

APA suit to obtain relief.

IV

Against all of that text, history, precedent, and common sense, the Government has recently rejected the straightforward and long-accepted conclusion that the phrase "set aside" in the APA authorizes vacatur. Instead, the Government contends that plaintiffs harmed by agency rules must seek injunctions against enforcement of those rules. See Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, pp. 40–44. One effect of the Government's new position would be to insulate many agency rules from meaningful judicial review in suits by unregulated but adversely affected parties.

To support its new position, the Government has offered an array of arguments.

First, the Government says that vacatur of a federal rule is akin to a nationwide injunction—in other words, an injunction that prohibits the Government from enforcing a law against *anyone*, not just the parties in a specific case. The Government has contended that equitable relief is ordinarily limited to the parties in a specific case. Therefore, nationwide injunctions would be permissible only if Congress authorized them.

But in the APA, Congress did in fact depart from that baseline and authorize vacatur. As noted above, the text of the APA expressly authorizes federal courts to "set aside" agency action. 5 U. S. C. §706(2). "Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants, the APA" and related statutory review provisions "go further by empowering the judiciary to act directly against the challenged agency action." J. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 1012 (2018). The text of §706(2) directs federal courts to vacate agency actions in the same way that appellate courts vacate the judgments of trial courts. See M. Sohoni, The

Power To Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1131–1134 (2020). The text of the APA therefore authorizes vacatur of agency rules. By contrast, Congress has rarely authorized courts to act directly on federal statutes or to prohibit their enforcement against nonparties. As a result, background equitable principles may control in those non-APA cases.

Second, the Government argues that the remedies available in APA suits are not governed by §706(2), which directs courts to "set aside" agency action, but instead are governed by §703. That argument is weak. Section 703 determines the "form of proceeding" for suits under the APA and identifies the federal actors against whom an "action for judicial review may be brought."[7] But "no court has ever held that Section 703 implicitly delimits the kinds of remedies available in an APA suit." M. Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J. 2305, 2337 (2024). For good reason: As explained above, the ordinary meaning of "set aside" in §706(2) has long been understood to refer to the remedy of vacatur. The conclusion that §706 governs remedies is also supported by §706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed"—unmistakably a remedy. By contrast, the text of §703 "speaks to venue and forms of proceedings, not to remedies, and regardless, its

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[7] Section 703 states: "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

listing of the available forms of proceedings is nonexhaustive." Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J., at 2337.

To support its novel reliance on §703, the Government suggests that the phrase "set aside" in §706(2) may refer to a "rule of decision directing the reviewing court to disregard unlawful" agency actions in "resolving the case before it," rather than the remedy of vacatur. Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, at 40. But the leading cases and legal dictionaries at the time of the APA's enactment did not use "set aside" in that manner. They instead referred to setting aside (that is, vacating) judgments—a meaning entirely consistent with the APA's authorization to vacate agency actions. See *supra*, at 5. The Government's position instead relies on some colloquial uses of the phrase "set aside" in federal constitutional challenges to state statutes. See, *e.g.*, Brief for United States in *United States* v. *Texas*, O. T. 2022, No. 22–58, at 41 (citing *Mallinckrodt Chemical Works* v. *Missouri ex rel. Jones*, 238 U. S. 41, 54 (1915)); see also *Mallinckrodt*, 238 U. S., at 54 (referring to "one who seeks to set aside a state statute as repugnant to the Federal Constitution"). That is a thin basis for suddenly prohibiting entire categories of long-common administrative litigation.

Third, the Government seizes on legislative history to argue that Congress did not expect the APA to create new remedies against unlawful agency actions. But vacatur was not a new remedy. On the contrary, several pre-APA statutes authorized courts to "set aside" specific kinds of agency actions, such as orders by the Interstate Commerce Commission. See n. 2, *supra*. This Court correctly understood those statutes to authorize vacatur. For example, in litigation regarding the regulation of railroads, this Court held that an unlawful ICC order was "void." *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464 (1935). Similar examples abound. See, *e.g.*, Sohoni, The

Past and Future of Universal Vacatur, 133 Yale L. J., at 2329–2335 (collecting cases). By similarly authorizing courts to "set aside" agency actions, the APA likewise authorized vacatur. §706(2).

Moreover, although vacatur was not as common in the years surrounding the APA's enactment, there is a simple explanation for that: Courts had few occasions to set aside agency rules before this Court's 1967 decision in *Abbott Laboratories* v. *Gardner*, which significantly expanded the opportunities for facial, pre-enforcement review of agency rules. 387 U. S. 136, 139–141. Indeed, it was not until *Abbott Laboratories* that "preenforcement review of agency rules" became "the norm, not the exception." S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 1137 (2d ed. 1985).

The Government's current position on vacatur would *de facto* overrule *Abbott Laboratories* as to suits by unregulated parties. Not surprisingly, the Government's current position on vacatur sounds very similar to Justice Fortas' dissent in a companion case to *Abbott Laboratories*, where he lamented that in the wake of those decisions, a court would be able to "suspend the operation of regulations in their entirety." *Gardner* v. *Toilet Goods Assn., Inc.*, 387 U. S. 167, 175 (1967). In any event, to the extent that the Government worries that vacatur of rules (as opposed to orders) is more common today than it was in the 1950s, the Government's true grievance is with *Abbott Laboratories*.

Fourth, the Government objects to the real-world consequences that occur when a federal district court wrongly vacates a lawful rule. I appreciate that concern. But federal law already gives the Government tools to mitigate those consequences—if not avoid them altogether. When the Government believes that a district court has erroneously vacated a rule (or erroneously issued a preliminary injunction against a rule), the Government may promptly seek a stay in the relevant federal court of

appeals. To determine whether to grant a stay, the court of appeals may then promptly review the Government's likelihood of success on the merits, among other factors. If the court of appeals denies a stay, the Government may seek further review in this Court. See *Labrador* v. *Poe*, 601 U. S. ___, ___ (2024) (KAVANAUGH, J., concurring in grant of stay) (slip op., at 2). The Government's frustration with the occasional incorrect district court vacatur of an agency rule is understandable. But especially given the readily accessible and regularly utilized procedures for staying a district court's vacatur,[8] we should not overreact by entirely gutting vacatur as a remedy and thereby barring unregulated but adversely affected parties from bringing APA suits.

Not surprisingly, when asked at oral argument in this case about the extraordinary consequences of its new no-vacatur position, the Government seemed to backpedal and hedge a bit. The Government suggested that vacatur may actually still be appropriate if it is "the only way to give the party before the court relief." Tr. of Oral Arg. 76. The Government also said that "it's possible that the only way to provide" Corner Post "relief would be vacatur." *Ibid.*

I appreciate the Government's apparent attempt to back away from its extreme stance. But in doing so, the Government also revealed the weakness of its position. The meaning of "set aside" in the APA cannot reasonably depend on the specific party before the court. Either the APA authorizes vacatur, or it does not.

More to the point, the Government's answer at oral argument is a solution in search of a problem. The federal courts have long interpreted the APA to authorize vacatur of agency actions. Both the text and the history of the APA support that interpretation, and courts have had no real

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[8] If the problem became sufficiently severe, the Executive Branch could always ask Congress to limit the remedies available under the APA.

difficulty applying the remedy in practice. Some 78 years after the APA and 57 years after *Abbott Laboratories*, I would not suddenly throw out that sound and settled interpretation of the APA and eliminate entire classes of historically common and vitally important litigation against federal agencies.

* * *

The Government's crusade against vacatur would create "strange and even absurd consequences." Sohoni, The Past and Future of Universal Vacatur, 133 Yale L. J., at 2340. In this opinion, I have described one such consequence: It would leave unregulated plaintiffs like Corner Post without a remedy in APA challenges to agency rules. The Government's position therefore would fundamentally reshape administrative law, leaving administrative agencies with extraordinary new power to issue rules free from potential suits by unregulated but adversely affected parties—businesses, environmental plaintiffs, workers, the list goes on.

I agree with the longstanding consensus—a consensus based on text, history, precedent, and common sense—that vacatur is an appropriate remedy when a federal court holds that an agency rule is unlawful. Because vacatur remains an available remedy under the APA, Corner Post can obtain meaningful relief if it prevails in this lawsuit.

SUPREME COURT OF THE UNITED STATES

No. 22–1008

CORNER POST, INC., PETITIONER *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[July 1, 2024]

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

More than half a century ago, this Court highlighted the long-recognized "hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'" *Crown Coat Front Co.* v. *United States*, 386 U. S. 503, 517 (1967). Today, the majority throws that caution to the wind and engages in the same kind of misguided reasoning about statutory limitations periods that we have previously admonished.

The flawed reasoning and far-reaching results of the Court's ruling in this case are staggering. First, the reasoning. The text and context of the relevant statutory provisions plainly reveal that, for facial challenges to agency regulations, the 6-year limitations period in 28 U. S. C. §2401(a) starts running when the rule is published. The Court says otherwise today, holding that the broad statutory term "accrues" requires us to conclude that the limitations period for Administrative Procedure Act (APA) claims runs from the time of a plaintiff's injury. Never mind that this Court's precedents tell us that the meaning of "accrues" is context specific. Never mind that, in the administrative-law context, limitations statutes uniformly run from the

moment of agency action. Never mind that a plaintiff's injury is utterly irrelevant to a facial APA claim. According to the Court, we must ignore all of this because, for other kinds of claims, accrual begins at the time of a plaintiff's injury.

Next, the results. The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses. It also allows well-heeled litigants to game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline.

The majority refuses to accept the straightforward, commonsense, and singularly plausible reading of the limitations statute that Congress wrote. In doing so, the Court wreaks havoc on Government agencies, businesses, and society at large. I respectfully dissent.

I

When a claim accrues depends on the nature of the claim. See *Crown Coat*, 386 U. S., at 517. So, understanding the context in which *these* claims arose is essential to determining when Congress meant for them to accrue. The facts of this very case illustrate the absurdity of the majority's one-size-fits-all approach. The procedural history is also a prime example of the gamesmanship that statutory limitations periods are enacted to prevent.

A

Start with the relevant agency regulation. In 2010, Congress required the Federal Reserve Board to issue rules for debit-card transaction fees. See 15 U. S. C. §1693*o*–2(a)(1). The Board did as Congress instructed. As relevant here, in

2011, the Board issued Regulation II, capping debit-card interchange fees at 21 cents per transaction plus 0.05 percent of the transaction. 76 Fed. Reg. 43420 (2011) (codified at 12 CFR §253.3(b) (2022)).

As often happens, affected parties challenged Regulation II almost immediately after the Board issued it Several large trade groups sued under the APA, alleging that Regulation II was, in several respects, arbitrary, capricious, and not in accordance with law. *NACS* v. *Board of Governors of FRS*, 958 F. Supp. 2d 85, 95–96 (DC 2013). Ultimately, the D. C. Circuit rejected that challenge in relevant part. *NACS* v. *Board of Governors of FRS*, 746 F. 3d 474, 477 (2014). And, a few months after that, we denied certiorari. See 574 U. S. 1121 (2015).

B

Now consider the facts of this challenge. In the majority's telling, this is about a single "truckstop and convenience store located in Watford City, North Dakota." *Ante,* at 1.

Not quite. Rather, two large trade groups initially filed this action in 2021—a full decade after the Federal Reserve Board finalized the debit-card-fee regulations at issue. Those groups were the North Dakota Petroleum Marketers Association, a "trade association that has existed since the mid-1950s," and the North Dakota Retail Association, another trade group. App. to Pet. for Cert. 53. Corner Post, which had only opened its doors in 2018, was not a party to the trade groups' initial complaint. The Government moved to dismiss the pleading, invoking §2401(a)'s 6-year statute of limitations. In response, the trade groups sought leave to amend.

It was only then that Corner Post was added as a plaintiff. And, importantly, other than the addition of Corner Post, the trade groups' complaint remained practically identical to the untimely one they had filed before. Other than a few changes of phrasing and some newly available

2019 data, the amended complaint alleged the same facts and sought the same relief as the original pleading. It also included the exact same legal claims—verbatim. The only material change to the amended complaint was the addition of Corner Post.

Thus, even before I analyze the statute of limitations arguments, one can see that this case is the poster child for the type of manipulation that the majority now invites—new groups being brought in (or created) just to do an end run around the statute of limitations.[1] To repeat: The claims in Corner Post's lawsuit were not new or in any way distinct (even in wording) from the pre-existing and untimely claims of the trade organizations that had been around for decades.

This time, however, when the Government renewed its motion to dismiss, the plaintiffs made the case all about Corner Post. The plaintiffs argued that, because Corner Post had not yet formed as a company when the Board issued Regulation II, it simply could not be subjected to a 6-year limitations period that ran from when the challenged regulation issued back in 2011. (One wonders how a company that formed against the backdrop of a long-settled rule could possibly be entitled to complain, or claim injury, related to the regulatory environment in which it willingly entered—but I digress.) Rather than accepting that the untimely challenge remained so, Corner Post demanded a personalized, plaintiff-specific limitations rule, giving an entity six years from when *it* was first affected by a

[1] If this case illustrates one type of gamesmanship, one does not need to think hard to imagine other examples. A cash-only business that announces its intent to accept debit cards and thereby claiming injury from the debit-card rule. New owners that buy out a shop, insisting that they too are entitled to challenge the debit-card rule based on their status as new entrants into the marketplace. It is telling that, even as the majority says that the moment of the plaintiff's injury marks the start of the limitations period for facial APA challenges, the majority fails to describe precisely when that injury occurs in this context.

Government action to file a facial challenge.

The District Court rejected Corner Post's argument, following the lead of every court of appeals that had ever addressed accrual of an APA facial challenge.[2] It held that the addition of Corner Post as a plaintiff did not make a difference to the timeliness of the business groups' claims. The Eighth Circuit affirmed, holding that "when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation." *North Dakota Retail Assn.* v. *Board of Governors of FRS*, 55 F. 4th 634, 641 (2022).

II

But here we are. Three-quarters of a century after Congress enacted the APA, a majority of this Court rejects the consensus view that, for facial challenges to agency rules, the statutory 6-year limitations period runs from the publication of the rule. Instead, it holds that an APA claim accrues "when the plaintiff is injured by final agency action." *Ante,* at 1. The majority maintains that the text of §2401(a) demands this result. But if that answer is so obvious, one wonders why no court proclaimed it until more than 75 years after all the statutory pieces were in place.

To explain how the majority got this ruling wrong, I find it necessary to provide the right answer. Here, the relevant

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[2] The majority's opinion says we took this case to resolve a circuit split, suggesting that the Sixth Circuit had reached the contrary conclusion. See *ante,* at 3–4. It had not. In *Herr* v. *United States Forest Serv.*, 803 F. 3d 809 (2015), the Sixth Circuit addressed accrual in the context of an *as-applied* challenge after the Government had threatened enforcement. There, the Circuit pegged accrual to the moment of the injury allegedly caused by application of the rule to the plaintiff, see *id.*, at 820, and did not discuss whether that same accrual rule would apply to facial challenges. Since *Herr*, neither the Sixth Circuit nor any district court within it has extended *Herr*'s rule to facial challenges to final agency actions, and at least one District Court has expressly rejected such an extension. See *Linney's Pizza, LLC* v. *Board of Governors of FRS*, 2023 WL 6050569, *2–*4 (ED Ky., Sept. 15, 2023).

statutory text is the catchall limitations provision for suits brought against the United States: §2401(a) of Title 28 of the United States Code. All agree that there are two key terms in that provision—"accrues" and "the right of action." *Ibid.* The majority misreads both. Contrary to the Court's rigid reading, the word "accrues" lacks any fixed meaning. See *Crown Coat*, 386 U. S., at 517. Instead, the meaning of accrue for the purpose of a statute of limitations is determined by the particular "right of action" at issue. For many kinds of legal claims, accrual is plaintiff specific because the claims themselves are plaintiff specific. But facial administrative-law claims are not. This means that, in the administrative-law context, the limitations period begins not when a plaintiff is injured, but when a rule is finalized.

A

When sovereign immunity has been waived, the Federal Government is often sued, and Congress has enacted statutes of limitations to ensure that those lawsuits are brought in a timely fashion. Because such suits arise in different contexts, Congress has enacted different statutes of limitations for different types of suits.

Most statutes of limitations are context specific. For example, a tort claim against the United States typically must be brought "within two years after such claim accrues." 28 U. S. C. §2401(b). By contrast, a party challenging certain administrative orders must seek review "within 60 days after [the order's] entry." §2344. Many more examples of context-specific limitations periods in the U. S. Code abound. See, *e.g.*, §2501 (claims over which the United States Court of Federal Claims has jurisdiction must be brought within six years); 33 U. S. C. §1369(b)(1) (challenges to certain standards adopted by the Environmental Protection Agency under the Clean Water Act must commence "within 120 days from the date of . . . promulgation").

The statute at issue here—28 U. S. C. §2401(a)—supplements those specific provisions. In doing so, §2401(a) serves a special purpose: to act as a catchall that imposes an outer time limit on claims brought against the United States when no other statute of limitations applies. Under §2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." This catchall limitations statute has been applied in a range of contexts, including APA claims (like this one), contract claims, see *Crown Coat*, 386 U. S., at 510–511, and more, see, *e.g.*, *Natural Resources Defense Council* v. *Haaland*, 102 F. 4th 1045, 1074 (CA9 2024) (claims under the Endangered Species Act).

Consistent with the broad scope of its potential application, §2401(a) uses broad language. It starts the 6-year clock when "the right of action first accrues." §2401(a). No more elaboration or specificity is given. So, what *does* the sparse text of §2401(a) tell us?

To start, the statute tells us to look at when "the right of action *first* accrues." (Emphasis added.) The word "first" directs us to start the clock at the earliest possible opportunity once the claim accrues. From the text alone, then, we know that this moment in time should happen sooner rather than later. But *when* that moment occurs depends on the meaning of both "the right of action" and "accrues."

Next, the provision uses the unadorned phrase "the right of action." Because this statute is applicable to a broad range of causes of action against the Government, the underlying statute (here the APA) provides "the right of action," not §2401(a) itself. Put another way, the §2401(a) catchall applies to different causes of action, and those causes of action establish different legal claims. Though the right of action is not the same for an APA claim as it is for an Endangered Species Act claim, §2401(a)'s broad "right of action" language applies to both of these claims, and more.

B

A proper understanding of the word "accrues" makes clear that this term is far more flexible and context dependent than the majority appreciates. Crucially, the Court has said this very thing before—more than once, in fact. We have long understood that it is simply not "possible to assign the word 'accrued' any definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other." *Reading Co.* v. *Koons*, 271 U. S. 58, 61–62 (1926); see also *Crown Coat*, 386 U. S., at 517 (recognizing "the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues'").

But, for some reason, that does not stop the majority from trying here. Its opinion repeatedly asserts that the ordinary meaning of accrual is that claims accrue only when a plaintiff can sue. See *ante,* at 6–10.[3] But even the majority acknowledges that its preferred definition of accrual is not universal; it is, at most, "the '*standard* rule'" that "can be displaced." *Ante,* at 8 (quoting *Green* v. *Brennan*, 578 U. S. 547, 554 (2016); emphasis added).

Far from imposing a one-size-fits-all definition of the word "accrue," this Court has traditionally taken a claim-specific view: "[A] right accrues when it comes into existence." *United States* v. *Lindsay*, 346 U. S. 568, 569 (1954). For example, in *McMahon* v. *United States*, 342 U. S. 25 (1951), we held that, under the Suits in Admiralty Act, a claim accrued when a seaman was injured, even though he could not yet sue at that time. See *id.*, at 27–28. In *Crown*

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[3] The majority insists on a single definition of "accrued," but it cannot keep its story straight as to what that definition is. Its opinion offers multiple formulations, stating that a claim accrues "when it comes into existence," "when the plaintiff has a complete and present cause of action," "when a suit may be maintained thereon," and, also, "after the plaintiff suffers the injury." *Ante,* at 7–8 (internal quotation marks omitted). These distinctions can make a difference.

Coat, we held the opposite—a claim brought under 28 U. S. C. §1346 did not accrue at the time of injury, but rather at the moment of final administrative action, because a plaintiff could not sue until the agency action was final. See 386 U. S., at 513–514, 517–518. The point is *not* that these cases all point in one direction or the other with respect to the meaning of accrue. Instead, our cases illustrate what this Court has expressly stated: The term "accrued" lacks "any definite technical meaning," *Reading*, 271 U. S., at 61.

The majority nevertheless decrees today that accrual must always be plaintiff specific—*i.e.,* that a claim cannot accrue until "this particular plaintiff" can bring suit. *Ante,* at 14. But that is not what §2401(a) says. It does not say that the clock starts when *the plaintiff's* right of action first accrues; rather, §2401(a) starts the clock when "*the* right of action first accrues." (Emphasis added.) In other words, the limitations provision here focuses on the claim being brought without regard for who brings it.

The dictionary definitions on which the majority relies further highlight this important observation. A claim accrues, according to those definitions, "'when *a* suit may be maintained thereon'" or upon the "'coming or springing into existence of *a* right to sue.'" *Ante,* at 7 (emphasis added) (first quoting Black's Law Dictionary 37 (4th ed. 1951), then quoting Ballentine's Law Dictionary 15–16 (2d ed. 1948)). Again, and notably, these dictionaries speak of *a* right to sue, not *the plaintiff's* right to sue. Like §2401(a) itself, these definitions do not support the majority's assertion that accrual is necessarily plaintiff specific.

Of course, many of our cases *do* say that a claim accrues when "'the plaintiff has a complete and present cause of action.'" *E.g.*, *Gabelli* v. *SEC*, 568 U. S. 442, 448 (2013); *Wallace* v. *Kato*, 549 U. S. 384, 388 (2007); *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, 418 (2005); *Bay Area Laundry and Dry*

Cleaning Pension Trust Fund v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997). But those statements were made in the context of particular cases, each of which dealt with plaintiff-specific causes of action. See, *e.g.*, *Gabelli*, 568 U. S., at 446 (civil enforcement claim by the Securities and Exchange Commission); *Wallace*, 549 U. S., at 388 (false imprisonment and arrest claims); *Graham County*, 545 U. S., at 412 (retaliation claim against an employer); *Bay Area Laundry*, 522 U. S., at 195 (claim alleging failure to make required payments to employee pension funds).

Here is what I mean by this. When a complaint brought against a defendant asserts, "You falsely imprisoned me," or "You retaliated against me," it is making a legal claim that is specific to the particular plaintiff. But, as discussed below, it is not similarly plaintiff specific to bring a claim saying, for example, that a particular regulation is invalid because it "exceeds the Board's statutory authority," or because the Government "failed to consider important aspects of the problem," as the complaint here alleges. App. to Pet. for Cert. 80, 82. So, while accrual may sometimes—even usually—be plaintiff specific, that is just because underlying legal claims are often plaintiff specific. The precedents the majority cites never say otherwise; *i.e.*, they do not tell us that accrual must *always* be plaintiff specific.

The majority's other hard-and-fast distinction—between statutes of limitations and statutes of repose—fares no better. See *ante,* at 9–10. The majority sets up a dichotomy: Statutes of limitations are plaintiff-centric rules that "'require plaintiffs to pursue diligent prosecution of known claims,'" while statutes of repose emphasize finality and are tied to "'the last culpable act or omission of the defendant.'" *Ante,* at 9 (quoting *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 8 (2014)). The problem is that statutes of limitations and statutes of repose, while different, are not nearly as different as the majority imagines. It is true that statutes of repose are considered to be "defendant-protective."

Ante, at 10. But the same is true of statutes of limitations. "The very purpose of a period of limitation is that there may be, at some definitely ascertainable period, an end to litigation." *Reading*, 271 U. S., at 65; see also *Gabelli*, 568 U. S., at 448 (repose is a "'basic polic[y] of all limitations provisions'"). In fact, according to one of the dictionaries the majority cites, "[s]tatutes of limitation *are* statutes of repose." Black's Law Dictionary, at 1077 (emphasis added). The difference is that unlike statutes of repose, statutes of limitations have more than one purpose: they bring finality for defendants *and* prevent plaintiffs from sleeping on their rights. Understanding these dual functions sheds no light whatsoever on what to do when those competing purposes point in different directions.[4]

III

Because different claims accrue at different times, we must look to the specific types of claims that the plaintiffs have brought and consider the context in which the limitations period operates. "Cases under [one statute] do not necessarily rule . . . claims" brought under another. *Crown Coat*, 386 U. S., at 517. And our understanding of accrual for limitations purposes has always been context specific. See, *e.g.*, *Wallace*, 549 U. S., at 389 (relying on torts treatises to explain the "distinctive rule" for commencement of limitations period for false imprisonment suits); *Franconia Associates* v. *United States*, 536 U. S. 129, 142–144 (2002) (citing contracts treatises to explain that contract claims accrue at the moment of breach); *Merck & Co.* v. *Reynolds*,

[4] Here, these purposes are at odds because repose favors starting the clock at the moment of final agency action, whereas a plaintiff-specific limitations rule would be targeted at a plaintiff's injury to ensure plaintiffs don't sleep on their rights. In the administrative-law context, one has to choose between those objectives; no one rule can equally achieve both of these ends.

559 U. S. 633, 644–646 (2010) (applying fraud-specific discovery rule to determine accrual). In other words, to understand when "the right of action" accrues under §2401(a), we must understand what the right of action is.

A

The right of action that is invoked in many administrative-law cases, including this one, is a statutory claim that an agency has violated certain legal requirements when it took a certain action, such that the agency's action itself is invalid. See, *e.g.,* 5 U. S. C. §706(2). And Congress has repeatedly made clear, through various statutory enactments, that in the administrative-law context, the statute of limitations for filing a claim that seeks to invalidate the agency action runs from the moment of final agency action.

Take the Administrative Orders Review Act (also known as the Hobbs Act), for example. See 28 U. S. C. §2342. That statute is the exclusive mechanism for reviewing certain orders issued by over a half-dozen federal agencies. The Act requires suits to be brought "within 60 days after [the] entry" of any final agency order. §2344. There are many other similar statutes. In its brief, the Government provided us with more than two dozen statutory provisions where the limitations period starts running at the moment of final agency action—whether that action is the publication of a rule, or the issuance of an order, or something else. See Brief for Respondent 15–17, and n. 4. And, as the Government itself acknowledges, even that list is not comprehensive. See Tr. of Oral Arg. 51 ("Candidly, we got to a page-long footnote and stopped").[5]

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[5] No kidding. On top of the dozens of examples that the Government provided, there are many, many others. See, *e.g.*, 5 U. S. C. §7703(b)(1)(A) ("[A] petition to review a final order or final decision of the [Merit Systems Protection] Board shall be filed . . . within 60 days after the Board issues notice of the final order or decision of the Board"); 15 U. S. C. §80b–13(a) ("Any person or party aggrieved by an order issued by the [Securities and Exchange] Commission under this subchapter

Despite the dozens of statutes that start the limitations period at the moment of final agency action, neither Corner Post nor the majority identifies a single statute in the administrative-law context—either now or before 1948—that takes any other approach. This tells us exactly the message that Congress might have expected courts to infer when interpreting §2401(a): For administrative-law actions, a claim accrues at the moment of final agency action.

The Court says we must ignore these other statutes because they post-date Congress's 1948 enactment of §2401(a). See *ante,* at 12–14. The majority's reasoning is doubly wrong. First, it is wrong on the facts. Even before 1948, Congress consistently started limitations periods in the administrative-law context at the moment of the last

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may obtain a review of such order . . . by filing . . . within sixty days after the entry of such order, a written petition"); 30 U. S. C. §1276(a)(2) ("Any [covered] order or decision . . . shall be subject to judicial review on or before 30 days from the date of such order or decision"); 38 U. S. C. §7266(a) ("[T]o obtain review . . . of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is issued"); 42 U. S. C. §405(g) ("Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision"); §1395*oo*(f)(1) ("Providers shall have the right to obtain judicial review of any final decision of the [Provider Reimbursement Review] Board . . . by a civil action commenced within 60 days of the date on which notice of any final decision by the Board . . . is received"); §7607(b)(1) ("Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise"); 49 U. S. C. §1153(b)(1) (petitions seeking review of National Transportation Safety Board orders that relate to aviation matters "must be filed not later than 60 days after the order is issued").

agency action.[6] Then, as now, Congress decided that the deadline for reviewing agency actions should be pegged to the action under review. Second, the majority misses the broader point: Whenever Congress imposes a deadline to challenge an agency decision, the limitations period always starts at the moment of the last agency action. We should pay attention to the uniformly expressed judgment of Congress, and read §2401(a) accordingly.

Somehow, the majority draws the opposite conclusion. In its view, either Congress's consistently expressed intention is irrelevant to what §2401(a) means, or Congress's failure to explicitly express that intention in the text of §2401(a) indicates that Congress decided otherwise in this particular statute (after all, Congress could have expressly pegged accrual to final agency action in §2401(a) but did not do so). See *ante,* at 8–10.[7] But mechanically drawing these sorts

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[6] See, *e.g.*, 42 Stat. 162 (1921) (codified at 7 U. S. C. §194(a)) (meatpackers must appeal agency orders within 30 days after service of order); 48 Stat. 1093 (1934) (codified as amended at 47 U. S. C. §402(c)) (Federal Communications Commission orders must be challenged in court "within twenty days after the decision complained of is effective"); 49 Stat. 860 (1935) (codified at 16 U. S. C. §825*l*(b)) (orders issued by the Federal Power Commission pursuant to the Public Utility Act of 1935 must be challenged in court "within sixty days after the order of the Commission"); 49 Stat. 980 (1935) (codified at 27 U. S. C. §204(h)) (orders related to alcohol permits must be challenged "within sixty days after the entry of such order"); 52 Stat. 112 (1938) (codified at 15 U. S. C. §45) (Federal Trade Commission cease-and-desist orders must be challenged "within sixty days from the date of the service of such order"); 52 Stat. 831 (1938) (codified at 15 U. S. C. §717r(b)) (orders issued by the Federal Power Commission pursuant to the Natural Gas Act must be challenged in court "within sixty days after the order of the Commission"); 52 Stat. 1053 (1938) (codified at 21 U. S. C. §355(h)) (orders related to new drug applications must be challenged in court "within sixty days after the entry of such order"); 54 Stat. 501 (1940) (orders apportioning costs for certain bridge projects must be challenged in court "within three months after the date such order is issued").

[7] The majority criticizes my review of congressional action in this area, but fails to adequately explore the record itself. *Ante,* at 12–14. The

of negative inferences when interpreting statutes can be risky. "Context counts, and it is sometimes difficult to read much into the absence of a word that is present elsewhere in a statute." *Bartenwerfer* v. *Buckley*, 598 U. S. 69, 78 (2023).

The majority's approach overlooks relevant context in all sorts of ways, including the fact that §2401(a) is a catchall provision that applies to a variety of actions—that is, the language we are interpreting here does not apply *only* in the administrative-law context. It applies to *every* suit against the United States not covered by another statute of limitations. One cannot expect for Congress to have explicitly stated that accrual in §2401(a) starts at the point of final agency action when §2401(a) is a residual provision that also applies to claims that do not involve agency action at all.[8]

Frankly, it was also entirely unnecessary for Congress to be explicit regarding its intentions. Again, in the administrative-law context, the consistent rule is *not* the plaintiff-specific accrual rule that exists in other contexts (*e.g.,* torts), but the rule that applies every time Congress has ever mentioned a limitations period with respect to a suit against an agency: The claim accrues at the moment of final agency action. So it is no wonder that Congress did not expressly mention this in the text of §2401(a)—it did not have to, for those who have a basic understanding of its statutes.

What is more, the standard accrual rule for the administrative-law context makes perfect sense. The APA itself focuses on the agency's action, not on the plaintiff. Section 704 subjects certain "agency action[s]" to judicial review.

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majority's conclusion that the accrual rule is plaintiff specific for APA claims is no more than *ipse dixit*.

[8] Contra the majority, see *ante,* at 12, the fact that Congress *could* have opted to enact a specific statutory review provision for APA claims says nothing about how we should apply the catchall review provision here.

Section 706 lays out the scope of judicial review. As relevant here, courts shall "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. §706(2)(A). Other subsections of §706 likewise focus exclusively on what the *agency* did. Did the *agency* act "in excess of statutory jurisdiction"? §706(2)(C). Did the *agency* act "without observance of procedure required by law"? §706(2)(D).

Section 702 is not to the contrary. The majority suggests otherwise, characterizing §702 as "equip[ping] injured parties with a cause of action." *Ante,* at 5. This is a misleading characterization. Section 702 restricts *who* may challenge agency action: only those "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." It is simply a limitation on who can sue. As such, it says nothing about the cause of action that such a person might bring, nor does it establish that an injury is an element of the claim, as the majority mistakenly suggests.[9] And that is for good reason, since, in administrative

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[9]The majority puts too much stock in the fact that §702 references an injury: That reference actually does no more than highlight the distinction between what constitutes a claim and who can bring that claim. See *ante,* at 4–5, and n. 1. This type of distinction is commonplace in many areas of our jurisprudence. Take, for example, the constitutional standing doctrine, which limits eligible plaintiffs to those who have suffered an injury in fact that is both traceable to the defendant's conduct and redressable in court. See *FDA* v. *Alliance for Hippocratic Medicine*, 602 U. S. 367, 380–385 (2024). Whether a particular plaintiff has standing to sue says nothing about the elements of the claim itself. See *Haaland* v. *Brackeen*, 599 U. S. 255, 291 (2023) ("We do not reach the merits of these claims because no party before the Court has standing to raise them"). The distinction between what a claim is and who can bring it applies with full force here. Section 702 codifies an injury requirement for bringing APA claims. Whether a particular plaintiff was "adversely affected or aggrieved by agency action within the meaning of a relevant statute" under §702 is a threshold inquiry about whether she is an appropriate plaintiff; it has no bearing on whether the agency did, in fact,

actions, the claim itself remains focused on the agency. See *Crown Coat*, 386 U. S., at 513 ("The focus of the court action is the validity of the administrative decision").

The way that courts review agency actions also reinforces this basic observation. Courts do not look at what happened to the plaintiff or what happened after the rulemaking—they look only at the rule and the rulemaking process itself. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U. S. 138, 142 (1973) (*per curiam*). Anything that happened after the rule's publication (including, perhaps, some injury to a regulated party) does not matter to an APA claim. So, the available claims, causes of action, and evidence are the same regardless of who brings the challenge or when they bring it.

Again, the complaint in this case proves the point. Before Corner Post was added as a plaintiff, the complaint alleged that (1) Regulation II is contrary to law and exceeds the Board's statutory authority, and (2) Regulation II is arbitrary and capricious. See Complaint in *North Dakota Retail Assn.* v. *Board of Governors of FRS*, No. 1:21–cv–00095 (D ND), ECF Doc. 1, pp. 32–36. After Corner Post was added as a plaintiff, the complaint made exactly those same two legal claims. See App. to Pet. for Cert. 79–84. Before Corner Post was added, the contrary-to-law claim said that the Board considered impermissible costs and capped interchange fees in a way that was not proportional to the specific costs of each transaction. See ECF Doc. 1, at 32–34. After Corner Post was added, the contrary-to-law claim said the exact same thing. See App. to Pet. for Cert. 79–81. Be-

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act in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," §706(2).

fore the addition of Corner Post, the arbitrary-and-capricious claim said that the Board failed to consider certain congressional instructions, relied on factors that Congress did not intend for it to consider, and ran counter to evidence before the Board. See ECF Doc. 1, at 34–36. Those claims, too, were unchanged after the addition of Corner Post. See App. to Pet. for Cert. 82–84.

From the pleadings filed in this case, three observations stand out. First, these APA claims, like all APA claims, are about what the agency itself did, so the logical point to start the clock is the moment the agency acted. Second, the claims that Corner Post brings are not specific to it—they are identical to the untimely claims the coplaintiff trade groups brought before. And, finally, although the majority puts procedural challenges to the side—asserting that its holding does not extend to those, see *ante,* at 21, n. 8—the claims in this case *are* procedural, so the majority's line-drawing exercise is meaningless.

B

On the matter of congressional intent, the consistent accrual rule in the administrative-law context (the limitations period starts running at the time of the final agency action) is patently superior to the majority's reading of §2401(a). Congress enacts statutes of limitations to achieve basic policy goals: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella* v. *Wood*, 528 U. S. 549, 555 (2000); see also *Gabelli*, 568 U. S., at 448. For APA claims, where rulemakings apply to the public writ large, repose and certainty would *never* exist if any and every newly formed entity can challenge every agency regulation in existence. Stated simply, the majority has adopted an implausible reading of §2401(a), because, as I explain below, a plaintiff-specific accrual rule operating in this context undermines each of the central goals of all limitations

provisions.

First, repose. This principle means that, at some point, litigation must end. Under the majority's reading of the statute, it never will. Instead of putting a stop to things after six years, §2401(a) now does nothing to prevent agency rules from being forever subjected to legal challenge by newly formed entities (or, as this case illustrates, by old entities that can find or create new entities to graft onto their complaint).[10]

Second, elimination of stale claims. The majority forces courts and agencies to parse cold administrative records. Long after the action in question, courts may be ill equipped to review decades-old administrative explanations.

Last, certainty. As I explain in Part IV, *infra*, the majority's approach creates uncertainty for the Government and every entity that relies on the Government to function. Agency rulemaking serves important "notice and predictability purposes." *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 69 (2011) (Scalia, J., concurring). When an administrative agency changes its own rules, it follows specific, established processes, so parties have some predictability about how the rules of the road might change. But when every rule on the books can perpetually be challenged by any new plaintiff, and is thus subject to limitless ad hoc amendment, no policy determination can ever be put to rest, and certainty about the rules that govern will forever remain elusive.

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[10] The fact that "courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent," *ante,* at 21, is irrelevant. What we are deciding now is how the statute of limitations should be interpreted, and more specifically, whether it makes sense to interpret it in a way that is inconsistent with the purpose of such statutes.

IV

Today's ruling is not only baseless. It is also extraordinarily consequential. In one fell swoop, the Court has effectively eliminated any limitations period for APA lawsuits, despite Congress's unmistakable policy determination to cut off such suits within six years of the final agency action. The Court has decided that the clock starts for limitations purposes whenever a new regulated entity is created. This means that, from this day forward, administrative agencies can be sued in perpetuity over every final decision they make.

The majority's ruling makes legal challenges to decades-old agency decisions fair game, even though courts of appeals had previously applied §2401(a) to find untimely a range of belated APA challenges. For example, a lower court rejected an APA challenge to the Food and Drug Administration's approval of the abortion medication mifepristone that was brought more than two decades after the relevant agency action. See *Alliance for Hippocratic Medicine* v. *FDA*, 78 F. 4th 210, 242 (CA5 2023). A 2008 APA challenge to a 1969 ruling by the Bureau of Alcohol, Tobacco, Firearms and Explosives implementing the Gun Control Act was also bounced on statute of limitations grounds. See *Hire Order Ltd.* v. *Marianos*, 698 F. 3d 168, 170 (CA4 2012). Other unquestionably tardy APA suits have been dismissed on similar grounds too.[11]

No more. After today, even the most well-settled agency

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[11] See, *e.g.*, *Alabama* v. *PCI Gaming Auth.*, 801 F. 3d 1278, 1292 (CA11 2015) (2013 challenge to Secretary of Interior's 1984, 1992, and 1995 decisions to take certain land into trust for tribes); *Wong* v. *Doar*, 571 F. 3d 247, 263 (CA2 2009) (2007 challenge to 1980 Medicaid regulation); *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Serv.*, 112 F. 3d 1283, 1286–1287 (CA5 1997) (1994 challenge to 1979 National Park Service regulations); *Shiny Rock Mining Corp.* v. *United States*, 906 F. 2d 1362, 1365–1366 (CA9 1990) (1984 challenges to 1964 and 1965 land management orders).

regulations can be placed on the chopping block. And please take note: The fallout will not stop with new challenges to old rules involving the most contentious issues of today. *Any* established government regulation about *any* issue—say, workplace safety, toxic waste, or consumer protection—can now be attacked by *any* new regulated entity within six years of the entity's formation. A brand new entity could pop up and challenge a regulation that is *decades* old; perhaps even one that is as old as the APA itself. No matter how entrenched, heavily relied upon, or central to the functioning of our society a rule is, the majority has announced open season.

Still, in issuing its ruling in this case, the Court seems oddly oblivious to the most foreseeable consequence of the accrual rule it is adopting: Giving every new entity in a regulated industry its own personal statute of limitations to challenge longstanding regulations affects our Nation's economy. Why? Because administrative agencies establish the baseline rules around which businesses and individuals order their lives. When an agency publishes a final rule, and the period for challenging that rule passes, people in that industry understand that the agency's policy choice is the law and act accordingly. They make investments because of it. They change their practices because of it. They enter contracts in light of it. They may not like the rule, but they live and work with it, because that is what the Rule of Law requires. It is profoundly destabilizing—and also acutely unfair—to permit newcomers to bring legal challenges that can overturn settled regulations long after the rest of the competitive marketplace has adapted itself to the regulatory environment.

Moreover, as I have explained, the Court's ruling in this case allows for every new entity to challenge any and every rule that an agency has ever adopted. It is extraordinarily presumptuous that an entity formed in full view of an

agency's rules, by founders who can choose to enter the industry or not, can demand that well-established rules of engagement be revisited. But even setting aside those commonsense fairness concerns, the constant churn of potential attacks on an agency's rules by new entrants can harm *all* entities in a regulated industry. At any time, anyone can come along and potentially cause every entity to have to adjust its whole operations manual, since any rule (no matter how well settled) might be subject to alteration. Indeed, the obvious need for stability in the rules that govern an industry is precisely why a defined period for challenging the rules was needed at all.

Knowledgeable *amici* have explained that the majority's approach to accrual of the statute of limitations for APA claims undermines the "[s]tability, predictability, and consistency [that] enable[s] small businesses to survive and thrive." Brief for Small Business Associations as *Amici Curiae* 5. And there is no question that long-term uncertainty "hinders the ability of businesses to plan effectively." *Id.,* at 9. The majority's accrual rule unnecessarily creates "frequent, inconsistent, judicially-driven policy changes that do not involve the sort of careful balancing envisioned in the normal process of regulatory change." *Id.,* at 12. And, again, one might think that preventing such chaos is precisely why Congress enacted a statute of limitations in the first place.

Seeking to minimize the fully foreseeable and potentially devastating impact of its ruling, the majority maintains that there is nothing to see here, because not every lawsuit brought by a new industry upstart will win, and, at any rate, many agency regulations are already subject to challenge. See *ante,* at 21. But this myopic rationalization overlooks other significant changes that this Court has wrought this Term with respect to the longstanding rules governing review of agency actions. The discerning reader will know that the Court has handed down other decisions this Term

that likewise invite and enable a wave of regulatory challenges—decisions that carry with them the possibility that well-established agency rules will be upended in ways that were previously unimaginable. Doctrines that were once settled are now unsettled, and claims that lacked merit a year ago are suddenly up for grabs.

In *Loper Bright Enterprises* v. *Raimondo*, 603 U. S. ___ (2024), for example, the Court has reneged on a blackletter rule of administrative law that had been foundational for the last four decades. *Id.*, at ___ (slip op., at 30). Under that prior interpretive doctrine, courts deferred to agency interpretations of ambiguous statutes that Congress authorized the agency to administer. Now, every legal claim conceived of in those last four decades—and before—can possibly be brought before courts newly unleashed from the constraints of any such deference. See Tr. of Oral Arg. 74 (Assistant to the Solicitor General explaining that this result "would magnify the effect of" overruling *Chevron*).

Put differently, a fixed statute of limitations, running from the agency's action, was one barrier to the chaotic upending of settled agency rules; the requirement that deference be given to an agency's reasonable interpretations concerning its statutory authority to issue rules was another. The Court has now eliminated both. Any new objection to any old rule must be entertained and determined *de novo* by judges who can now apply their own unfettered judgment as to whether the rule should be voided.

* * *

At the end of a momentous Term, this much is clear: The tsunami of lawsuits against agencies that the Court's holdings in this case and *Loper Bright* have authorized has the potential to devastate the functioning of the Federal Government. Even more to the present point, that result simply cannot be what Congress intended when it enacted legislation that stood up and funded federal agencies and

vested them with authority to set the ground rules for the individuals and entities that participate in the our economy and our society. It is utterly inconceivable that §2401(a)'s statute of limitations was meant to permit fresh attacks on settled regulations from all new comers forever. Yet, that is what the majority holds today.

But Congress still has a chance to address this absurdity and forestall the coming chaos. It can opt to correct this Court's mistake by clarifying that the statutes it enacts are designed to facilitate the functioning of agencies, not to hobble them. In particular, Congress can amend §2401(a), or enact a specific review provision for APA claims, to state explicitly what any such rule *must* mean if it is to operate as a limitations period in this context: Regulated entities have six years from the date of the agency action to bring a lawsuit seeking to have it changed or invalidated; after that, facial challenges must end. By doing this, Congress can make clear that lawsuits bringing facial claims against agencies are not personal attack vehicles for new entities created just for that purpose. So, while the Court has made a mess of this pivotal statute, and the consequences are profound, "the ball is in Congress' court." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618, 661 (2007) (Ginsburg, J., dissenting).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SECURITIES AND EXCHANGE COMMISSION *v.* JARKESY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22–859. Argued November 29, 2023—Decided June 27, 2024

In the aftermath of the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud and increase market transparency. Three such statues are relevant: The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. These Acts respectively govern the registration of securities, the trading of securities, and the activities of investment advisers. Although each regulates different aspects of the securities markets, their pertinent provisions—collectively referred to by regulators as "the antifraud provisions," App. to Pet. for Cert. 73a, 202a—target the same basic behavior: misrepresenting or concealing material facts.

To enforce these Acts, Congress created the Securities and Exchange Commission. The SEC may bring an enforcement action in one of two forums. It can file suit in federal court, or it can adjudicate the matter itself. The forum the SEC selects dictates certain aspects of the litigation. In federal court, a jury finds the facts, an Article III judge presides, and the Federal Rules of Evidence and the ordinary rules of discovery govern the litigation. But when the SEC adjudicates the matter in-house, there are no juries. The Commission presides while its Division of Enforcement prosecutes the case. The Commission or its delegee—typically an Administrative Law Judge—also finds facts and decides discovery disputes, and the SEC's Rules of Practice govern.

One remedy for securities violations is civil penalties. Originally, the SEC could only obtain civil penalties from unregistered investment advisers in federal court. Then, in 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Act authorized the SEC to impose such penalties through its own in-house

Syllabus

proceedings.

Shortly after passage of the Dodd-Frank Act, the SEC initiated an enforcement action for civil penalties against investment adviser George Jarkesy, Jr., and his firm, Patriot28, LLC for alleged violations of the "antifraud provisions" contained in the federal securities laws. The SEC opted to adjudicate the matter in-house. As relevant, the final order determined that Jarkesy and Patriot28 had committed securities violations and levied a civil penalty of $300,000. Jarkesy and Patriot28 petitioned for judicial review. The Fifth Circuit vacated the order on the ground that adjudicating the matter in-house violated the defendants' Seventh Amendment right to a jury trial.

Held: When the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial. Pp. 6–27.

(a) The question presented by this case—whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud—is straightforward. Following the analysis set forth in *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, and *Tull* v. *United States*, 481 U. S. 412, this action implicates the Seventh Amendment because the SEC's antifraud provisions replicate common law fraud. And the "public rights" exception to Article III jurisdiction does not apply, 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.

(b) The Court first explains why this action implicates the Seventh Amendment.

(1) The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U. S. 474, 486. When the British attempted to evade American juries by siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts, the Americans protested and eventually cited the British practice as a justification for declaring Independence. In the Revolution's aftermath, concerns that the proposed Constitution lacked a provision guaranteeing a jury trial right in civil cases was perhaps the "most success[ful]" critique leveled against the document during the ratification debates. The Federalist No. 83, p. 495. To fix that flaw, the Framers promptly adopted the Seventh Amendment. Ever since, "every encroachment upon [the jury trial right] has been watched with great jealousy." *Parsons* v. *Bedford*, 3 Pet. 433, 446. Pp. 7–8.

(2) The Seventh Amendment guarantees that in "[s]uits at common law . . . the right of trial by jury shall be preserved." The right

itself is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. *Curtis* v. *Loether*, 415 U. S. 189, 193. Rather, it "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Parsons*, 3 Pet., at 447. That includes statutory claims that are "legal in nature." *Granfinanciera*, 492 U. S., at 53. To determine whether a suit is legal in nature, courts must consider whether the cause of action resembles common law causes of action, and whether the remedy is the sort that was traditionally obtained in a court of law. Of these factors, the remedy is the more important. And in this case, the remedy is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. Such relief is legal in nature when it is designed to punish or deter the wrongdoer rather than solely to "restore the status quo." *Tull*, 481 U. S., at 422. The Acts condition the availability and size of the civil penalties available to the SEC based on considerations such as culpability, deterrence, and recidivism. See §§77h–1; 78u–2, 80b–3. These factors go beyond restoring the status quo and so are legal in nature. The SEC is also not obligated to use civil penalties to compensate victims. SEC civil penalties are thus "a type of remedy at common law that could only be enforced in courts of law." *Tull*, 481 U. S., at 422. This suit implicates the Seventh Amendment right and a defendant would be entitled to a jury on these claims.

The close relationship between federal securities fraud and common law fraud confirms that conclusion. Both target the same basic conduct: misrepresenting or concealing material facts. By using "fraud" and other common law terms of art when it drafted the federal securities laws, Congress incorporated common law fraud prohibitions into those laws. This Court therefore often considers common law fraud principles when interpreting federal securities law. See, *e.g., Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 343–344. While federal securities fraud and common law fraud are not identical, the close relationship between the two confirms that this action is "legal in nature." *Granfinanciera*, 492 U. S., at 53. Pp. 8–13.

(c) Because the claims at issue here implicate the Seventh Amendment, a jury trial is required unless 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. For the reasons below, the exception does not apply. Pp. 13–27.

(1) The Constitution prevents Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284. Once such a suit "is brought within

the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies. *Stern* v. *Marshall*, 564 U. S. 462, 484. On that basis, this Court has repeatedly explained that matters concerning private rights may not be removed from Article III courts. See, *e.g., Murray's Lessee,* 18 How., at 284. 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. *Stern*, 564 U. S., at 484.

The Court also recognizes a class of cases concerning "public rights." Such matters "historically could have been determined exclusively by [the executive and legislative] branches." *Id.,* at 493 (internal quotation marks omitted). No involvement by an Article III court in the initial adjudication of public rights claims is necessary. Certain categories that have been recognized as falling within the exception include matters concerning: the collection of revenue; aspects of customs law; immigration law; relations with Indian tribes; the administration of public lands; and the granting of public benefits. The Court's opinions governing this exception have not always spoken in precise terms. But "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 69, n. 23 (plurality opinion). Pp. 13–18.

(2) In *Granfinanciera*, this Court previously 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." 492 U. S., at 37, 50. There the issue was whether Congress's designation of fraudulent conveyance actions as "core [bankruptcy] proceedings" authorized non-Article III bankruptcy judges to hear them without juries. *Id.*, at 50. The Court held that the designation was not permissible, even under the public rights exception. To determine whether the claim implicated the Seventh Amendment, the Court applied the principles distilled in *Tull.* Surveying English cases and considering the remedy these suits provided, the Court concluded that fraudulent conveyance actions were "quintessentially suits at common law." *Granfinanciera*, 492 U. S., at 56. Because these actions were akin to "suits at common law" and were not "closely intertwined" with the bankruptcy process, the Court held that the public rights exception did not apply, and a jury was required. *Id.,* at 54, 56. Pp. 19–20.

(3) *Granfinanciera* effectively decides this case. The action here was brought under the "anti-fraud provisions" of the federal securities laws and provide civil penalties that can "only be enforced in courts of law." *Tull*, 481 U. S., at 422. 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." *Granfinanciera*, 492 U. S., at 56. Pp. 20–21.

(4) The SEC claims that the public rights exception applies 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." Brief for Petitioner 21. *Granfinanciera* 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." 492 U. S., at 52. The SEC's argument that *Granfinanciera* does not apply because the Government is the party bringing this action also fails. What matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. *Northern Pipeline Constr. Co.*, 458 U. S., at 69 n. 23 (plurality opinion). Pp. 21–22.

(5) The Court's opinion in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, is not to the contrary. The litigation in that case arose under the Occupational Health and Safety Act. Facing agency enforcement actions, two employers alleged that the agency's adjudicatory authority violated the Seventh Amendment. See *id.,* at 448–449. The Court concluded that Congress could assign the OSH Act adjudications to an agency because the claims involved "a new cause of action, and remedies therefor, unknown to the common law." *Id.,* at 461. The cases *Atlas Roofing* relied upon applied the "public rights" exception to actions that were "'not . . . suit[s] at common law or in the nature of such . . . suit[s].'" *Id.*, at 453. *Atlas Roofing* therefore does not apply here, where the statutory claim is "'in the nature of'" a common law suit. *Id.,* at 453. Later rulings also foreclose reading *Atlas Roofing* as the SEC does. This Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the statutory claims are akin to common law claims. See 481 U. S., at 421–423. And the Court has explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication. See *Granfinanciera*, 492 U. S., at 52. Pp. 22–27.

The Court does not reach the remaining issues in this case.

34 F. 4th 446, affirmed and remanded.

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

NOTICE: This opinion is subject to formal revision before publication in the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, pio@supremecourt.gov, of any typographical or other formal errors.

SUPREME COURT OF THE UNITED STATES

No. 22–859

SECURITIES AND EXCHANGE COMMISSION, PETITIONER *v.* GEORGE R. JARKESY, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 27, 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

In the aftermath of the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud and increase market transparency. Three such statues are relevant here: The Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. 48 Stat. 74, 15 U. S. C. §§77a *et seq*.; 48 Stat.

881, 78a *et seq.*; 54 Stat. 847, 80b–1 *et seq*. These Acts respectively govern the registration of securities, the trading of securities, and the activities of investment advisers. Their protections are mutually reinforcing and often overlap. See *Lorenzo* v. *SEC*, 587 U. S. 71, 80 (2019). Although each regulates different aspects of the securities markets, their pertinent provisions—collectively referred to by regulators as "the antifraud provisions," App. to Pet. for Cert. 73a, 202a—target the same basic behavior: misrepresenting or concealing material facts.

The three antifraud provisions are Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Section 206 of the Investment Advisers Act. Section 17(a) prohibits regulated individuals from "obtain[ing] money or property by means of any untrue statement of a material fact," as well as causing certain omissions of material fact. 15 U. S. C. §77q(a)(2). As implemented by Rule 10b–5, Section 10(b) prohibits using "any device, scheme, or artifice to defraud," making "untrue statement[s] of . . . material fact," causing certain material omissions, and "engag[ing] in any act . . . which operates or would operate as a fraud." 17 CFR §240.10b–5 (2023); see 15 U. S. C. §78j(b). And finally, Section 206(b), as implemented by Rule 206(4)–8, prohibits investment advisers from making "any untrue statement of a material fact" or engaging in "fraudulent, deceptive, or manipulative" acts with respect to investors or prospective investors. 17 CFR §§275.206(4)–8(a)(1), (2); see 15 U. S. C. §80b–6(4).

To enforce these Acts, Congress created the SEC. The SEC may bring an enforcement action in one of two forums. First, the Commission can adjudicate the matter itself. See §§77h–1, 78u–2, 78u–3, 80b–3. Alternatively, it can file a suit in federal court. See §§77t, 78u, 80b–9. The SEC's choice of forum dictates two aspects of the litigation: The procedural protections enjoyed by the defendant, and the remedies available to the SEC.

Procedurally, these forums differ in who presides and makes legal determinations, what evidentiary and discovery rules apply, and who finds facts. Most pertinently, in federal court a jury finds the facts, depending on the nature of the claim. See U. S. Const., Amdt. 7. In addition, a life-tenured, salary-protected Article III judge presides, see Art. III, §1, and the litigation is governed by the Federal Rules of Evidence and the ordinary rules of discovery.

Conversely, when the SEC adjudicates the matter in-house, there are no juries. Instead, the Commission presides and finds facts while its Division of Enforcement prosecutes the case. The Commission may also delegate its role as judge and factfinder to one of its members or to an administrative law judge (ALJ) that it employs. See 15 U. S. C. §78d–1. In these proceedings, the Commission or its delegee decides discovery disputes, see, *e.g.*, 17 CFR §201.232(b), and the SEC's Rules of Practice govern, see 17 CFR §201.100 *et seq*. The Commission or its delegee also determines the scope and form of permissible evidence and may admit hearsay and other testimony that would be inadmissible in federal court. See §§201.320, 201.326.

When a Commission member or an ALJ presides, the full Commission can review that official's findings and conclusions, but it is not obligated to do so. See §201.360; 15 U. S. C. §78d–1. Judicial review is also available once the proceedings have concluded. See §§77i(a), 78y(a)(1), 80b–13(a). But such review is deferential. By law, a reviewing court must treat the agency's factual findings as "conclusive" if sufficiently supported by the record, *e.g.*, §78y(a)(4); see *Richardson* v. *Perales*, 402 U. S. 389, 401 (1971), even when they rest on evidence that could not have been admitted in federal court.

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. See Insider Trading

Sanctions Act of 1984, §2, 98 Stat. 1264; Securities Enforcement Remedies and Penny Stock Reform Act of 1990, §§101, 201–202, 104 Stat. 932–933, 935–938. That is no longer so. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 124 Stat. 1376. That Act "ma[de] the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court." H. R. Rep. No. 111–687, p. 78 (2010). In other words, the SEC may now seek civil penalties in federal court, or it may impose them through its own in-house proceedings. See Dodd-Frank Act, §929P(a), 124 Stat. 1862–1864 (codified in relevant part as amended at 15 U. S. C. §§77h–1(g), 78u–2(a), 80b–3(i)(1)).

Civil penalties rank among the SEC's most potent enforcement tools. These penalties consist of fines of up to $725,000 per violation. See §§77h–1(g), 78u–2, 80b–3(i). And the SEC may levy these penalties even when no investor has actually suffered financial loss. See *SEC* v. *Blavin*, 760 F. 2d 706, 711 (CA6 1985) (*per curiam*).

B

Shortly after passage of the Dodd-Frank Act, the SEC began investigating Jarkesy and Patriot28 for securities fraud. Between 2007 and 2010, Jarkesy launched two investment funds, raising about $24 million from 120 "accredited" investors—a class of investors that includes, for example, financial institutions, certain investment professionals, and high net worth individuals. App. to Pet. for Cert. 72a–73a, 110a, n. 72; see 17 CFR §230.501. Patriot28, which Jarkesy managed, served as the funds' investment adviser. 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. App. to Pet. for Cert. 80a–86a, 95a–105a. 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. *Id.*, at 155a–225a. The SEC reviewed the decision and then released its final order in 2020. *Id.*, at 71a–154a. 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. *Id.*, at 152a–154a.

Jarkesy and Patriot28 petitioned for judicial review. 34 F. 4th 446, 450 (CA5 2022). A divided panel of the Fifth Circuit granted their petition and vacated the final order. *Id.*, at 449–450. 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. 34 F. 4th, at 451. 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. *Id.*, at 454; see *id.*, at 453–455. 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. See *id.*, at 455–459. 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. *Id.*, at 459.

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. See *id.*, at 459–463. 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. See *id.*, at 463–466. Judge Davis dissented. *Id.*, at 466–479. The Fifth Circuit denied rehearing en banc, 51 F. 4th 644 (2022), and we granted certiorari, 600 U. S. ___ (2023).

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.

1

The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U. S. 474, 486 (1935). Commentators recognized the right as "the glory of the English law," 3 W. Blackstone, Commentaries on the Laws of England 379 (8th ed. 1778) (Blackstone), and it was prized by the American colonists. When the English began evading American juries by siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts, Americans condemned Parliament for "subvert[ing] the rights and liberties of the colonists." Resolutions of the Stamp Act Congress, Art. VIII (Oct. 19, 1765), reprinted in Sources of Our Liberties 270, 271 (R. Perry & J. Cooper eds. 1959). Representatives gathered at the First Continental Congress demanded that Parliament respect the "great and inestimable privilege of being tried by their peers of the vicinage, according to the [common] law." 1 Journals of the Continental Congress, 1774–1789, p. 69 (Oct. 14, 1774) (W. Ford ed. 1904). And when the English continued to try Americans without juries, the Founders cited the practice as a justification for

severing our ties to England. See Declaration of Independence ¶20; see generally *Erlinger* v. *United States*, 602 U. S. ___, ___–___ (2024).

In the Revolution's aftermath, perhaps the "most success[ful]" critique leveled against the proposed Constitution was its "want of a . . . provision for the trial by jury in civil cases." The Federalist No. 83, p. 495 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). The Framers promptly adopted the Seventh Amendment to fix that flaw. In so doing, they "embedded" the right in the Constitution, securing it "against the passing demands of expediency or convenience." *Reid* v. *Covert*, 354 U. S. 1, 10 (1957) (plurality opinion). Since then, "every encroachment upon it has been watched with great jealousy." *Parsons* v. *Bedford*, 3 Pet. 433, 446 (1830).

2

By its text, the Seventh Amendment guarantees that in "[s]uits at common law, . . . the right of trial by jury shall be preserved." In construing this language, we have noted that the right is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. *Curtis* v. *Loether*, 415 U. S. 189, 193 (1974). As Justice Story explained, the Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." *Parsons*, 3 Pet., at 446. 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." *Id.*, at 447.

The Seventh Amendment extends to a particular statutory claim if the claim is "legal in nature." *Granfinanciera*, 492 U. S., at 53. As we made clear in *Tull*, whether that claim is statutory is immaterial to this analysis. See 481 U. S., at 414–415, 417–425. In that case, the Government sued a real estate developer for civil penalties in federal

court. The developer responded by invoking his right to a jury trial. Although the cause of action arose under the Clean Water Act, the Court surveyed early cases to show that the statutory nature of the claim was not legally relevant. "Actions by the Government to recover civil penalties under statutory provisions," we explained, "historically ha[d] been viewed as [a] type of action in debt requiring trial by jury." *Id.*, at 418–419. To determine whether a suit is legal in nature, we directed courts to consider the cause of action and the remedy it provides. Since some causes of action sound in both law and equity, we concluded that the remedy was the "more important" consideration. *Id.*, at 421 (brackets and internal quotation marks omitted); see *id.*, at 418–421.

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. See *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 255 (1993). What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to "restore the status quo." *Tull*, 481 U. S., at 422. As we have previously explained, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Austin* v. *United States*, 509 U. S. 602, 610 (1993) (internal quotation marks omitted). And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to "punish culpable individuals." *Tull*, 481 U. S., at 422. Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law." *Ibid.* The same is true here.

To start, the Securities Exchange Act and the Investment

Advisers Act condition the availability of civil penalties on six statutory factors: (1) whether the alleged misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements, (2) whether it caused harm, (3) whether it resulted in unjust enrichment, accounting for any restitution made, (4) whether the defendant had previously violated securities laws or regulations, or had previously committed certain crimes, (5) the need for deterrence, and (6) other "matters as justice may require." §§78u–2(c), 80b–3(i)(3). Of these, several concern culpability, deterrence, and recidivism. Because they tie the availability of civil penalties to the perceived need to punish the defendant rather than to restore the victim, such considerations are legal rather than equitable.

The same is true of the criteria that determine the size of the available remedy. The Securities Act, the Securities Exchange Act, and the Investment Advisers Act establish three "tiers" of civil penalties. See §§77h–1(g)(2), 78u–2(b), 80b–3(i)(2). Violating a federal securities law or regulation exposes a defendant to a first tier penalty. A second tier penalty may be ordered if the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements. Finally, if those acts also resulted in substantial gains to the defendant or losses to another, or created a "significant risk" of the latter, the defendant is subject to a third tier penalty. Each successive tier authorizes a larger monetary sanction. See *ibid.*

Like the considerations that determine the availability of civil penalties in the first place, the criteria that divide these tiers are also legal in nature. Each tier conditions the available penalty on the culpability of the defendant and the need for deterrence, not the size of the harm that must be remedied. Indeed, showing that a victim suffered harm is not even required to advance a defendant from one tier to the next. Since nothing in this analysis turns on "restor[ing] the status quo," *Tull*, 481 U. S., at 422, these factors

show that these civil penalties are designed to be punitive.

The final proof that this remedy is punitive is that the SEC is not obligated to return any money to victims. See *id.*, at 422–423. Although the SEC can choose to compensate injured shareholders from the civil penalties it collects, see 15 U. S. C. §7246(a), it admits that it is not required to do so, see App. to Pet. for Cert. 124a, n. 116 (citing 17 CFR §201.1100). Such a penalty by definition does not "restore the status quo" and can make no pretense of being equitable. *Tull*, 481 U. S., at 422.

In sum, the 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." *Ibid.* 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. See *id.*, at 421–423.

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. Compare 15 U. S. C. §§77q(a)(2), 78j(b), 80b–6(4); 17 CFR §§240.10b–5(b), 275.206(4)–8(a)(1), with Restatement (Third) of Torts: Liability for Economic Harm, §§9, 13 (2018); see also, *e.g.*, *Pauwels* v. *Deloitte LLP*, 83 F. 4th 171, 189–190 (CA2 2023) (identifying the elements of common law fraud under New York law); *Conroy* v. *Regents of Univ. of Cal.*, 45 Cal. 4th 1244, 1254–1255, 203 P. 3d 1127, 1135 (2009) (same for California law); *Wesdem, L.L.C.* v. *Illinois Tool Works, Inc.*, 70 F. 4th 285, 291 (CA5 2023) (same for Texas law). 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. *E.g.*, 15 U. S. C. §77q(a)(3) (prohibiting any practice "which operates . . . as a fraud"). In so doing, Congress incorporated prohibitions from common law fraud into federal securities law. The SEC has followed

suit in rulemakings. Rule 10b–5, for example, prohibits "any device, scheme, or artifice to defraud," and "engag[ing] in any act . . . which operates or would operate as a fraud." 17 CFR §§240.10b–5(a), (c).

Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law "ancestor." *Foster* v. *Wilson*, 504 F. 3d 1046, 1050 (CA9 2007). "[W]hen Congress transplants a common-law term, the old soil comes with it." *United States* v. *Hansen*, 599 U. S. 762, 778 (2023) (internal quotation marks omitted). Our precedents therefore often consider common law fraud principles when interpreting federal securities law. *E.g.*, *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 343–344 (2005) (evaluating pleading requirements in light of the "common-law roots of the securities fraud action"); *Schreiber* v. *Burlington Northern, Inc.*, 472 U. S. 1, 7 (1985) ("The meaning the Court has given the term 'manipulative' [in §10b of the Securities Exchange Act] is consistent with the use of the term at common law . . . ." (footnote omitted)); *Chiarella* v. *United States*, 445 U. S. 222, 227–229 (1980) (explaining that insider trading liability under Rule 10b–5 is rooted in the common law duty of disclosure); *Basic Inc.* v. *Levinson*, 485 U. S. 224, 253 (1988) (White, J., concurring in part and dissenting in part) ("In general, the case law developed in this Court with respect to §10(b) and Rule 10b–5 has been based on doctrines with which we, as judges, are familiar: common-law doctrines of fraud and deceit.").

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." *SEC* v. *Zandford*, 535 U. S. 813, 820 (2002). 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. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 387–390 (1983). Courts have also not typically interpreted federal securities fraud to require a showing of harm to be actionable by the SEC. See, *e.g.*, *Blavin*, 760 F. 2d, at 711; *SEC* v. *Life Partners Holdings, Inc.*, 854 F. 3d 765, 779 (CA5 2017). Nevertheless, the close relationship between federal securities fraud and common law fraud confirms that this action is "legal in nature." *Granfinanciera*, 492 U. S., at 53.

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.

The Constitution prohibits Congress from "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies. *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011). These propositions are critical to maintaining the proper role of the Judiciary in the Constitution: "Under 'the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government' adopted in the Constitution, 'the judicial Power of

the United States'" cannot be shared with the other branches. *Id.*, at 483 (quoting *United States* v. *Nixon*, 418 U. S. 683, 704 (1974); alteration in original). Or, as Alexander Hamilton wrote in The Federalist Papers, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" The Federalist No. 78, at 466 (quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773)).

On that basis, we have repeatedly explained that matters concerning private rights may not be removed from Article III courts. *Murray's Lessee*, 18 How., at 284; *Granfinanciera*, 492 U. S., at 51–52; *Stern*, 564 U. S., at 484. 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.'" *Id.*, at 484 (quoting *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)). 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. *Stern*, 564 U. S., at 484.

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," *id.*, at 493 (internal quotation marks omitted), even when they were "presented in such form that the judicial power [wa]s capable of acting on them," *Murray's Lessee*, 18 How., at 284. In contrast to common law claims, no involvement by an Article III court in the initial adjudication is necessary in such a case.

The decision that first recognized the public rights exception was *Murray's Lessee*. In that case, a federal customs collector failed to deliver public funds to the Treasury, so the Government issued a "warrant of distress" to compel him to produce the withheld sum. 18 How., at 274–275.

Pursuant to the warrant, the Government eventually seized and sold a plot of the collector's land. *Id.*, at 274. Plaintiffs later attacked the purchaser's title, arguing that the initial seizure was void because the Government had audited the collector's account and issued the warrant itself without judicial involvement. *Id.*, at 275.

The Court upheld the sale. It explained that pursuant to its power to collect revenue, the Government could rely on "summary proceedings" to compel its officers to "pay such balances of the public money" into the Treasury "as may be in their hands." *Id.*, at 281, 285. Indeed, the Court observed, there was an unbroken tradition—long predating the founding—of using these kinds of proceedings to "enforce payment of balances due from receivers of the revenue." *Id.*, at 278; see *id.*, at 281. In light of this historical practice, the Government could issue a valid warrant without intruding on the domain of the Judiciary. See *id.*, at 280–282. The challenge to the sale thus lacked merit.

This principle extends beyond cases involving the collection of revenue. In *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320 (1909), we considered the imposition of a monetary penalty on a steamship company. Pursuant to its plenary power over immigration, Congress had excluded immigration by aliens afflicted with "loathsome or dangerous contagious diseases," and it authorized customs collectors to enforce the prohibition with fines. *Id.*, at 331–334. When a steamship company challenged the penalty under Article III, we upheld it. Congress's power over foreign commerce, we explained, was so total that no party had a "'vested right'" to import anything into the country. *Id.*, at 335 (quoting *Buttfield* v. *Stranahan*, 192 U. S. 470, 493 (1904)). By the same token, Congress could also prohibit immigration by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury. See *Oceanic Steam Navigation Co.*, 214 U. S., at

339–340.[1]

In *Ex parte Bakelite Corp.*, we upheld a law authorizing the President to impose tariffs on goods imported by "unfair methods of competition." 279 U. S. 438, 446 (1929). The law permitted him to set whatever tariff was necessary, subject to a statutory cap, to produce fair competition. If the President was "satisfied the unfairness [was] extreme," the law even authorized him to "exclude[]" foreign goods entirely. *Ibid.* Because the political branches had traditionally held exclusive power over this field and had exercised

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[1]The dissent asserts that *Oceanic Steam Navigation* stands for the proposition that the public rights exception applies to any exercise of power granted to Congress. *Post*, at 10–11 (opinion of SOTOMAYOR, J). It must be reading from a different case than we are. *Oceanic Steam Navigation* expressly confines its analysis to the exercise of Congress's power over *foreign* commerce. 214 U. S., at 339 ("It is insisted that the decisions just stated and the legislative practices referred to are inapposite here, because they all relate to subjects peculiarly within the authority of the legislative department of the Government, and which, from the necessity of things, required the concession that administrative officers should have the authority to enforce designated penalties without resort to the courts. But over no conceivable subject is the legislative power of Congress more complete than it is over that with which the act we are now considering deals."); *id.*, at 334 (explaining that the statute "rest[s] . . . upon the authority of Congress over *foreign* commerce and its right to control the coming of aliens into the United States" (emphasis added)); *id.*, at 340 (citing "the authority of Congress over the right to bring aliens into the United States"); see *id.*, at 339 (discussing congressional power over "the valuation of imported merchandise," "'importers,'" and "tariff[s]" (quoting *Bartlett* v. *Kane*, 16 How. 263, 274 (1854)); 214 U. S., at 334 (expressly acknowledging and avoiding comment on "'limitations'" of Congress's "'interstate commerce'" power because this case concerns instead Congress's exercise of its "'plenary power in respect to the exclusion of merchandise brought from *foreign* countries'" (quoting *Buttfield* v. *Stranahan*, 192 U. S. 470, 492 (1904); emphasis added). Nowhere does *Oceanic Steam Navigation* say that the public rights exception applies to cases concerning the securities markets or interstate commerce more broadly. The rules the dissent purports to locate in *Oceanic Steam Navigation* are therefore wholly inapposite.

it, we explained that the assessment of tariffs did not implicate Article III. *Id.*, at 458, 460–461.

This Court has since held that certain other historic categories of adjudications fall within the exception, including relations with Indian tribes, see *United States* v. *Jicarilla Apache Nation*, 564 U. S. 162, 174 (2011), the administration of public lands, *Crowell* v. *Benson*, 285 U. S. 22, 51 (1932), and the granting of public benefits such as payments to veterans, *ibid.*, pensions, *ibid.*, and patent rights, *United States* v. *Duell*, 172 U. S. 576, 582–583 (1899).

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." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 583 (1985) (internal quotation marks omitted). The Court "has not 'definitively explained' the distinction between public and private rights," and we do not claim to do so today. *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 334 (2018).

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. *Murray's Lessee* itself, for example, took pains to justify the application of the exception in that particular instance by explaining that it flowed from centuries-old rules concerning revenue collection by a sovereign. See 18 How., at 281–285. 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. See *post*, at 2 (opinion of SOTOMAYOR, J.). It bases this rule not in the constitutional text (where it would find

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." *Murray's Lessee*, 18 How., at 284. We have never embraced the proposition that "practical" considerations alone can justify extending the scope of the public rights exception to such matters. *Stern*, 564 U. S., at 501. "[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." *Northern Pipeline Constr. Co.*, 458 U. S., at 69, n. 23 (plurality opinion) (citing *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 548–549, and n. 21 (1962) (plurality opinion)). And for good reason: "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside

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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.

The dissent also appeals to practice, ignoring that the statute Jarkesy and Patriot28 have been prosecuted under is barely over a decade old. It is also unclear how practice could transmute a private right into a public one, or how the absence of legal challenges brought by one generation could waive the individual rights of the next. Practice may be probative when it reflects the settled institutional understandings of the branches. That case is far weaker when the rights of individuals are directly at stake.

Article III." *Stern*, 564 U. S., at 484.

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." 492 U. S., at 37, 50. We did so in *Granfinanciera*, and the principles identified in that case largely resolve this one.

Granfinanciera involved a statutory action for fraudulent conveyance. As codified in the Bankruptcy Code, the claim permitted a trustee to void a transfer or obligation made by the debtor before bankruptcy if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U. S. C. §548(a)(2)(A) (1982 ed., Supp. V). Actions for fraudulent conveyance were well known at common law. 492 U. S., at 43. Even when Congress added these claims to the Bankruptcy Code in 1978, see 92 Stat. 2600, it preserved parties' rights to a trial by jury, 492 U. S., at 49–50. In 1984, however, Congress designated fraudulent conveyance actions "core [bankruptcy] proceedings" and authorized non-Article III bankruptcy judges to hear them without juries. *Id.*, at 50.

The issue in *Granfinanciera* was whether this designation was permissible under the public rights exception. *Ibid.* We explained that it was not. Although Congress had assigned fraudulent conveyance claims to bankruptcy courts, that assignment was not dispositive. See *id.*, at 52. What mattered, we explained, was the substance of the suit. "[T]raditional legal claims" must be decided by courts, "whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." *Ibid.* To determine whether the claim implicated the Seventh Amendment, the Court applied the principles distilled in *Tull*. We examined whether the matter was "from [its] nature subject to 'a suit at common law.'" 492 U. S., at 56

(some internal quotation marks omitted); see *id.*, at 43–50. A survey of English cases showed that "actions to recover . . . fraudulent transfers were often brought at law in late 18th-century England." *Id.*, at 43. The remedy the trustee sought was also one "traditionally provided by law courts." *Id.*, at 49. Fraudulent conveyance actions were thus "quintessentially suits at common law." *Id.*, at 56.

We also considered whether these actions were "closely intertwined" with the bankruptcy regime. *Id.*, at 54. Some bankruptcy claims, such as "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," *id.*, at 56, are highly interdependent and require coordination. Resolving such claims fairly is only possible if they are all submitted at once to a single adjudicator. Otherwise, parties with lower priority claims can rush to the courthouse to seek payment before higher priority claims exhaust the estate, and an orderly disposition of a bankruptcy is impossible. Other claims, though, can be brought in standalone suits, because they are neither prioritized nor subordinated to related claims. Since fraudulent conveyance actions fall into that latter category, we concluded that these actions were not "closely intertwined" with the bankruptcy process. *Id.*, at 54. We also noted that Congress had already authorized jury trials for certain bankruptcy matters, demonstrating that jury trials were not generally "incompatible" with the overall regime. *Id.*, at 61–62 (internal quotation marks omitted).

We accordingly concluded that fraudulent conveyance actions were akin to "suits at common law" and were not inseparable from the bankruptcy process. *Id.*, at 54, 56. 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. *Id.*, at 52. And in this case, the substance points in only one direction.

According to the SEC, these are actions under the "anti-fraud provisions of the federal securities laws" for "fraudulent conduct." App. to Pet. for Cert. 72a–73a (opinion of the Commission). They provide civil penalties, a punitive remedy that we have recognized "could only be enforced in courts of law." *Tull*, 481 U. S., at 422. And they target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles. See *supra*, at 10–12. In short, this action involves a "matter[] of private rather than public right." *Granfinanciera*, 492 U. S., at 56. Therefore, "Congress may not 'withdraw'" it "'from judicial cognizance.'" *Stern*, 564 U. S., at 484 (quoting *Murray's Lessee*, 18 How., at 284).

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." Brief for Petitioner 21 (internal quotation marks omitted).

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." 492 U. S., at 52. 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. *Ibid.* The constructive fraud claim in *Granfinanciera* was also statutory, see *id.*, at 37, 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. See *id.*, at 52, 56.

The SEC's sole remaining basis for distinguishing *Granfinanciera* is that the Government is the party prosecuting this action. See Brief for Petitioner 26–28; see also Tr. of Oral Arg. 25 (Principal Deputy Solicitor General) (the "critical distinction" in the public rights analysis is "enforcement by the executive"); *id.*, at 26 (identifying as "the constitutionally relevant distinction" that "this is something that has been assigned to a federal agency to enforce"). 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. *Northern Pipeline Constr. Co.*, 458 U. S., at 69, n. 23 (plurality opinion). Again, what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled. See *ibid.* 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.[3]

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. *Id.*, at 444–445. 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. *Id.*, at 445–446. If a party violated the regulations, the agency could impose civil penalties. *Id.*, at 446.

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." 84 Stat. 1593, 29 U. S. C. §654(a)(2) (1976 ed.). These standards bring no common law soil with them. Cf. *Hansen*, 599 U. S., at 778. Rather than reiterate common law terms of art, they instead resembled a detailed building code. For example, the OSH Act regulations directed that a ground trench wall of "Solid Rock, Shale, or Cemented Sand and Gravels" could be constructed at a 90 degree angle to the ground. 29 CFR §1926.652, Table P–1 (1976); see *Atlas Roofing*, 430 U. S., at 447 (discussing Table P–1). But a wall of "Compacted Angular Gravels" needed to be sloped at 63 degrees, and a wall of "Well Rounded Loose Sand" at 26 degrees. §1926.652, Table P–1. The purpose of this regime was not to enable the Federal Government to bring or adjudicate

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[3] The dissent chides us for "leav[ing] open the possibility that *Granfinanciera* might have overruled *Atlas Roofing*." *Post*, at 25, n. 8 (opinion of SOTOMAYOR, J.). But the author of *Atlas Roofing* certainly thought that *Granfinanciera* may have done so. See *Granfinanciera*, 492 U. S., at 79 (White, J., dissenting) ("Perhaps . . . *Atlas Roofing* is no longer good law after today's decision."); see also *id.*, at 71, n. 1 (*Granfinanciera* "can be read as overruling or severely limiting" *Atlas Roofing*).

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." 29 U. S. C. §651(b)(5) (1976 ed.). 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. See *Atlas Roofing*, 430 U. S., at 448–449. 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[]." *Id.*, at 455. As the Court explained, the case involved "a new cause of action, and remedies therefor, unknown to the common law." *Id.*, at 461. The Seventh Amendment, the Court concluded, was accordingly "no bar to . . . enforcement outside the regular courts of law." *Ibid.*

The cases that *Atlas Roofing* relied upon did not extend the public rights exception to "traditional legal claims." *Granfinanciera*, 492 U. S., at 52. Instead, they applied the exception to actions that were "'not . . . suit[s] at common law or in the nature of such . . . suit[s].'" *Atlas Roofing*, 430 U. S., at 453 (quoting *Jones & Laughlin Steel Corp.*, 301 U. S., at 48); see *Atlas Roofing*, 430 U. S., at 450–451 (discussing, *e.g.*, *Murray's Lessee*, *Ex parte Bakelite Corp.*, *Helvering* v. *Mitchell*, 303 U. S. 391 (1938), and *Oceanic Steam Navigation Co.*). Indeed, the Court recognized that if a case did involve a common law action or its equivalent, a jury was required. See 430 U. S., at 455 ("'[W]here the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial.'" (quoting *Pernell* v. *Southall Realty*, 416 U. S. 363, 383 (1974)); *Atlas Roofing*, 430 U. S., at 458–459 (jury required

when "courts of law supplied a cause of action and an adequate remedy to the litigant").

Atlas Roofing concluded that Congress could assign the OSH Act adjudications to an agency because the claims were "unknown to the common law." 430 U. S., at 461. The case therefore does not control here, where the statutory claim is "'in the nature of'" a common law suit. *Id.*, at 453 (quoting *Jones & Laughlin*, 301 U. S., at 48). As we have explained, Jarkesy and Patriot28 were prosecuted for "fraudulent conduct," App. to Pet. for Cert. 72a, and the pertinent statutory provisions derive from, and are interpreted in light of, their common law counterparts, see 15 U. S. C. §§77q(a)(2), 78j(b), 80b–6(4); 17 CFR §§240.10b–5(b), 275.206(4)–8(a)(1); *Basic Inc.*, 485 U. S., at 253 (opinion of White, J.).

The reasoning of *Atlas Roofing* cannot support any broader rule. The dissent chants "*Atlas Roofing*" like a mantra, but no matter how many times it repeats those words, it cannot give *Atlas Roofing* substance that it lacks.[4]

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[4] Reading the dissent, one might also think that *Atlas Roofing* is among this Court's most celebrated cases. As the concurrence shows, *Atlas Roofing* represents a departure from our legal traditions. See *post*, at 12–20 (opinion of GORSUCH, J.).

This view is also reflected in the scholarship. Commentators writing comprehensively on Article III and agency adjudication have often simply ignored the case. See, *e.g.*, R. Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915 (1988) (no citation to *Atlas Roofing*); J. Harrison, Public Rights, Private Privileges, and Article III, 54 Ga. L. Rev. 143 (2019) (same); W. Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511 (2020) (same).

Others who have considered it have offered nothing but a variety of criticisms. See, *e.g.*, R. Kirst, Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment, 126 U. Pa. L. Rev. 1281, 1294 (1978) (through its "careless use of precedent," *Atlas Roofing* did "not recognize or [mis]understood" "careful distinctions developed by . . . earlier judges"); G. Young, Federal Courts & Federal Rights, 45 Brooklyn L. Rev. 1145, 1153 (1979) ("The *Atlas* Court . . . failed to offer an adequate justification for its interpretation of the sev-

Even as *Atlas Roofing* invoked the public rights exception, the definition it offered of the exception was circular. The exception applied, the Court said, "in cases in which 'public rights' are being litigated—*e. g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes." 430 U. S., at 450; see *id.*, at 458.

After *Atlas Roofing*, this Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims. See 481 U. S., at 421–423. In addition, we have explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication. See *Granfinanciera*, 492 U. S., at 52.

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. *Post*, at 15 (opinion of SOTOMAYOR, J.). Again, our precedents foreclose this argument. As *Stern* explained, effects like increasing efficiency and reducing public costs are not enough to trigger the exception. See 564 U. S., at 501; *INS* v. *Chadha*, 462 U. S. 919, 944 (1983). Otherwise, evading

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enth amendment, either in terms of precedent or the language and history of the amendment."); M. Redish & D. La Fave, Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill of Right J. 407, 436 (1995) (criticizing *Atlas Roofing* for failing to "provid[e] a principled basis upon which to determine the proper scope of congressional power to remove the civil jury from federal adjudications"); V. Amar, Implementing an Historical Version of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines, 47 S. Tex. L. Rev. 291, 298 (2005) (questioning *Atlas Roofing* for "invert[ing] and turn[ing] on its head the *Apprendi* doctrine's central insight that juries are most important to check the power of the state" (emphasis deleted)); C. Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 604–605, and n. 189 (2007) (describing *Atlas Roofing* as "misus[ing]" precedent to "deny the novelty of its holding" and "drive a wedge" into the traditional understanding of the public-private rights distinction). We express no opinion on these various criticisms.

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. See 3 Blackstone 41–42; §§77t, 78u, 80b–9. 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." *Murray's Lessee*, 18 How., at 284.

* * *

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.

SUPREME COURT OF THE UNITED STATES

No. 22–859

SECURITIES AND EXCHANGE COMMISSION, PETITIONER *v.* GEORGE R. JARKESY, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 27, 2024]

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring.

The Court decides a single issue: Whether the Security and Exchange Commission's use of in-house hearings to seek civil penalties violates the Seventh Amendment right to a jury trial. It does. As the Court details, the government has historically litigated suits of this sort before juries, and the Seventh Amendment requires no less.

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." *In re Murchison*, 349 U. S. 133, 136 (1955).

I

In March 2013, the SEC's Commissioners approved

charges against Mr. Jarkesy. The charges were serious; the agency accused him of defrauding investors. The relief the agency sought was serious, too: millions of dollars in civil penalties. See SEC, Division of Enforcement's Post-Hearing Memorandum of Law in *In re John Thomas Capital Management Group, LLC*, Admin. Proc. File No. 3–15255, pp. 28–29 (SEC, Apr. 7, 2014). For most of the SEC's 90-year existence, the Commission had to go to federal court to secure that kind of relief against someone like Mr. Jarkesy. *Ante*, at 3–4. Proceeding that way in this case hardly would have promised him an easy ride. But it would have at least guaranteed Mr. Jarkesy a jury, an independent judge, and traditional procedures designed to ensure that anyone caught up in our judicial system receives due process.

In 2010, however, all that changed. With the passage of the Dodd Frank Act, Congress gave the SEC an alternative to court proceedings. Now, the agency could funnel cases like Mr. Jarkesy's through its own "adjudicatory" system. See 124 Stat. 1376, 1862–1865. That is the route the SEC chose when it filed charges against Mr. Jarkesy.

There is little mystery why. The new law gave the SEC's Commissioners—the same officials who authorized the suit against Mr. Jarkesy—the power to preside over his case themselves and issue judgment. To be sure, the Commissioners opted, as they often do, to send Mr. Jarkesy's case in the first instance to an "administrative law judge" (ALJ). See 17 CFR §201.110 (2023). But the title "judge" in this context is not quite what it might seem. Yes, ALJs enjoy some measure of independence as a matter of regulation and statute from the lawyers who pursue charges on behalf of the agency. But they remain servants of the same master—the very agency tasked with prosecuting individuals like Mr. Jarkesy. This close relationship, as others have long recognized, can make it "extremely difficult, if not impossible, for th[e ALJ] to convey the image of being an impartial fact finder." B. Segal, The Administrative Law

Judge, 62 A. B. A. J. 1424, 1426 (1976). And with a jury out of the picture, the ALJ decides not just the law but the facts as well.[1]

Going in, then, the odds were stacked against Mr. Jarkesy. The numbers confirm as much: According to one report, during the period under study the SEC won about 90% of its contested in-house proceedings compared to 69% of its cases in court. D. Thornley & J. Blount, SEC In-House Tribunals: A Call for Reform, 62 Vill. L. Rev. 261, 286 (2017) (Thornley). Reportedly, too, one of the SEC's handful of ALJs even warned individuals during settlement discussions that he had found defendants liable in every contested case and never once "'ruled against the agency's enforcement division.'" *Axon Enterprise, Inc.* v. *FTC*, 598 U. S. 175, 213–214 (2023) (GORSUCH, J., concurring in judgment).

The shift from a court to an ALJ didn't just deprive Mr. Jarkesy of the right to an independent judge and a jury. He also lost many of the procedural protections our courts supply in cases where a person's life, liberty, or property is at stake. After an agency files a civil complaint in court, a defendant may obtain from the SEC a large swathe of documents relevant to the lawsuit. See Fed. Rule Civ. Proc. 26(b)(1). He may subpoena third parties for testimony and documents and take 10 oral depositions—more with the court's permission. Rule 45; Rule 30(a)(2)(A)(i). A court has flexibility, as well, to set deadlines for discovery and other matters to meet the needs of the case. See Rule 16. And

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[1] In many agencies, litigants are not even entitled to have ALJs, with their modicum of protections, decide their cases. These agencies use "administrative judges." Some agencies can replace these administrative judges if they don't like their decisions. And some of these judges may move in and out of prosecutorial and adjudicatory roles, or move in and out of the very industries their agencies regulate. See *United States* v. *Arthrex, Inc.*, 594 U. S. 1, 36–37 (2021) (GORSUCH, J., concurring in part and dissenting in part).

come trial, the Federal Rules of Evidence apply, meaning that hearsay is generally inadmissible and witnesses must usually testify in person, subject to cross-examination. See Fed. Rule Evid. 802.

Things look very different in agency proceedings. The SEC has a responsibility to provide "documents that contain material exculpatory evidence." 17 CFR §201.230(b)(3). But the defendant enjoys no general right to discovery. Though ALJs enjoy the power to issue subpoenas on the request of litigants like Mr. Jarkesy, §201.232(a), they "often decline to issue [them] or choose to significantly narrow their scope," G. Mark, SEC and CFTC Administrative Proceedings, 19 U. Pa. J. Const. L. 45, 68 (2016). Oral depositions are capped at five, with another two if the ALJ grants permission. §201.233(a). In some cases, an administrative trial must take place as soon as 1 month after service of the charges, and that hearing must follow within 10 months in even the most complex matters. §201.360(a)(2)(ii). The rules of evidence, including their prohibition against hearsay, do not apply with the same rigor they do in court. §201.235(a)(5); see §201.230. For that reason, live testimony often gives way to "investigative testimony"—that is, a "sworn statement" taken outside the presence of the defendant or his counsel. §201.235(b).

How did all this play out in Mr. Jarkesy's case? Accompanying its charges, the SEC disclosed 700 gigabytes of data—equivalent to between 15 and 25 million pages of information—it had collected during its investigation. App. to Pet. for Cert. 164a; Complaint in *Jarkesy* v. *U. S. SEC*, No. 1:14–cv–00114 (DDC, Jan. 29, 2014), ECF Doc. 1, ¶49, pp. 12–13. Over Mr. Jarkesy's protest that it would take "two lawyers or paralegals working twelve-hour days over four decades to review," *ibid.*, the ALJ gave Mr. Jarkesy 10 months to prepare for his hearing, see App. to Pet. for Cert. 156a. Then, after conducting that hearing, the ALJ turned around and obtained from the Commission "an extension of

six months to file [her] initial decision." *In re John Thomas Capital Management Group LLC*, SEC Release No. 9631, p. 1 (Aug. 13, 2014). The reason? The "'size and complexity of the proceeding.'" *Id.*, at 2. When that decision eventually arrived seven months after the hearing, the ALJ agreed with the SEC on every charge. See App. to Pet. for Cert. 155a–156a, 212a.

Mr. Jarkesy had the right to appeal to the Commission, but appeals to that politically accountable body (again, the same body that approved the charges) tend to go about as one might expect. The Commission may decline to review the ALJ's decision. §201.411(b)(2). If it chooses to hear the case, it may *increase* the penalty imposed on the defendant. Thornley 286. A defendant unhappy with the result can seek further review in court, though that process will take more time and money, too. Nor will he find a jury there, only a judge who must follow the agency's findings if they are supported by "'more than a mere scintilla'" of evidence. *Biestek* v. *Berryhill*, 587 U. S. 97, 103 (2019).

Mr. Jarkesy filed an appeal anyway. The Commission agreed to review the ALJ's decision. It then afforded itself the better part of six years to issue an opinion. And, after all that, it largely agreed with the ALJ. See App. to Pet. for Cert. 71a–74a. None of this likely came as a surprise to the SEC employees in the Division of Enforcement responsible for pressing the action against Mr. Jarkesy. While his appeal was pending, employees in that division—including an "'Enforcement Supervisor'" in the regional office prosecuting Mr. Jarkesy—accessed confidential memos by the Commissioners' advisors about his appeal. See SEC, Second Commission Statement Relating to Certain Administrative Adjudications 3 (June 2, 2023).

II

A

If administrative proceedings like Mr. Jarkesy's seem a

thoroughly modern development, the British government and its agents engaged in a strikingly similar strategy in colonial America. Colonial administrators routinely steered enforcement actions out of local courts and into vice-admiralty tribunals where they thought they would win more often. These tribunals lacked juries. They lacked truly independent judges. And the procedures materially differed from those available in everyday common-law courts.

The vice-admiralty courts in the Colonies began as rough equivalents of English courts of admiralty. E. Surrency, The Courts in the American Colonies, 11 Am. J. Legal Hist. 347, 355 (1967). These courts generally concerned themselves with maritime matters arising on "the oceans and rivers and their immediate shores." C. Ubbelohde, The Vice-Admiralty Courts and the American Revolution 19 (1960) (Ubbelohde). And the proceedings they used accorded more with civil law traditions than common law ones. Among other things, this meant officials could try cases against colonists without a jury. *Id.*, at 21.

Confined to admiralty disputes, perhaps the lack of a jury would have proven unexceptional (as juries were not usually required in such cases then, nor are they today). See, *e.g.*, *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U. S. 438, 448 (2001). But Parliament deployed these juryless tribunals in the Colonies to new ends that, according to John Adams, could fill "'volumes.'" Ubbelohde vii. The creep away from the original province of those courts began with the grant of authority over violations of certain trade and customs laws. But in the decade before the Revolution, the drip, drip, drip of expanding power became a torrent, as Parliament allowed more and more actions to be brought in colonial vice-admiralty courts.

Many of the matters added to vice-admiralty jurisdiction in the Colonies would have required juries in England. *Id.*, at 112. But as the Massachusetts royal governor explained,

colonial juries "'were not to be trusted.'" D. Lovejoy, Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764–1776, 16 Wm. & Mary Q. 459, 468 (1959). Even violations that did not implicate the jury right normally would have been heard in England "before a court in [one's] own neighborhood or county where [one] could count on traditional common-law procedure." *Id.*, at 471. But by expanding the reach of vice-admiralty jurisdiction in the Colonies, Parliament denied similar protections to Americans. See *Erlinger* v. *United States*, 602 U. S. ___, ___ (2024) (slip op., at 5).

Vice-admiralty court judges also lacked independence. While judges in England since the end of the seventeenth century generally enjoyed the protection of tenure during good behavior, colonial judges usually served at the pleasure of the royal administration. See *United States* v. *Will*, 449 U. S. 200, 218–219 (1980). And, doing away with the pretense of impartiality entirely, some vice-admiralty judges held dual appointments—for instance, as colonial attorneys general and vice-admiralty judges. Ubbelohde 162–163.

Like the modern SEC, British colonial officials were not *required* to bring many of their cases before the vice-admiralty courts. Often, Parliament gave those officials the option to proceed in either the ordinary common-law courts or the vice-admiralty courts. Unsurprisingly, though, they sought to file where they were most likely to win. And "[i]n this contest, the vice-admiralty courts were usually the victors." *Id.*, at 21.

B

The abuses of these courts featured prominently in the calls for revolution. In the First Continental Congress, the assembled delegates condemned how Parliament "extend[ed] the jurisdiction of Courts of Admiralty," complained how colonial judges were "dependent on the

Crown," and demanded the right to the "common law of England" and the "great and inestimable privilege" of a jury trial. Declaration and Resolves of the First Continental Congress, Oct. 14, 1774, in 1 Journals of the Continental Congress, 1774–1789, pp. 68–69 (W. Ford 1904 ed.). Two years later, the drafters of the Declaration of Independence repeated these concerns, admonishing the King for "ma[king] Judges dependent on his Will alone," ¶11, and "[f]or depriving [the colonists] in many cases, of the benefits of Trial by Jury," ¶20. By that point, however, the "musket fire at Lexington and Concord . . . signaled the end not only of the vice-admiralty courts, but of all British rule in America." Ubbelohde 190.

When the smoke settled, the American people went to great lengths to prevent a backslide toward anything like the vice-admiralty courts. *Erlinger*, 602 U. S., at ___–___ (slip op., at 5–6). One product of these efforts was Article III of the Constitution. There, the Constitution provided that "[t]he judicial Power"—the power over "Cases" and "Controversies"—would lie with life-tenured, salary-protected judges. §§1–2; see *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 346 (2018) (GORSUCH, J., dissenting). As the Court has recognized, this meant the Executive Branch could "exercise no part of th[e] judicial power." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 275 (1856), "no matter how court-like [its] decisionmaking process might appear," *Ortiz* v. *United States*, 585 U. S. 427, 465 (2018) (ALITO, J., dissenting). Nor could Congress "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"—the traditional scope of the "judicial Power." *Murray's Lessee*, 18 How., at 284; see Art. III, §2.

Despite these guarantees, many at the founding thought Article III didn't go far enough. Yes, it promised a defendant an independent judge rather than one dependent on

those who hold political power. But what would stop Congress from requiring litigants to navigate vice-admiralty's alien procedures in *all* federal cases? Or from making "federal processes" even *more* byzantine, so "as to [effectively] destroy [individual] rights?" Letter from a Federal Farmer (Jan. 20, 1788), in 2 The Complete Anti-Federalist 328 (H. Storing ed. 1981).

And what about civil juries? "[T]he jury trial," one prominent Anti-Federalist observed, "brings with it an open and public discussion of all causes, and excludes secret and arbitrary proceedings." Letter from a Federal Farmer (Jan. 18, 1788), in *id.*, at 320 (Federal Farmer 15). The participation of ordinary Americans "drawn from the body of the people" serves another function, too: "If the conduct of judges shall . . . tend to subvert the laws, and change the forms of government, the jury may check them." *Ibid.* As originally composed, however, the Constitution promised a trial by jury for "all Crimes," but said nothing about civil cases. Art III, §2, cl. 3. Some wondered, did this mean judges, not juries, would be "left masters as to facts" in civil disputes? Federal Farmer 15, at 322. If so, asked another, "what satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen"? Essay of a Democratic Federalist (Oct. 17, 1787), in 3 Complete Anti-Federalist 61.

The answer to these concerns was the Bill of Rights. *Erlinger*, 602 U. S., at ___ (slip op., at 6). As the Court details, the Seventh Amendment promised the right to a jury trial in "'[s]uits at common law.'" *Ante*, at 8 (quoting Amdt. 7). But because the Constitution was designed to "endure for ages to come," *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819), this did not mean only those "suits, which the common law recognized among its old and settled proceedings," *Parsons* v. *Bedford*, 3 Pet. 433, 447 (1830). The founding

generation anticipated the possibility Congress would introduce new causes of action and perhaps new remedies, too. See *ibid.* Accordingly, this Court has long understood the Seventh Amendment's protections to apply in "all [civil] suits which are not of equity [or] admiralty jurisdiction." *Ibid.*; accord, *ante*, at 8–9. In this way, the Seventh Amendment seeks to ensure there will be no juryless vice-admiralty courts in the United States.

The Fifth Amendment's Due Process Clause addressed remaining concerns about the processes that would attend trials before independent judges and juries. It provided that the government may not deprive anyone of "life, liberty, or property, without due process of law." As originally understood, this provision prohibited the government from "depriv[ing] a person of those rights without affording him the benefit of (at least) those customary procedures to which freemen were entitled by the old law of England." *Sessions* v. *Dimaya*, 584 U. S. 148, 176 (2018) (GORSUCH, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see *Erlinger*, 602 U. S., at ___–___ (slip op., at 6–7).

More than that, because it was "the peculiar province of the judiciary" to safeguard life, liberty, and property, due process often meant *judicial* process. 1 St. George Tucker, Blackstone's Commentaries, Editor's App. 358 (1803). That is, if the government sought to interfere with those rights, nothing less than "the process and proceedings of the common law" had to be observed before any such deprivation could take place. 3 J. Story, Commentaries on the Constitution of the United States §1783, p. 661 (1833) (Story). In other words, "'due process of law' generally implie[d] and include[d] . . . *judex* [a judge], regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." *Murray's Lessee*, 18 How., at 280. This constitutional baseline was designed to serve

as "a restraint on the legislative" branch, preventing Congress from "mak[ing] any process 'due process of law,' by its mere will." *Id.*, at 276.

C

These three constitutional provisions were meant to work together, and together they make quick work of this case. In fact, each provision requires the result the Court reaches today.

First, because the "'matter'" before us is one "which, from its nature, is the subject of a suit at the common law," *id.*, at 284, "the responsibility for deciding [it] rests with Article III judges in Article III courts." *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011). Nor does it make a difference whether we think of the SEC's action here as a civil-penalties suit or something akin to a traditional fraud claim: At the founding, both kinds of actions were tried in common-law courts. See *ante*, at 9–13 (discussing civil penalties); see also, *e.g.*, *Pasley* v. *Freeman*, 3 T. R. 51, 100 Eng. Rep. 450 (K. B. 1789) (action for fraud); *Baily* v. *Merrell*, 3 Bulst. 94, 81 Eng. Rep. 81 (K. B. 1615) (same). And that tells us all we need to know that the SEC's in-house civil-penalty scheme violates Article III by "withdraw[ing]" the matter "from judicial cognizance" and handing it over to the Executive Branch for an in-house trial. *Murray's Lessee*, 18 How., at 284; see *supra*, at 7–8.

Second, because the action the SEC seeks to pursue is not the stuff of equity or admiralty jurisdiction but the sort of suit historically adjudicated before common-law courts, the Seventh Amendment guarantees Mr. Jarkesy the right to have his case decided by a jury of his peers. In this regard, it is irrelevant that the SEC derived its power to sue under a "new statut[e]" or that the agency proceeded under "a new cause of action." Brief for Petitioner 13, 22 (internal quotation marks omitted). As we have seen, the government cannot evade the Seventh Amendment so easily. See *ante*, at

9; *supra*, at 8–10.

Third, were there any doubt, the Due Process Clause confirms these conclusions. Cf. *Murray's Lessee*, 18 How., at 275 (explaining that the Article III challenge before the Court could "best be considered" as raising a due process question). Because the penalty the SEC seeks would "depriv[e]" Mr. Jarkesy of "property," Amdt. 5, due process demands nothing less than "the process and proceedings of the common law," 3 Story §1783, at 661. That means the regular course of trial proceedings with their usual protections, see *Murray's Lessee*, 18 How., at 280, not the use of ad hoc adjudication procedures before the same agency responsible for prosecuting the law, subject only to hands-off judicial review, see *supra*, at 10–11.

III

A

The government resists these conclusions. As the government sees it, this case implicates the so-called public rights exception. One that defeats not only Mr. Jarkesy's right to trial by jury, but also his right to proceed before an independent trial judge consistent with traditional judicial processes. That is, on the government's account, not only does the Seventh Amendment fall away; so does the usual operation of Article III and the Due Process Clause.

In the government's view, the public rights exception "*at a minimum* allows Congress to create new statutory obligations, impose civil penalties for their violation, and then commit to an administrative agency the function of deciding whether a violation has in fact occurred." Brief for Petitioner 21 (emphasis added; internal quotation marks omitted). Put plainly, all that need be done to dispense almost entirely with three separate constitutional provisions is an Act of Congress creating some new statutory obligation. And, the government continues, this case easily meets that standard because the proceeding against Mr. Jarkesy is one

"brought by the government against a private party" under a statute designed "to remedy harm to the public at large." *Id.*, at 24 (internal quotation marks omitted).

The Court rightly rejects these arguments. See *ante*, at 19–21. No one denies that, under the public rights exception, Congress may allow the Executive Branch to resolve certain matters free from judicial involvement in the first instance. *Ante*, at 6, 14–15. But, despite its misleading name, the exception does not refer to *all* matters brought by the government against an individual to remedy public harms, or even all those that spring from a statute. See *ante*, at 16–17. Instead, public rights are a narrow class defined and limited by history. As the Court explains, that class has traditionally included the collection of revenue, customs enforcement, immigration, and the grant of public benefits. *Ante*, at 15–17.

How did these matters find themselves categorized as public rights? Competing explanations abound. Some have pointed to ancient practical considerations. In *Murray's Lessee*, for example, the Court reasoned that the "[i]mperative necessity" of tax collection for a functional state had long caused governments to treat "claims for public taxes" differently from "all others." 18 How., at 282. Others have theorized that "the core of the judicial power" concerns the disposition of the "three 'absolute' rights" "to life, liberty, and property." *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665, 713–714 (2015) (THOMAS, J., dissenting). Public rights, the theory goes, involve matters originally understood to fall outside this core. *Id.*, at 714. So, for example, "[a]lthough Congress could authorize executive agencies to dispose of *public* rights in land—often by means of adjudicating a claimant's qualifications for a land grant under a statute—the United States had to go to the courts if it wished to revoke" that grant, which had become the owner's private property. *Id.*, at 715. There are still other theories yet. See, *e.g.*, *Stern*, 564 U. S., at 489.

Whatever their roots, traditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree. See *Culley* v. *Marshall*, 601 U. S. 377, 397–398 (2024) (GORSUCH, J., concurring); *ante*, at 14–17. For good reason. If the Article III "judicial Power" encompasses "the stuff of the traditional actions at common law tried by the courts of Westminster in 1789," *ante*, at 14 (internal quotation marks omitted), it follows that matters traditionally adjudicated outside those courts might *not* fall within Article III's ambit. See *Stern*, 564 U. S., at 504–505 (Scalia, J., concurring) ("[A]n Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary"). So too with the Due Process Clause. If that clause sets customary common-law practice as the ordinary procedural baseline, see Part II–B, *supra*, clear historical evidence of a different practice might warrant a departure from that baseline, see *Murray's Lessee*, 18 How., at 280. That's why this Court has said "'a process of law . . . must be taken to be due process of law' if it enjoys 'the sanction of settled usage both in England and in this country.'" *Culley*, 601 U. S., at 397 (GORSUCH, J., concurring) (quoting *Hurtado* v. *California*, 110 U. S. 516, 528 (1884)).

With the public rights exception viewed in this light, the government's invocation of it in this case cannot succeed. Starting with a "'presumption . . . in favor of Article III courts'" and their usual attendant processes, *ante*, at 18, we look for some "deeply rooted" tradition of nonjudicial adjudication before permitting a case to be tried in a different forum under different procedures, *Culley*, 601 U. S., at 397 (GORSUCH, J., concurring). We have upheld summary procedures for customs collection, for example, because they were consistent with both "the common and statute law of England prior to the emigration of our ancestors" and "the laws of many of the States at the time of the adoption of" the Constitution. *Murray's Lessee*, 18 How., at 280; see

ante, at 14–15. But when it comes to the kind of civil-penalty suit before us, that same history points in the opposite direction, suggesting actions of this sort belong before an independent judge, a jury, and decided in a trial that accords with traditional judicial procedures. *Ante*, at 9–13; *supra*, at 11–12. Just as SEC practices themselves largely reflected as recently as 2010.

B

If all that's so, why might the government feel comfortable invoking the public rights exception? To be fair, much of it may have to do with this Court. Some of our past decisions have allowed the government to chip away at the courts' historically exclusive role in adjudicating private rights—and juries' accompanying role in that adjudication. This process began, of all places, in an admiralty case.

In *Crowell* v. *Benson*, 285 U. S. 22 (1932), this Court faced a constitutional challenge to the Longshoremen's and Harbor Workers' Compensation Act of 1927. The Act directed employers to compensate employees for injuries occurring at sea. 44 Stat. 1426. The law further assigned primary responsibility for deciding liability disputes to an Executive Branch official, the deputy commissioner of the United States Employees' Compensation Commission. *Id.*, at 1435–1437; *Crowell*, 285 U. S., at 42–43. The Court acknowledged that this regime empowered the deputy commissioner to decide in the first instance the monetary "liability of one individual to another." *Id.*, at 51. The Court recognized that this amounted to a classic "private right" suit of the kind traditionally tried in court. *Ibid.* The Court even conceded that, under the law, the factual "findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final": An Article III court could not review the facts anew. *Id.*, at 46. But the Court upheld the scheme and its limited judicial review anyway.

To get there took a dash of fiction and a pinch of surmise. From time to time, the Court observed, judges appoint their own special "masters and commissioners" to prepare reports on fact issues or damages. *Id.*, at 51. These reports are nonbinding and "essentially . . . advisory." *Ibid.* Judges themselves remain the decisionmakers. In *Crowell*, the Court embraced the fiction that Executive Branch officials might similarly act as assistants or adjuncts to Article III courts. And because judges often adopt the proposed findings of their masters and commissioners, the Court surmised, Article III posed no bar to Congress taking a further step and *requiring* judges to treat the findings of Executive Branch officials as essentially "final." *Id.*, at 46. "To hold otherwise," the Court reasoned, "would be to defeat the obvious purpose of the legislation": "to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Ibid.*

Crowell itself only went so far, however. The case fell within federal courts' admiralty jurisdiction, and tribunals sitting in admiralty in England and America alike had long heard certain matters falling within the public rights exception. See *Culley*, 601 U. S., at 398 (GORSUCH, J., concurring). In deciding those matters, courts had long tolerated some flexibility in procedures, had long restricted appellate review of factual findings, and had always proceeded without a jury. *Crowell*, 285 U. S., at 45, 53.

Soon, though, none of that mattered. Almost in a blink, the admiralty limitation was discarded, and more and more agencies began assuming adjudicatory functions previously reserved for judges and juries, employing novel procedures that sometimes bore faint resemblance to those observed in court. Along the way, prominent voices in and out of government expressed concern at this development. Consider just two typical examples. Were an agency endowed with

the power to assess civil penalties, advised a committee overseen by Attorney General (soon-to-be Justice) Robert H. Jackson, "the aggrieved person" should at least "be permitted review de novo by a Federal district court." Final Report of Attorney General's Committee on Administrative Procedure 147 (1941). That was the only way, the committee opined, "to resolve any doubts concerning the constitutionality of the procedure." *Ibid.* Around the same time, a committee of the American Bar Association led by Roscoe Pound sounded a similar alarm. Administrative agencies, the committee warned, had a "tendency to mix up rule making, investigation, prosecution, the advocate's function, the judge's function, and the function of enforcing the judgment, so that the whole proceeding from end to end is one to give effect to a complaint." Report of the Special Committee on Administrative Law, 63 Ann. Rep. 331, 351 (1938).

The high-water mark of the movement toward agency adjudication may have come in 1977 in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442. Some have read that decision to suggest the category of public rights might encompass pretty much any case arising under any "'new statutory obligations,'" Brief for Petitioner 22 (quoting *Atlas Roofing*, 430 U. S., at 450). It is a view the government essentially espouses in this case. But without reference to any constitutional text or history to guide what does or does not qualify as a public right, that view has (unsurprisingly) proven wholly unworkable.

It did not take long for this Court to realize as much. Just 12 years later, in *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989), this Court cabined *Atlas Roofing* so narrowly that the author of *Atlas Roofing* complained that the Court had "overrul[ed]" it. 492 U. S., at 71, n. 1 (White, J., dissenting); see *ante*, at 23, n. 3. Far from endorsing the notion that any new statutory obligation could qualify for

treatment as a public right, for example, the Court in *Granfinancieria* read *Atlas Roofing* as having "left the term 'public rights' undefined." 492 U. S., at 51, n. 8. And since then this Court has, in one case after another, "adhere[d]" only to *Atlas Roofing's* "general teaching" that Congress may constitutionally adopt "new statut[es]" assigning matters that indeed qualify as "public rights . . . to an administrative agency." 492 U. S., at 51 (internal quotation marks omitted); see, *e.g.*, *Stern*, 564 U. S., at 489–490; *Oil States*, 584 U. S., at 345.

Yet, even after the Court moved away from *Atlas Roofing*, our public rights jurisprudence remained muddled. Since then, the Court has suggested that public rights might include those "involving statutory rights that are integral parts of a public regulatory scheme." *Granfinanciera*, 492 U. S., at 55, n. 10. We have changed course and tried our hand at a five-factor balancing test. See *Stern*, 564 U. S., at 491 (describing *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986)). We have replaced that test with one that considers "at least seven different" factors. 564 U. S., at 504 (Scalia, J., concurring). And at one time or another, these factors have included the consideration of "the concerns that drove Congress to depart from the requirements of Article III." *Schor*, 478 U. S., at 851. So, for example, we have asked whether insistence on "the institutional integrity of the Judicial Branch" would "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Ibid.*

Today, the Court does much to return us to a more traditional understanding of public rights. Adhering to *Granfinancieria*, the Court rejects the government's overbroad reading of *Atlas Roofing* and recognizes that the kind of atextual and ahistorical (not to mention confusing) tests it inspired do little more than ask policy questions the Constitution settled long ago. Yes, a limited category of public rights were originally and even long before understood to

be susceptible to resolution without a court, jury, or the other usual protections an Article III court affords. But outside of those limited areas, we have no license to deprive the American people of their constitutional right to an independent judge, to a jury of their peers, or to the procedural protections at trial that due process normally demands. Let alone do so whenever the government wishes to dispense with them.

This Court does not subject other constitutional rights to such shabby treatment. We have "reaffirm[ed]," many times and "emphatically[,] that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988). We have rejected a framework for Second Amendment challenges that would balance the right to bear arms against "'other important governmental interests.'" *District of Columbia* v. *Heller*, 554 U. S. 570, 634 (2008). It is hornbook Fourth Amendment law that "[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Georgia* v. *Randolph*, 547 U. S. 103, 115, n. 5 (2006). And even though the Sixth Amendment's guarantee of a jury trial in criminal cases may have "'its weaknesses and the potential for misuse,'" *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968), we continue to insist that it "be jealously preserved," *Patton* v. *United States*, 281 U. S. 276, 312 (1930); see *Ramos* v. *Louisiana*, 590 U. S. 83, 110–111 (2020) (plurality opinion); *Erlinger*, 602 U. S., at ___ (slip op., at 18) ("There is no efficiency exception to the . . . Sixth Amendmen[t]").

Why should Article III, the Seventh Amendment, or the Fifth Amendment's promise of due process be any different? None of them exists to "protec[t] judicial authority for its own sake." *Oil States*, 584 U. S., at 356 (GORSUCH, J., dissenting). They exist to "protect the individual." *Bond* v. *United States*, 564 U. S. 211, 222 (2011). And their protec-

tions are no less vital than those afforded by other constitutional provisions. As American colonists learned under British rule, "the right of trial" means little "when the actual administration of justice is dependent upon caprice, or favour, [or] the will of rulers." 3 Story §1568, at 426; *id.*, §1783, at 661. In recognizing as much today, the Court essentially follows the advice of Justices Brennan and Marshall, "limit[ing] the judicial authority of non-Article III federal tribunals to th[o]se few, long-established exceptions" that bear the sanction of history, and "countenanc[ing] no further erosion." *Schor*, 478 U. S., at 859 (Brennan, J., joined by Marshall, J., dissenting).

C

The dissent's competing account of public rights is astonishing. On its telling, the Constitution might impose some (undescribed) limits on the power of the government to send cases "involving the liability of one individual to another" to executive tribunals for resolution. *Post*, at 22 (opinion of SOTOMAYOR, J.). But, thanks to public rights doctrine, the dissent insists, the Constitution imposes *no* limits on the government's power to seek civil penalties "outside the regular courts of law where there are no juries." *Post*, at 2. In that field, the Constitution falls silent. The dissent does not even attempt to deploy any of the contrived balancing tests that emerged in *Atlas Roofing*'s aftermath to rein in the government's power. But where in Article III, the Seventh Amendment, and due process can the dissent find this new rule? What about founding-era practice or original meaning? And why would a Constitution drawn up to protect against arbitrary government action make it easier for the government than for private parties to escape its dictates? The dissent offers no answers.

To be sure, the dissent tries to appeal to precedent. It even asserts that our decisions support, "*without exception*," its sweeping conception of public rights doctrine. *Post*, at

12 (emphasis added). But the dissent's approach to our precedents is like a picky child at the dinner table. It selects only a small handful while leaving much else untouched. To start, the dissent lingers briefly on *Murray's Lessee*—but not long enough to explain the opinion's conception of Article III, due process, or the extended historical inquiry that led the Court to conclude the collection of revenue concerned a public right. See *post*, at 9–10; *supra*, at 8, 10–14.

The 19th century behind it (for it does not trouble with the founding era), the dissent turns to *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320 (1909). Drawing on that decision, the dissent contends that "Congress [has] routinely 'impose[d] appropriate obligations'" by statute and given "'executive officers the power to enforce'" them "'without the necessity of invoking the judicial power.'" *Post*, at 11 (quoting *Stranahan*, 214 U. S., at 339). Notably absent from the dissent's account, however, is the decision's discussion of Congress's long-recognized and extensive authority over the field of immigration, the area of law at issue there. See *id.*, at 339. Unmentioned, too, is *Stranahan*'s explanation that what links immigration to other public rights like "tariff[s], . . . internal revenue, taxation," and "foreign commerce" is that, "'from the beginning[,] Congress has exercised a plenary power'" over them "because they all relate to subjects peculiarly within the authority of the legislative department." *Id.*, at 334, 339.

Really, one has to wonder: If the public rights exception is as broad and unqualified as the dissent asserts, why did our predecessors bother to discuss history or Congress's peculiar powers when it comes to revenue and immigration? Why didn't the Court simply announce the rule the dissent would have us announce today: that our Constitution does not stand in the way of "agency adjudications of statutory claims . . . brought by the Government in its sovereign ca-

pacity"? *Post*, at 4. The answer, of course, is that the Constitution has never countenanced the dissent's notion that the Executive is free to reassign virtually any civil case in which it is a party to its own tribunals where its own employees decide cases and inconvenient juries and traditional trial procedures go by the boards.

That my dissenting colleagues plow ahead anyway with their remarkable conception of public rights is all the more puzzling considering how regularly they have argued *against* that sort of sweeping concentration of governmental power. The dissenters have recognized that a "lack of standardized procedural safeguards" can leave government enforcement schemes "vulnerable to abuse" and individuals subject to coercive "pressure from unchecked prosecutors." *Culley*, 601 U. S., at 405, 407 (SOTOMAYOR, J., joined by KAGAN and JACKSON, JJ., dissenting). They have contended that the Judiciary has an affirmative obligation to supply "meaningful remedies," trials before judges and juries included, even when "Congress or the Executive has [already] created a remedial process." *Egbert* v. *Boule*, 596 U. S. 482, 524–525 (2022) (SOTOMAYOR, J., joined by, *inter alios*, KAGAN, J., dissenting) (internal quotation marks omitted; emphasis deleted). And like most every current Member of this Court at one time or another, they have acknowledged that the jury-trial right "stands as one of the Constitution's most vital protections against arbitrary government." *United States* v. *Haymond*, 588 U. S. 634, 637 (2019) (plurality opinion).

The dissent's conception of public rights is so unqualified that it refuses to commit itself on the question whether even muted forms of judicial review—such as asking executive tribunals to muster "more than a mere scintilla" of evidence in support of their rulings—are constitutionally required in the essentially unbounded class of cases that fall within its conception of public rights. See Part I, *supra*; *post*, at 8, n. 4. Gone, too, is any role for the jury—for why would the

government ever go to court if it may more readily secure a win before its own employees? The only attempt to mitigate the havoc its rule would wreak comes when the dissent declares that "'[t]he public-rights doctrine does not extend to . . . criminal matters.'" *Post*, at 27, n. 9. But the dissent does not (and cannot) explain how that fits with all else it says. If, as the dissent insists, a public right is any "new right" that "belongs to the public and inheres in the Government in its sovereign capacity," *post*, at 28, what could possibly better fit the description than the enforcement of new criminal laws? See *Shinn* v. *Martinez Ramirez*, 596 U. S. 366, 376 (2022) ("The power to convict and punish criminals lies at the heart of the States' residuary and inviolable sovereignty" (internal quotation marks omitted)).[2]

All but admitting its view has no support in "historical practice dating back to the founding," the dissent chastises the Court for daring to rely on that practice to flesh out the scope of the public rights exception. *Post*, at 18. It would be so much simpler, the dissent says, to adopt its rule permitting the government to skirt oversight by judge and jury alike whenever it enacts a new law. And, true enough, "a principle that the government always wins surely would be simple for judges to implement." *United States* v. *Rahimi*, 602 U. S. ___, ___ (2024) (GORSUCH, J., concurring) (slip op., at 6). But looking to original meaning and historical practice informing it is exactly how this Court proceeds in so

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[2]The best the dissent can do is to observe that "Article III itself prescribes that '[t]he trial of all Crimes . . . shall be by Jury.'" *Post*, at 27, n. 9 (quoting §2, cl. 3). That response might be reassuring if the dissent's treatment of the Seventh Amendment didn't supply a roadmap for working around it. On the dissent's telling, the Seventh Amendment can be dispensed with at will: It applies "only in judicial proceedings," and not whenever the government chooses to assign a matter to its own in-house tribunals. *Post*, at 5. And under that logic, there is no apparent reason why the government could not evade Article III's jury-trial right just as easily, simply by choosing to route criminal prosecutions through executive agencies.

many other contexts where we seek to honor the Constitution's demands—including, notably, when we seek to ascertain the scope of the *criminal* jury-trial right and the defendant's attendant right to confront his accusers. See *Erlinger*, 602 U. S., at ___–___ (slip op., at 19–20); *Crawford* v. *Washington*, 541 U. S. 36, 50 (2004). What's more, this approach has the virtue of "keep[ing] judges in their proper lane" by "seeking to honor the supreme law the people have ordained rather than substituting our will for theirs." *Rahimi*, 602 U. S., at ___–___ (GORSUCH, J., concurring) (slip op., at 4–5); see *Crawford*, 541 U. S., at 67.

It is hard, as well, to take seriously the dissent's charges of unworkability and unpredictability. At least until today, the dissenters supported procedural protections for those in the government's sights in civil as well as criminal cases. What kind of protections? Often, they have argued, it depends on a judicial balancing test. One that is "flexible," defies "technical conception," lacks "fixed content," and will "not always yield the same result" even when applied in similar circumstances. *Culley*, 601 U. S., at 413 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). As we have seen, that was essentially the course some pursued, too, when it came to the public rights exception in the fallout from *Atlas Roofing*. See Part III–B, *supra*. But that kind of "'we know it when we see it'" approach to constitutional rights, *post*, at 21, can hardly claim any serious advantages when it comes to workability or predictability.

Failing all else, the dissent retreats to *Atlas Roofing*. At least that decision, it insists, supports its nearly boundless conception of public rights. The dissent goes so far as to accuse the Court of undermining "*stare decisis* and the rule of law," *post*, at 15, and engaging in "a power grab," *post*, at 37, by failing to give *Atlas Roofing* its broadest possible construction. It's a "disconcerting" accusation indeed, *post*, at 36, and a misdirected one at that. Construed as broadly as the dissent proposes, *Atlas Roofing*'s view of public rights

stands as an outlier in our jurisprudence—with no apparent support in original meaning, at odds with prior precedent, and inconsistent with later precedent as well. See *ante*, at 25, n. 4; Part III–B, *supra*. Meanwhile, the Court's alternative construction of *Altas Roofing* fits far more comfortably with all those legal sources. In that respect, the majority's approach is of a piece with *Granfinanciera*'s similar approach 25 years ago. And, more broadly, it is of a piece with our usual practice of construing "loose language" found in a prior judicial opinion in a way that better conforms it to the mainstream of our precedents. *Groff* v. *DeJoy*, 600 U. S. 447, 474 (2023) (SOTOMAYOR, J., concurring). As the dissenters have previously acknowledged, that course is neither unusual nor at odds with *stare decisis*. See *id.*, at 474–475; see also *Brown* v. *Davenport*, 596 U. S. 118, 141 (2022) ("We neither expect nor hope that our successors will comb these pages for stray comments and stretch them beyond their context—all to justify an outcome inconsistent with this Court's reasoning and judgments").

Were there any doubt about the propriety of the Court's treatment of *Atlas Roofing*, consider one more feature of the alternative the dissent proposes. In defending the broadest possible construction of *Atlas Roofing*'s public rights discussion, the dissent necessarily endorses that decision's exceptionally narrow conception of the Seventh Amendment. See *post*, at 6. After all, as public rights expand, so too the jury-trial right must contract. Yet *Atlas Roofing*'s discussion of the jury-trial right, no less than its discussion of public rights, is difficult to square with precedent and original meaning.

Recall that, from the start, the Seventh Amendment was understood to protect that right "not merely" in suits recognized at common law, but in "*all* suits which are" of legal, as opposed to "equity [or] admiralty[,] jurisdiction." *Parsons*, 3 Pet., at 447 (emphasis added); see Part II–B, *supra*. This Court repeated that understanding of the Amendment

until well into the 1970s, noting, for example, that "the applicability of the constitutional right to jury trial in actions enforcing statutory rights" was "a matter too obvious to be doubted." *Curtis* v. *Loether*, 415 U. S. 189, 193 (1974) (internal quotation marks omitted); accord, *Pernell* v. *Southall Realty*, 416 U. S. 363, 375 (1974) (the Seventh "Amendment requires trial by jury in actions unheard of at common law"). And the Court rejected the notion that a statute must present "a close equivalent" to a common-law cause of action; the jury-trial right attached, we said, so long as the "action involve[d] rights and remedies of the sort traditionally enforced in an action at law." *Ibid.*

Atlas Roofing ignored all of that. Instead, it suggested, "[t]he phrase 'Suits at common law' has been construed to refer to cases tried *prior* to the adoption of the Seventh Amendment in courts of law." 430 U. S., at 449 (emphasis added). That cramped construction of the Seventh Amendment was, of course, a key move in *Atlas Roofing*. For without it, the Court would have been hard pressed to suggest the public rights doctrine permits Congress to route any "'new cause of action'" for adjudication before agencies where juries do not sit. *Post*, at 14 (quoting *Atlas Roofing*, 430 U. S., at 461).

Almost immediately, however, the Court rejected *Atlas Roofing*'s analysis, not just with respect to public rights doctrine but the Seventh Amendment, too. Returning to our mainstream precedents, the Court reaffirmed the applicability of the Seventh Amendment to new causes of action, first in *Tull* v. *United States*, 481 U. S. 412 (1987), and then in *Granfinanciera*. See *ante*, at 8–9. And by 1990, our case law had come full circle, announcing once again what has always been true: that "[t]he right to a jury trial includes more than the common-law forms of action recognized in 1791." *Teamsters* v. *Terry*, 494 U. S. 558, 564.

Today, the Court respects and follows this longstanding

message in our Seventh Amendment precedents. The dissent chooses another path entirely—adopting a reading of *Atlas Roofing* that leads not only to an implausibly broad construction of public rights, but to an implausibly narrow understanding of the jury-trial guarantee as well. One wholly at odds with precedents both old and new. Nor is the dissent shy about its real motivation—and it has nothing to do with respect for precedent but much more to do with a "power grab": Holding the government to the Constitution's promise of a jury trial, the dissent insists, would impose "constraints on what," in its view, "modern-day adaptable governance must look like." *Post*, at 37. All of which, at bottom, amounts to little more than a complaint with the Constitution's revolutionary promise of popular oversight of government officials—and with those judges who would honor that promise.

*

People like Mr. Jarkesy may be unpopular. Perhaps even rightly so: The acts he allegedly committed may warrant serious sanctions. But that should not obscure what is at stake in his case or others like it. While incursions on old rights may begin in cases against the unpopular, they rarely end there. The authority the government seeks (and the dissent would award) in this case—to penalize citizens without a jury, without an independent judge, and under procedures foreign to our courts—certainly contains no such limits. That is why the Constitution built "high walls and clear distinctions" to safeguard individual liberty. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 239 (1995). Ones that ensure even the least popular among us has an independent judge and a jury of his peers resolve his case under procedures designed to ensure a fair trial in a fair forum. In reaffirming all this today, the Court hardly leaves the SEC without ample powers and recourse. The agency is free to pursue all of its charges against Mr.

Jarkesy. And it is free to pursue them exactly as it had always done until 2010: In a court, before a judge, and with a jury. With these observations, I am pleased to concur.

SUPREME COURT OF THE UNITED STATES

No. 22–859

SECURITIES AND EXCHANGE COMMISSION, PETITIONER *v.* GEORGE R. JARKESY, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 27, 2024]

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 Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 460 (1977). 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.

I

The story of this case is straightforward. The Securities and Exchange Commission (SEC or Commission) investigated respondents George Jarkesy and his advisory firm Patriot28, LLC, for alleged violations of federal-securities laws in connection with the launch of two hedge funds.

In deciding how and where to enforce these laws, the SEC could have filed suit in federal court or adjudicated the matter in an administrative enforcement action subject to judicial review. See 15 U. S. C. §§77h–1, 77t, 78u, 78u–2, 78u–3, 80b–3, 80b–9. The SEC opted for the latter. In 2013, the SEC initiated an administrative enforcement action against respondents, alleging violations of the Securities

Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. Specifically, the SEC alleged that respondents falsely told brokers and investors that: (1) a prominent accounting firm would audit the hedge funds; (2) a prominent investment bank would serve as the funds' prime broker; and (3) one of the funds would invest 50% of its capital in certain life-insurance policies. In reality, the audit never took place, the bank never opened a prime brokerage account, and the hedge fund invested less than 20% of its capital in the life-insurance policies. In addition to misrepresenting the funds' investment strategies, respondents allegedly overvalued the funds' holdings to charge higher management fees.

The SEC assigned the action to one of its administrative law judges, who held an evidentiary hearing and issued a lengthy initial decision, concluding that respondents in fact had violated the three securities laws. The full Commission reviewed the initial decision and reached the same determination. The Commission also denied respondents' constitutional challenges to the order, including that the agency's in-house adjudication violated respondents' Seventh Amendment right to a jury trial in federal court. Ultimately, the SEC ordered respondents to pay a civil penalty of $300,000 and to cease and desist from violating the federal-securities laws. It also barred Jarkesy from doing certain things in the securities industry and ordered Patriot28 to disgorge $685,000 in illicit profits.

Respondents filed a petition for review in the Fifth Circuit. 34 F. 4th 446, 466 (2022). A divided panel granted the petition and vacated the SEC's order. The panel held, over the dissent of Judge Davis, that respondents were entitled to a jury trial in federal court under the Seventh Amendment because the federal-securities antifraud provisions were similar to common-law fraud claims to which the jury-trial right would attach. See *id.*, at 451–459. Because the SEC forced respondents to proceed within the agency, the

Court of Appeals held that the SEC violated respondents' Seventh Amendment rights and thus vacated the SEC's order. *Id.*, at 465–466.[1]

The majority affirms the Fifth Circuit's decision, notwithstanding the mountain of precedent against it. A faithful application of our precedent would have led, inexorably, to upholding the statutory scheme that Congress enacted for the SEC's in-house adjudication of federal-securities claims.

II

The majority did not need to break any new ground to resolve respondents' Seventh Amendment challenge. This Court's longstanding precedent and established government practice uniformly support the constitutionality of administrative schemes like the SEC's: agency adjudications of statutory claims for civil penalties brought by the Government in its sovereign capacity. See Part II–B (*infra*, at 7–14). In assessing the constitutionality of such adjudications, the political branches' "'[l]ong settled and established practice,'" which this Court has upheld and reaffirmed time and again, is entitled to "'great weight.'" *Chiafalo* v. *Washington*, 591 U. S. 578, 592–593 (2020) (quoting *The Pocket Veto Case*, 279 U. S. 655, 689 (1929)); accord, *Vidal* v. *Elster*, 602 U. S. 286, 323 (2024) (BARRETT, J., concurring in part); *id.*, at 330 (SOTOMAYOR, J., concurring in judgment); *Consumer Financial Protection Bureau* v. *Community Financial Services Assn. of America, Ltd.*, 601 U. S. 416, 442

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[1] As the majority notes, respondents also prevailed on two other constitutional challenges in the Court of Appeals. See *ante,* at 6. The divided panel concluded that: (1) the SEC's discretion to bring the case within the agency instead of federal court violated the nondelegation doctrine; and (2) a for-cause restriction on the Administrative Law Judge's removal violated Article II and the separation of powers. 34 F. 4th 446, 459–465 (CA5 2022). I disagree with the ruling below on both points. Because the majority does not reach these issues, though, I address only the Seventh Amendment challenge discussed in the majority's opinion.

(2024) (KAGAN, J., concurring).

A

There are two key constitutional provisions at issue here. One is the Seventh Amendment, which "preserve[s]" the "right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." The other is Article III's Vesting Clause, which provides that the "judicial Power of the United States . . . shall be vested" in federal Article III courts. This case presents the familiar interplay between these two provisions.

Although this case involves a Seventh Amendment challenge, the principal question at issue is one rooted in Article III and the separation of powers. That is because, as the majority rightly acknowledges, the Seventh Amendment's jury-trial right "applies" only in "an Article III court." *Ante,* at 7. That conclusion follows from both the text of the Constitution and this Court's precedents.

As to the text, the Amendment is limited to "Suits at common law." That means two things. First, that the right applies only in judicial proceedings. The term "suit," after all, refers to "the prosecution of some demand in a Court of justice," *Cohens* v. *Virginia*, 6 Wheat. 264, 407 (1821) (Marshall, C. J.), or a "proceeding in a court of justice," *Weston* v. *City Council of Charleston*, 2 Pet. 449, 464 (1829) (same) ("The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit"). Consistent with that understanding, this Court has held repeatedly that "the Seventh Amendment is not applicable to administrative proceedings." *Tull* v. *United States*, 481 U. S. 412, 418, n. 4 (1987); accord, *Atlas Roofing*, 430 U. S., at 454–455; *Curtis* v. *Loether*, 415 U. S. 189, 195 (1974). Factfinding by a jury is "incompatible with the whole concept of administrative adjudication," which empowers executive officials to find the relevant facts and apply the law to

those facts like juries do in a courtroom. *Pernell* v. *Southall Realty*, 416 U. S. 363, 383 (1974) (collecting cases).

Second, the requirement that the "'[s]uit'" must be one "'at common law'" means that the claim at issue must be "'legal in nature.'" *Ante,* at 8. So, whether a defendant is entitled to a jury under the Seventh Amendment depends on both the forum and the cause of action. If the claim is in an Article III proceeding, then the right to a jury attaches if the claim is "legal in nature" and the amount in controversy exceeds $20. *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 53 (1989); *Atlas Roofing*, 430 U. S., at 454, n. 12, 461, n. 16. Yet when, as here, the claim proceeds in a non-Article III forum, the relevant question becomes whether "Congress properly assign[ed the] matter" for decision to that forum consistent with Article III and the separation of powers. *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 345 (2018). In other words, the question is whether Congress improperly bestowed federal judicial power on a non-Article III forum. See *id.*, at 334 (Congress cannot "'confer the Government's "judicial Power" on entities outside Article III'" (quoting *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011))).[2]

The conclusion that Congress properly assigned a matter to an agency for adjudication therefore necessarily "resolves [any] Seventh Amendment challenge." *Oil States*, 584 U. S., at 345 (explaining that if non-Article III adjudication

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[2] Since the founding, Executive Branch officials have adjudicated certain matters, while others have required resolution in an Article III court. An executive official properly vested with the authority to find facts, apply the law to those facts, and impose the consequences prescribed by law exercises executive power under Article II, not judicial power under Article III. See *Arlington* v. *FCC*, 569 U. S. 290, 305, n. 4 (2013) (explaining that agency rulemaking and adjudications may "take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'" (quoting Art. II, §1, cl. 1)).

is permissible, then "'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder'" (quoting *Granfinanciera*, 492 U. S., at 53–54)); see W. Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511, 1571 (2020) ("The Article III analysis should be conducted first, on its own. And then . . . if the non-Article III adjudication is permissible, the Seventh Amendment should be ignored"). When executive power is at stake, Congress does not violate Article III or the Seventh Amendment by authorizing a nonjury factfinder to adjudicate the dispute.

So, the critical issue in this type of case is whether Congress can assign a particular matter to a non-Article III factfinder.

B

For more than a century and a half, this Court has answered that Article III question by pointing to the distinction between "private rights" and "public rights." See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (recognizing public-rights exception). The distinction is helpful because public rights always can be assigned outside of Article III. They "'do not require judicial determination'" under the Constitution, even if they "'are susceptible of it.'" *Crowell* v. *Benson*, 285 U. S. 22, 50 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U. S. 438, 451 (1929)).

The majority says that aspects of the public-rights doctrine have been confusing. See *ante,* at 17. That might be true for cases involving wholly private disputes, but not for cases where the Government is a party.[3] It has long been

[3] Every case that has expressed consternation about the precise contours of the public-rights doctrine, including those cited by the majority, involve only private disputes—or, more precisely, "disputes to which the Federal Government is not a party in its sovereign capacity." *Granfi-*

settled and undisputed that, at a minimum, a matter of public rights arises "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell*, 285 U. S., at 50; *Oil States*, 584 U. S., at 335 (describing the "Court's longstanding formulation of the public-rights doctrine"); accord, *Granfinanciera*, 492 U. S., at 51, and n. 8; *Atlas Roofing*, 430 U. S., at 452, 457; *Ex parte Bakelite Corp.*, 279 U. S., at 451. Indeed, "from the time the doctrine of public rights was born, in 1856," everyone understood that public rights "'arise "between the government and others,"'" and refer to "rights *of the public*—that is, rights pertaining to claims brought by or against the United States." *Granfinanciera*, 492 U. S., at 68–69 (Scalia, J., concurring in part and concurring in judgment); see *ibid.* (collecting sources). So, while this Court has recognized public rights in certain disputes between private parties, see *infra*, at 19–20, the doctrine's heartland consists of claims belonging to the Government.

When a claim belongs to the Government as sovereign, the Constitution permits Congress to enact new statutory obligations, prescribe consequences for the breach of those obligations, and then empower federal agencies to adjudicate such violations and impose the appropriate penalty. See *Atlas Roofing*, 430 U. S., at 450–455 (collecting cases).[4]

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nanciera, S. A. v. *Nordberg*, 492 U. S. 33, 55, n. 10 (1989) (involving dispute between private parties in bankruptcy court); see *ante*, at 17 (citing *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 332–334 (2018) (involving patent dispute between private parties before the U. S. Patent and Trademark Office); *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 575 (1985) (involving challenge to arbitration procedure for private parties disputing data compensation under federal pesticide registration program)); see also *Stern* v. *Marshall*, 564 U. S. 462, 469–470 (2011) (involving dispute between private parties in bankruptcy court); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 56–57 (1982) (plurality opinion) (same).

[4]Judicial review of these agency decisions allows Congress to avoid

This Court has repeatedly emphasized these unifying principles through an unbroken series of cases over almost 200 years.

1

Start at the beginning, with *Murray's Lessee* in 1856. In that case, the Government issued a warrant to compel a federal customs collector to produce public funds that the Government determined the collector had unlawfully withheld. See 18 How., at 274–275. The Government executed the warrant to seize and sell a plot of the collector's land to make up for the withheld funds. See *id.*, at 274. In upholding the sale of the seized property, this Court concluded that the Government's in-house assessment and collection of taxes and penalties based on a federal official's adjudication of the facts did not violate Article III. The scheme was

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any due process concerns that might arise from having executive officials deprive someone of their property without review in an Article III court. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 455, n. 13 (1977) ("[T]hese cases do not present the question whether Congress may commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceedings"); accord, *Oil States*, 584 U. S., at 344 (same); Tr. of Oral Arg. 29 (Principal Deputy Solicitor General) (stating that "the Court has emphasized that judicial review of agency action may well be required" and the Due Process Clause may "ha[ve] something to say" about that requirement). The concurrence reproaches this dissent for declining to address any potential deficiencies in this administrative scheme, as well as failing to specify which forms of judicial review may be constitutionally required, see *ante,* at 22 (opinion of GORSUCH, J.), even though respondents did not raise any due process challenge in this case. Deciding whether this statutory scheme is procedurally deficient and so circumscribes judicial review that it violates due process would be inconsistent with the "settled principles of party presentation and adversarial testing." *Vidal* v. *Elster*, 602 U. S. 286, 328 (2024) (SOTOMAYOR, J., concurring in judgment) (citing *Maslenjak* v. *United States*, 582 U. S. 335, 354 (2017) (GORSUCH, J., joined by THOMAS, J., concurring in part and concurring in judgment)).

constitutional, the Court said, because "public rights" were at issue. *Id.*, at 284. In other words, the dispute arose between the Government and the customs collector in connection with the Government's exercise of its constitutional power to collect revenue. Congress could have brought such claims, if it wanted, "within the cognizance of the courts of the United States, as it may deem proper." *Ibid.* The Court thus endorsed that constitutional balance: Congress could decide whether to assign a public-rights dispute to the Executive for initial adjudication subject to judicial review or to an Article III federal court for resolution.

Fast forward half a century. In *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320, 338–340 (1909), the Court upheld a customs official's imposition of a penalty on a steamship company that violated immigration laws barring the entry of certain classes of people into the country. The customs official determined the facts, adjudicated the violation, and enforced the statutory prohibition on immigration through the assessment of a monetary penalty. See *id.*, at 329. The Court noted the breadth of Congress's immigration power and held that the civil-penalty statutory scheme at issue was "beyond all question constitutional." *Id.*, at 342. Yet, far from restricting the public-rights doctrine to this particular exercise of congressional power or to specific prerogatives, the *Stranahan* Court went out of its way to explain that the "settled judicial construction" that civil-penalty claims brought by the Government could be assigned to the Executive for initial adjudication extended "not only as to tariff, but as to internal revenue, taxation, and other subjects," including the regulation of foreign commerce. *Id.*, at 339; see also *id.*, at 334–335.

Importantly, *Stranahan* rejected the "proposition" that, in "cases of penalty or punishment, . . . enforcement must depend upon the exertion of judicial power, either by civil or criminal process." *Id.*, at 338. In words that could have

been written in response to today's ruling, the Court explained that such a "proposition magnifies the judicial to the detriment of all other departments of the Government, disregards many previous adjudications of this court, and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question." *Ibid.* For that reason, the validity of legislation authorizing the non-Article III adjudication of civil-penalty claims does not turn on the Judiciary's assessment of whether it is necessary for executive officials "to enforce designated penalties without resort to the courts." *Id.*, at 339. Whether or not such legislation violates Article III depends on whether Congress acted pursuant to a "grant of power made by the Constitution," and not on whether it "relate[s] to subjects peculiarly within the authority of the legislative department of the Government" or on the circumstances that might have "caused Congress to exert a specified power." *Id.*, at 339–340.

By the time *Stranahan* was decided, Congress already routinely "impose[d] appropriate obligations and sanction[ed] their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." *Id.*, at 339. Far from limiting the public-rights doctrine to the particular context in *Stranahan* and prior cases, this Court has expressly rejected the notion that the public-rights doctrine is so confined. See *infra*, at 18–19. This Court has repeatedly approved Congress's assignment of public rights to agencies in diverse areas of the law, reflecting Congress's varied constitutional powers.[5] A nonexhaustive list includes "interstate and foreign commerce, taxation, immigration, the public lands, public health, the

[5]The majority's fixation on this dissent's discussion of *Stranahan*, see *ante,* at 16, n. 1, misses the fact that *Stranahan* exists within a long line of cases recognizing the diverse areas of the law comprising the public-rights doctrine.

facilities of the post office, pensions, and payments to veterans," *Crowell*, 285 U. S., at 51, and n. 13 (collecting cases); see also, *e.g.*, *Helvering* v. *Mitchell*, 303 U. S. 391, 401–404 (1938) (administrative penalty for underpayment of taxes); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 22–24, 48–49 (1937) (reinstatement of dismissed employee and backpay in adjudication of unfair-labor-practices claim under the National Labor Relations Act); *Phillips* v. *Commissioner*, 283 U. S. 589, 591–592 (1931) (deficiency assessments for unpaid taxes); *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting*, 287 U. S. 329, 334–335 (1932) (fines for violation of immigration law barring entry of certain classes of individuals); *Ex parte Bakelite Corp.*, 279 U. S., at 446–447, 451, 458 (adjudication of unfair-methods-of-competition and unfair-acts claims, and imposition of additional duties under customs law); *Passavant* v. *United States*, 148 U. S. 214, 215–216, 220 (1893) (penalty for undervaluation of imported merchandise).

The list could go on and on. That is because, in every case where the Government has acted in its sovereign capacity to enforce a new statutory obligation through the administrative imposition of civil penalties or fines, this Court, without exception, has sustained the statutory scheme authorizing that enforcement outside of Article III.

2

A unanimous Court made this exact point nearly half a century ago in *Atlas Roofing*. That was the last time this Court considered a public-rights case where the constitutionality of an in-house adjudication of statutory claims brought by the Government was at issue. That case presented the same question as this one: Whether the Seventh Amendment permits Congress to commit the adjudication of a new cause of action for civil penalties to an administrative agency. 430 U. S., at 444. The Court said it did.

In *Atlas Roofing*, the Court explained how Congress identified a national problem, concluded that existing legal remedies were inadequate to address it, and then created a new statutory scheme that endorsed Executive in-house enforcement as a solution. Specifically, Congress found "that work-related deaths and injuries had become a 'drastic' national problem," and that existing causes of action, including tort actions for negligence and wrongful death, did not adequately "protect the employee population from death and injury due to unsafe working conditions." *Id.*, at 444–445. In response, Congress enacted the Occupational Safety and Health Act of 1970 (OSHA) to require employers "to avoid maintaining unsafe or unhealthy working conditions." *Id.*, at 445. OSHA in turn "empower[ed] the Secretary of Labor to promulgate health and safety standards," and the Occupational Safety and Health Review Commission to impose civil penalties on employers maintaining unsafe working conditions, regardless of whether any worker was in fact injured or killed. *Id.*, at 445–446.

Two employers that had been assessed civil penalties for OSHA violations resulting in the death of employees challenged the constitutionality of the statute's enforcement procedures. They observed that "a suit in a federal court by the Government for civil penalties for violation of a statute is a suit for a money judgment[,] which is classically a suit at common law." *Id.*, at 449. Therefore, the employers claimed, the Seventh Amendment right to a jury attached and Congress could not assign the matter to an agency for resolution. See *ibid.*

This Court upheld OSHA's statutory scheme. It relied on the long history of public-rights cases endorsing Congress's now-settled practice of assigning the Government's rights to civil penalties for violations of a statutory obligation to in-house adjudication in the first instance. See *id.*, at 450–455. In light of this "history and our cases," the Court con-

cluded that, where Congress "create[s] a new cause of action, and remedies therefor, unknown to the common law," it is free to "plac[e] their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved." *Id.*, at 460–461. "That is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law." *Id.*, at 455; see *id.*, at 461, n. 16.

The "new rule" and "legally unsound principle" that the majority accuses this dissent of "unfurl[ing]" today, *ante,* at 17–18, n. 2, is the one that this Court declared "'settled judicial construction' . . . 'from the beginning'": "[T]he Government could commit the enforcement of statutes and the imposition and collection of fines . . . for administrative enforcement, without judicial trials," even if the same action would have required a jury trial if committed to an Article III court. *Atlas Roofing*, 430 U. S., at 460 (collecting cases); accord, *Elting*, 287 U. S., at 334 (Congress "may lawfully impose appropriate obligations, sanction their enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them"); *Stranahan*, 214 U. S., at 339 (Congress may "impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power").

C

It should be obvious by now how this case should have been resolved under a faithful and straightforward application of *Atlas Roofing* and a long line of this Court's precedents. The constitutional question is indistinguishable. The majority instead wishes away *Atlas Roofing* by burying it at the end of its opinion and minimizing the unbroken line of cases on which *Atlas Roofing* relied. That approach

to precedent significantly undermines this Court's commitment to *stare decisis* and the rule of law.

This case may involve a different statute from *Atlas Roofing*, but the schemes are remarkably similar. Here, just as in *Atlas Roofing*, Congress identified a problem; concluded that the existing remedies were inadequate; and enacted a new regulatory scheme as a solution. The problem was a lack of transparency and accountability in the securities market that contributed to the Great Depression of the 1930s. See *ante,* at 1. The inadequate remedies were the then-existing state statutory and common-law fraud causes of action. The solution was a comprehensive federal scheme of securities regulation consisting of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. See *ibid.* In particular, Congress enacted these securities laws to ensure "full disclosure" and promote ethical business practices "in the securities industry," *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963), as well as to "protect investors against manipulation of stock prices," *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 195 (1976).

The prophylactic nature of the statutory regime also is virtually indistinguishable from the OSHA scheme at issue in *Atlas Roofing*. Among other things, these securities laws prohibit the misrepresentation or concealment of various material facts through the imposition of federal registration and disclosure requirements. See *ante,* at 2. Critically, federal-securities laws do not require proof of actual reliance on an investor's misrepresentations or that an "investor has actually suffered financial loss." *Ante,* at 4; see also *SEC* v. *Life Partners Holdings, Inc.* 854 F. 3d 765, 779 (CA5 2017); *SEC* v. *Blavin*, 760 F. 2d 706, 711 (CA6 1985) (*per curiam*). OSHA too prohibits conduct that could, but does not necessarily, injure a private person. *Atlas Roofing*, 430 U. S., at 445 (OSHA remedies "exis[t] whether or not an employee is

actually injured or killed as a result of the [unsafe or unhealthy working] condition"). The employer's failure to maintain safe and healthy working conditions violates OSHA even if there is no actionable harm to an employee, just as a misrepresentation to investors in connection with the buying or selling of securities violates federal-securities law even if there is no actual injury to the investors.

Moreover, both here and in *Atlas Roofing*, Congress empowered the Government to institute administrative enforcement proceedings to adjudicate potential violations of federal law and impose civil penalties on a private party for those violations, all while making the final agency decision subject to judicial review. In bringing a securities claim, the SEC seeks redress for a "violation" that "is committed against the United States rather than an aggrieved individual," which "is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Kokesh* v. *SEC*, 581 U. S. 455, 463 (2017). Put differently, the SEC seeks to "'remedy harm to the public at large'" for violation of the Government's rights. *Ibid.* The Government likewise seeks to remedy a public harm when it enforces OSHA's prohibition of unsafe working conditions.

Ultimately, both cases arise between the Government and others in connection with the performance of the Government's constitutional functions, and involve the Government acting in its sovereign capacity to bring a statutory claim on behalf of the United States in order to vindicate the public interest. They both involve, as *Atlas Roofing* put it, "new cause[s] of action, and remedies therefor, unknown to the common law." 430 U. S., at 461. Neither Article III nor the Seventh Amendment prohibits Congress from assigning the enforcement of these new "Governmen[t] rights to civil penalties" to non-Article III adjudicators, and thus "supplying speedy and expert resolutions of the issues involved." *Id.*, at 450, 461. In a world where precedent means

something, this should end the case. Yet here it does not.

III

The practice of assigning the Government's right to civil penalties for statutory violations to non-Article III adjudication had been so settled that it become an undisputable reality of how "our Government has actually worked." *Consumer Financial Protection Bureau*, 601 U. S., at 445 (KAGAN, J., concurring). That is why the Court has had no cause to address this kind of constitutional challenge since its unanimous decision in *Atlas Roofing*. The majority takes a wrecking ball to this settled law and stable government practice. To do so, it misreads this Court's precedents, ignores those that do not suit its thesis, and advances distinctions created from whole cloth.

The majority's treatment of the public-rights doctrine is not only incomplete, but is gerrymandered to produce today's result. See Part III–A (*infra*, at 17–21). Unable to explain that doctrine, the majority effectively ignores the Article III threshold question to focus instead on two Seventh Amendment cases: *Tull* v. *United States*, 481 U. S. 412 (1987), and *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989). Neither involved the in-house adjudication of statutory claims brought by the Government pursuant to its sovereign powers, which is the critical fact under this Court's precedent. See Part III–B–1 (*infra*, at 22–24) (discussing *Tull*); Part III–B–2 (*infra*, at 24–29) (discussing *Granfinanciera*). The majority and the concurrence then predictably fail to distinguish *Atlas Roofing*, which resolved the Seventh Amendment question for cases like this one implicating that critical fact. See Part III–C (*infra*, at 29–32).

A

To start, it is almost impossible to discern how the majority defines a public right and whether its view of the doctrine is consistent with this Court's public-rights cases. The

majority at times seems to limit the public-rights exception to areas of its own choosing. It points out, for example, that some public-rights cases involved the collection of revenue, customs law, and immigration law, see *ante*, at 14–17, and that *Atlas Roofing* involved OSHA and not "civil penalty suits for fraud," *ante*, at 22.[6] Other times, the majority highlights a particular practice predating the founding, such as the "unbroken tradition" in *Murray's Lessee* of executive officials issuing warrants of distress to collect revenue. *Ante*, at 15; see also *ante*, at 13–14 (GORSUCH, J., concurring). Needless to say, none of these explanations for the doctrine is satisfactory. What is the legal principle behind saying only these areas and no further? This Court has rejected that kind of arbitrary line-drawing in cases like *Stranahan* and *Atlas Roofing*. How does the requirement of a historical practice dating back to the founding, or "flow[ing] from centuries-old rules," *ante*, at 17, account for the broad universe of public-rights cases in the United States Reporter? The majority does not say.

The majority's only other theory fares no better. The majority seems to suggest that a common thread underlying these cases is that "the political branches had traditionally held exclusive power over th[ese] field[s] and had exercised it." *Ante,* at 16–17. To the extent the majority thinks this is a distinction, it fails for at least two reasons.

First, *Atlas Roofing* expressly rejected the argument that the public-rights doctrine is limited to particular exercises of congressional power. The employers in *Atlas Roofing* argued "that cases such as *Murray's Lessee*, *Elting*, [*Stranahan*], *Phillips*, and *Helvering* all deal with the exercise of sovereign powers that are inherently in the exclusive do-

[6] The majority also cites cases involving "relations with Indian tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights." *Ante,* at 17 (citations omitted).

main of the Federal Government and critical to its very existence—the power over immigration, the importation of goods, and taxation." 430 U. S., at 456. Cabining the cases in that way, the employers argued that "[t]he theory of those cases is inapplicable where the Government exercises other powers that [they] regard[ed] as less fundamental, less exclusive, and less vital to the existence of the Nation, such as the power to regulate commerce among the several States, the latter being the power Congress sought to exercise in enacting [OSHA]." *Ibid.* The Court rejected the employers' argument, explaining that nothing in those cases turned on those particular exercises of the Government's authority. See *id.*, at 456–457; cf. *Crowell*, 285 U. S., at 51 (offering a list of "[f]amiliar illustrations of . . . exercise[s]" of Congress's constitutional authority that have fallen within the public-rights exception to Article III).

Second, even if *Atlas Roofing* had not explicitly rejected the proposed distinction here, the majority cannot reconcile its restrictive view of the public-rights doctrine with *Atlas Roofing* and other precedents. For example, it is unclear how OSHA, or the National Labor Relations Act at issue in *Jones & Laughlin*, would fit the majority's view of the public-rights doctrine, or why the exercise of interstate-commerce power to enact those statutes would be any different from the exercise of that same power to enact the federal-securities laws at issue here. See *Atlas Roofing*, 430 U. S., at 457 ("It is also apparent that *Jones & Laughlin*, *Pernell*, and *Curtis* are not amenable to the limitations suggested by [the employers]").

The majority's description of the doctrine also fails to account for public rights that do not belong to the Federal Government in its sovereign capacity. See *Granfinanciera*, 492 U. S., at 54 ("[T]he Federal Government need not be a party for a case to revolve around 'public rights'"). This Court, after all, has rejected the confinement of public rights to that heartland. See *ibid.* ("[W]e [have] rejected the

view that 'a matter of public rights must at a minimum arise "between the government and others"'"). Conspicuously absent from the majority's discussion are, for example, cases in which this Court held that Congress could assign a private federally created action that was "closely integrated into a public regulatory scheme" for adjudication in a non-Article III forum. *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 594 (1985). These cases include, for example, an agency's adjudication of state-law counterclaims to an investor's federal action against its broker, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 835–836, 847–850 (1986), and the arbitration of data-compensation disputes among participants in the Environmental Protection Agency's pesticide registration scheme, *Thomas*, 473 U. S., at 571, 589–592. Both *Thomas* and *Schor* thus upheld the non-Article III adjudication of disputes between private parties, which naturally did not involve the Government in its sovereign capacity.

Even accepting the majority's public-rights-are-confusing defense, its "strategy for dealing with the confusion is not to offer a theory for rationalizing this body of law," but to provide an incomplete and unprincipled account of the doctrine. *Haaland* v. *Brackeen*, 599 U. S. 255, 279 (2023). The majority references, but does not explain, "distinctions our cases have drawn," *ante*, at 18, n. 2, also cherry-picking some cases and ignoring others. Indeed, in lieu of a coherent theory, all the majority has to offer is a list of five "historic categories of adjudications [that] fall within the exception," *ante*, at 14–17, and maybe (just maybe) OSHA, which the majority reluctantly adds to the mix at the end of its opinion for good measure, see *ante*, at 22–24. The majority ignores countless public-rights cases and entire strands of the doctrine, and fails to heed its own admonition that "close attention" must be paid "to the basis for each asserted

application of the doctrine." *Ante,* at 17.[7]

The majority also attacks a strawman when it asserts that "precedents foreclose th[e] argument" that the public-rights doctrine "applies whenever a statute increases governmental efficiency." *Ante,* at 26; see also *ante,* at 19 (GORSUCH, J., concurring). No one has made that argument in this case; not the Government and certainly not this dissent. The fact that certain rights might be susceptible to speedy and expert resolution through non-Article III adjudication is not what makes them "rights *of the public*—that is, rights pertaining to claims brought by or against the United States." *Granfinanciera*, 492 U. S., at 68–69 (Scalia, J., concurring in part and concurring in judgment).

It is not clear what else, if anything, might qualify as a public right, or what is even left of the doctrine after today's opinion. Rather than recognize the long-settled principle that a statutory right belonging to the Government in its sovereign capacity falls within the public-rights exception to Article III, the majority opts for a "we know it when we see it" formulation. This Court's precedents and our coequal branches of Government deserve better.

B

Rather than relying on *Atlas Roofing* or the relevant public-rights cases, the majority instead purports to follow *Tull* and *Granfinanciera*. The former involved a suit in federal court and the latter involved a dispute between private parties. So, just like that, the majority ventures off on the wrong path. Indeed, as explained below, both the majority and the concurrence miss the critical distinction drawn in

[7] Among other things, the concurrence accuses this dissent of behaving like a "picky child at the dinner table." *Ante,* at 21 (opinion of GORSUCH, J.). The precedents, though, speak for themselves. It is the majority and concurrence that pick and choose among public-rights cases, excluding broad strands of precedent constituting the doctrine.

this Court's precedents between the non-Article III adjudication of public-rights matters involving the liability of one individual to another and those involving claims belonging to the Government in its sovereign capacity.

According to the majority, respondents are entitled to a jury trial in federal court because, as here, *Tull* involved a Government claim for civil penalties, and *Granfinanciera* looked to the common law to determine if a statutory cause of action was legal in nature. By focusing on the remedy in this case, and the perceived similarities between the statutory cause of action and a common-law analogue, the majority elides the critical distinction between those cases and this one: Whether Congress assigned the Government's sovereign rights to civil penalties to a non-Article III factfinder for adjudication.

1

The majority bafflingly proclaims that "the remedy is all but dispositive" in this case, *ante,* at 9, ignoring that *Atlas Roofing* and countless precedents before it rejected that proposition. Not content to take just a page from the employers' challenge in *Atlas Roofing*, the majority has taken their whole brief, resuscitating yet another theory that this Court has long foreclosed. The employers in *Atlas Roofing* argued that the Seventh Amendment prohibited Congress from assigning to an agency the same remedy at issue here: civil penalties. See 430 U. S., at 450 ("Petitioners . . . claim that . . . assign[ing] the function of adjudicating the Government's rights to civil penalties for [a statutory] violation . . . deprive[s] a defendant of his Seventh Amendment jury right"). This Court rejected that argument outright, citing a long line of cases involving the Executive's adjudication of statutory claims for civil penalties brought by the Government in its sovereign capacity. *Id.*, at 450–455 (collecting cases).

As discussed above, this Court has long endorsed statutory schemes authorizing agency adjudicators to find violations and award civil penalties to the Government. See *supra*, at 9–12. Long before *Atlas Roofing*, this Court held that the Constitution permits Congress to enact statutory obligations and then "sanction their enforcement by reasonable money penalties" by government officials "without the necessity of invoking the judicial power." *Stranahan*, 214 U. S., at 339; see *id.*, at 338–339 (collecting cases). That the SEC imposed civil penalties on respondents therefore has little, if any, bearing on the resolution of this case.

Again, even if over a century of precedent did not foreclose the majority's argument, it fails on its own terms. The majority relies almost entirely on *Tull*, which held that statutory claims for civil penalties were "a type of remedy at common law" that entitled a defendant to a jury trial. 481 U. S., at 422; see *id.*, at 425. Critically, however, the *Tull* Court's analysis took place in an entirely different context: federal court. See *ante,* at 8–9 ("In [*Tull*], the Government sued a real estate developer for civil penalties [under the Clean Water Act] *in federal court*" (emphasis added)). *Tull* did not present the question at issue in *Atlas Roofing* and other cases involving non-Article III adjudication of Government claims in the first instance. Rather, *Tull* stands for the unremarkable proposition that, when the Government sues an entity for civil penalties in federal district court, the Seventh Amendment entitles the defendant "to a jury trial to determine his liability on the legal claims." 481 U. S., at 425.

That conclusion says nothing about the constitutionality of the SEC's in-house adjudicative scheme. *Atlas Roofing* and its predecessors could not have been clearer on this point: Congress can assign the enforcement of a statutory obligation for in-house adjudication to executive officials, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a

federal court of law instead of an administrative agency." 430 U. S., at 455. Although "the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial would be required," the Government "could also validly opt for administrative enforcement, without judicial trials." *Id.*, at 460 (citing *Stranahan*, 214 U. S., at 339; *Hepner* v. *United States*, 213 U. S. 103 (1909); *United States* v. *Regan*, 232 U. S. 37 (1914); *Helvering*, 303 U. S., at 402–403; *Crowell*, 285 U. S., at 50–51); *Curtis*, 415 U. S., at 195 (explaining that Congress can "entrust [the] enforcement of statutory rights to an administrative process . . . free from the strictures of the Seventh Amendment," but must abide by the Amendment when it does so "in an ordinary civil action in the district courts").

It would have been quite remarkable for *Tull*, which involved a claim in federal court, to overrule silently more than a century of caselaw involving non-Article III adjudications of the Government's rights to civil penalties for statutory violations. Of course, *Tull* did no such thing. *Tull* even reaffirmed *Atlas Roofing* by emphasizing that the Seventh Amendment depends on the forum, not just the remedy, because it "is not applicable to administrative proceedings." 481 U. S., at 418, n. 4 (citing *Atlas Roofing*, 430 U. S., at 454; *Pernell*, 416 U. S., at 383). For the majority to pretend otherwise is wishful thinking at best.

2

The majority next argues that the "close relationship" between the federal-securities laws and common-law fraud "confirms that this action is 'legal in nature,'" and entitles respondents to a jury trial. *Ante,* at 13. That argument does not fare any better than the argument on remedy. Again, the majority bends inapposite case law to an illogical thesis. *Granfinanciera*, on which the majority relies to make its cause-of-action argument, set forth the public-

rights analysis only for "disputes to which the Federal Government is not a party in its sovereign capacity." 492 U. S., at 55, n. 10. For cases that, as here, involve the Government in its sovereign capacity, the *Granfinanciera* Court plainly stated that "Congress may fashion causes of action that are closely *analogous* to common-law claims and [still] place them beyond the ambit of the Seventh Amendment by assigning their resolution to a [non-Article III] forum in which jury trials are unavailable." *Id.*, at 52 (citing *Atlas Roofing*, 430 U. S., at 450–461).[8]

The Court held in *Granfinanciera* that "a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer." 492 U. S., at 36. In doing so, the Court noted that actions to recover such transfers through a claim of fraudulent conveyance were traditionally available at common law. See

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[8]The majority leaves open the possibility that *Granfinanciera* might have overruled *Atlas Roofing*. See *ante,* at 22–23. That suggestion strains credulity. By my count, *Granfinanciera* favorably cites to *Atlas Roofing* at least 12 times. See 492 U. S., at 48, 51–54, 57, 60–61; see also *id.*, at 65 (Scalia, J., concurring in part and concurring in judgment). It even reaffirmed the definition of public rights from *Atlas Roofing*, declaring that the Court "adhere[d] to that general teaching . . . in *Atlas Roofing*." 492 U. S., at 51. The majority's only response is to say that Justice White thought *Granfinanciera* may have overruled *Atlas Roofing*. See *ante,* at 23, n. 3; see also *ante,* at 17 (GORSUCH, J., concurring). That is misleading at best. When Justice White said in his *Granfinanciera* dissent that the Court's opinion in that case could be read as overruling or limiting portions of several cases, including *Atlas Roofing*, he was referring to his understanding that *Atlas Roofing* also extended to private disputes. See *Granfinanciera*, 492 U. S., at 79–83; see also Tr. of Oral Arg. 58–59 (Principal Deputy Solicitor General explaining that Justice White understood "*Atlas Roofing* to speak [also] to the private parties cases," not just to cases involving the Government, which "is really a through line that the Court has never questioned"). With respect to claims involving the Government, such as those at issue here, *Granfinanciera* expressly reaffirmed *Atlas Roofing* and "adhere[d] to [its] general teaching." 492 U. S., at 51.

id., at 43–49. That did not resolve the case, however. Unlike in *Tull*, the proceeding at issue in *Granfinanciera* was in a non-Article III forum (*i.e.*, a bankruptcy court). So, to answer whether Congress could assign the fraudulent-conveyance claim to a bankruptcy judge for decision, Congress needed to decide whether the "legal cause of action involve[d] 'public rights.'" 492 U. S., at 53.

Granfinanciera explains that there are two ways to identify a "public right." First, there are the matters in which Congress enacts a statutory cause of action that "inheres in, or lies against, the Federal Government in its sovereign capacity." *Id.*, at 53 (citing *Atlas Roofing*, 430 U. S., at 458). These matters necessarily arise between the Government and the people in connection with the Government's exercise of its constitutional authority. See *supra,* at 7–8. In these cases, the Court said, *Atlas Roofing* controls the public-rights analysis. See *Granfinanciera*, 492 U. S., at 51, 53. The Court explained that "Congress may effectively supplant a common law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." *Id.*, at 53 (citing *Atlas Roofing*, 430 U. S., at 458).

The second kind of public right that *Granfinanciera* recognized involves "disputes to which the Federal Government is not a party in its sovereign capacity," 492 U. S., at 55, n. 10, that is, usually "[w]holly private" disputes, *id.*, at 51. The public-rights analysis in these private-dispute cases looks different: "The crucial question, *in cases not involving the Federal Government*, is whether 'Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.'" *Id.*, at 54 (quoting *Thomas*, 473 U. S., at 593–594;

emphasis added; alterations omitted).

These two approaches together stand for the proposition that "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, *and* if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." 492 U. S., at 54–55 (emphasis added). Once in federal court, "[i]f the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial." *Id.*, at 55.

Because *Granfinanciera* did not involve a statutory right that belonged to the Government in its sovereign capacity, *Atlas Roofing* did not control the outcome. Instead, the Court applied the private-disputes test to determine whether fraudulent-conveyance "actions were 'closely intertwined' with the bankruptcy regime." *Ante*, at 20 (quoting *Granfinanciera*, 492 U. S., at 54). The Court held that the fraudulent-conveyance actions "were not inseparable from the bankruptcy process," and thus the public-rights exception did not apply. *Ante*, at 20 (citing *Granfinanciera*, 492 U. S., at 54, 56).

The majority brushes aside this critical distinction between *Atlas Roofing* and *Granfinanciera* in one sentence. That "the Government is the party prosecuting this action," the majority writes, is meaningless because this Court has "never held that the 'presence of the United States as a proper party to the proceeding is . . . sufficient' by itself to trigger the exception." *Ante*, at 22 (quoting *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 69, n. 23 (1982) (plurality opinion)). Here, too, the majority attacks a strawman. The SEC does not claim that the mere presence of the United States as a proper party necessarily means that a public right is at issue. See Reply Brief 8, n. 2 (disclaiming this argument).[9] Of course "what matters is

[9] Indeed, "the public-rights doctrine does not extend to any criminal

the substance" of the claim. *Ante*, at 21.

By no means, though, does this case involve a "purely taxonomic change." *Granfinanciera*, 492 U. S., at 61. Congress did not just repackage a common-law claim under a new label. It created new statutory obligations and an entire federal scheme. See *supra*, at 14–16.[10] Perhaps most importantly, Congress created a new right unknown to the common law that, unlike common-law fraud, belongs to the public and inheres in the Government in its sovereign capacity. That is why, when the SEC seeks to enforce the federal-securities laws, it does so to remedy the harm to the United States. See *supra*, at 16. It seeks to protect the integrity of the securities market as a whole through the imposition of new and distinct remedies like civil penalties

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matters, although the Government is a proper party." *Northern Pipeline Constr. Co.*, 458 U. S., at 70, n. 24 (plurality opinion) (citing *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955)). That is so not only because this Court has held as much, but also because Article III itself prescribes that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury." §2, cl. 3. In other words, Article III requires criminal trials to take place before a jury in federal court, but says nothing about civil-penalty claims brought by the Government. Beyond criminal trials, the Solicitor General also concedes that, under this Court's precedents, the public-rights doctrine does not apply when the Government brings a common-law claim in a proprietary capacity. See Reply Brief 8, n. 2.

[10] The majority spills much ink on the perceived similarities between federal-securities fraud and common-law fraud, only to conclude that the causes of action are not identical. That conclusion was inevitable because of critical differences between the two. Even if Congress drew upon common-law fraud when it enacted federal-securities laws, see *ante,* at 11–12, this Court has repeatedly disclaimed any suggestion that Congress federalized a common-law fraud claim. See, *e.g.*, *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 162 (2008) ("Section 10(b) does not incorporate common-law fraud into federal law"); *SEC* v. *Zandford*, 535 U. S. 813, 820 (2002) ("[T]he statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of §10(b)"); *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 388–389 (1983) ("[T]he antifraud provisions of the securities laws are not coextensive with common-law doctrines of fraud").

and orders barring violators from holding certain positions and performing certain activities in the industry. See 15 U. S. C. §§77h–1(f), and (g), 78u–2, 78u–3(f).

For these reasons, "[a]n action brought by an Executive Branch agency to enforce federal securities laws is not the same as an action brought by one individual against another for monetary or injunctive relief of the sort that law courts (with juries) in England or the States have traditionally heard." Brief for Professor John Golden et al. as *Amici Curiae* 3. Congress did not unlawfully "siphon" a traditional legal action "away from an Article III court" when it enacted the federal-securities laws and provided for their enforcement within the SEC. *Ante,* at 21.

The majority asserts that "*Granfinanciera* effectively decides this case." *Ante*, at 20. That can only be true, though, if one ignores what *Granfinanciera* actually says: Its public-rights analysis of whether an action is closely intertwined with a federal regulatory program only applies "in cases not involving the Federal Government." 492 U. S., at 54. The analysis from *Atlas Roofing* controls where, as here, "'the Government is involved in its sovereign capacity under an otherwise valid statute.'" 492 U. S., at 51 (quoting *Atlas Roofing*, 430 U. S., at 458).

C

Both cases relied on by the majority, *Tull* and *Granfinanciera*, reaffirm that *Atlas Roofing* controls precisely in circumstances like the ones at issue in this case. That is why the majority's late-stage attempt to distinguish *Atlas Roofing* fails. The majority's principal argument that the OSHA scheme in *Atlas Roofing* "did not borrow its cause of action from the common law" and was instead a "self-consciously novel" scheme that "resembled a detailed building code," *ante,* at 23–24, is flawed on multiple fronts.

First, OSHA's cause of action should be largely irrelevant under the majority's view that the remedy of civil penalties

is effectively dispositive under *Tull*. *Atlas Roofing*, and many other cases involving non-Article III adjudications, also involved civil penalties designed to punish and deter, and yet the majority does not expressly disavow them. Logically, then, either *Atlas Roofing* and countless other cases were wrongly decided, or the majority's view on civil penalties is wrong.

Second, because the majority elides the critical distinction between *Atlas Roofing* and *Granfinanciera*, it fails to grapple with the fact that this case, like *Atlas Roofing* and unlike *Granfinanciera*, involves the Government acting in its sovereign capacity to enforce a statutory violation. That makes the right at issue a "public right" that Congress can take outside the purview of Article III, even when the new cause of action is analogous to a common-law claim.

Third, the relationship between the federal-securities laws (including their antifraud provisions) and common-law fraud is materially indistinguishable from the relationship between OSHA and the common-law torts of wrongful death and negligence. Unlike their common-law comparators, neither statute requires actionable harm to an individual. See *supra*, at 15. In arguing that OSHA's scheme was "self-consciously" novel in ways unknown to the common law, the majority points to the granularity of OSHA standards. *Ante,* at 23–24. Yet lawyers and regulated parties in the securities industry would be surprised to hear that this could be a distinguishing feature. Anyone familiar with the industry knows securities laws are replete with specific and exceedingly detailed requirements implementing the statute's disclosure and antifraud provisions. See, *e.g.*, 17 CFR §275.206(4)–1(b) (2023) (prohibiting testimonials and endorsements that do not satisfy requirements without meeting complex disclosure requirements); §275.206(4)–2(a) (prohibiting investment advisers from having custody of client funds or securities unless specific requirements are

met, including qualifications, notices, and account statements).

The majority further rests on the notion that Congress drew inspiration from the common law in enacting the antifraud provisions of the federal-securities laws, whereas OSHA's new statutory duty did not bring any common-law soil with it. See *ante,* at 23–24. Yet both statutes share elements with claims at common law that Congress deemed inadequate to address the national problems that prompted it to legislate. See *supra*, at 14–15. Still, even accepting that federal-securities laws bring common-law soil with them and OSHA does not, the majority does not explain why that is a constitutionally relevant distinction.[11]

In sum, all avenues by which the majority attempts to distinguish *Atlas Roofing* fail. The majority cannot escape the entrenched principle that a "legal cause of action involves 'public rights'" that can be taken outside of Article III if the "statutory right is . . . closely intertwined with a federal regulatory program Congress has power to enact" *or* if it "belongs to [o]r exists against the Federal Government." *Granfinanciera*, 492 U. S., at 53–54.[12] In both *Atlas Roofing* and this case, a public right exists. In both statutory

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[11] In *Tull* v. *United States*, 481 U. S. 412 (1987), for example, there was no common-law soil brought into that federal regulatory regime, and the Seventh Amendment still applied. Indeed, no one can argue that "[t]he purpose of [the Clean Water Act] was . . . to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law." *Ante*, at 23–24.

[12] The concurrence's assertion that the majority is "follow[ing] the advice of Justices Brennan and Marshall" by "'limit[ing] the judicial authority of non-Article III federal tribunals'" is misleading. *Ante,* at 20 (quoting *Schor*, 478 U. S., at 859 (Brennan, J., joined by Marshall, J., dissenting)). Justice Brennan in his *Schor* dissent wrote that he would limit the authority of non-Article III tribunals to three recognized exceptions: (1) territorial courts; (2) courts-martial; and (3) forums adjudicating public-rights matters. As examples of the public-rights category, Justice Brennan cited *Murray's Lessee*, *Ex parte Bakelite*, *Crowell*, *Thomas*, and his plurality opinion in *Northern Pipeline*. See *Schor*, 478 U. S., at

schemes, regardless of any perceived resemblance to the common law, Congress enacted a new cause of action that created a statutory right belonging to the United States for the Government to enforce pursuant to its sovereign powers.

IV

A faithful and straightforward application of this Court's longstanding precedent should have resolved this case. Faithful "[a]dherence to precedent is 'a foundation stone of the rule of law.'" *Kisor* v. *Wilkie*, 588 U. S. 558, 586 (2019) (quoting *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014)). It allows courts to function, and be perceived, as courts, and not as political entities. "'It promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" 588 U. S., at 586–587 (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991); alterations omitted). That is why, "even in constitutional cases, a departure from precedent 'demands special justification.'" *Gamble* v. *United States*, 587 U. S. 678, 691 (2019) (quoting *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984)).

Today's decision disregards these foundational principles.[13] Time will tell what is left of the public-rights doc-

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859. As those citations demonstrate, both Justices Brennan and Marshall certainly thought that public-rights matters extend to certain private disputes that do not involve the Government as a party, as well as disputes involving the Government in connection with different exercises of congressional power. Indeed, it was Justice Brennan who reaffirmed *Atlas Roofing* in his opinion for the *Granfinanciera* Court and explained that a public right includes, at a minimum, a statutory right that "belongs to [o]r exists against the Federal Government." 492 U. S., at 53–54.

[13] Precedents should not be so easily discarded based on the views of

trine. Less uncertain, however, are the momentous consequences that flow from the majority's insistence that the Government's rights to civil penalties must now be tried before a jury in federal court. The majority's decision, which strikes down the SEC's in-house adjudication of civil-penalty claims on the ground that such claims are legal in nature and entitle respondents to a federal jury, effects a seismic shift in this Court's jurisprudence. Indeed, "[i]f you've never heard of a statute being struck down on that ground," and you recall having read countless cases approving of that arrangement, "you're not alone." *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 294 (2020) (KAGAN, J., concurring in judgment with respect to severability and dissenting in part).

The majority pulls a rug out from under Congress without even acknowledging that its decision upends over two centuries of settled Government practice. The United States, led by then-Solicitor General Robert Bork and then-Assistant Attorney General for the Civil Division Rex Lee, told this Court in *Atlas Roofing* that "during the whole of our history, regulatory fines and penalties have been collected by non-jury procedures pursuant to . . . legislative decisions," and that "[i]t would be most remarkable if, at this late date, the Seventh Amendment were construed to outlaw this consistent rule of government followed for two centuries." Brief for Respondents in *Atlas Roofing*, O. T. 1976, No. 75–746, etc., pp. 81–82. This Court agreed and upheld that practice, it seemed, once and for all.

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some commentators, or on whether or not a particular case is "celebrated." *Ante*, at 25, n. 4. *Atlas Roofing* and the long line of cases before it are precedents from this Court entitled to *stare decisis* effect. Indeed, this Court has reaffirmed and repeatedly cited *Atlas Roofing* with approval. See, *e.g.*, *Oil States*, 584 U. S., at 344–345; *Stern*, 564 U. S., at 489–490; *Granfinanciera*, 492 U. S., at 48, 51–54, 60–61; *id.*, at 65–66 (Scalia, J., concurring in part and concurring in judgment); *Tull*, 481 U. S., at 418, n. 4; *Northern Pipeline Constr. Co.*, 458 U. S., at 67, n. 18, 69, n. 23, 70, 73, 77 (plurality opinion).

Following this Court's precedents and the recommendation of the Administrative Conference of the United States, Congress has enacted countless new statutes in the past 50 years that have empowered federal agencies to impose civil penalties for statutory violations. See 2 P. Verkuilm, D. Gifford, C. Koch, R. Pierce, & J. Lubbers, Administrative Conference of the United States, Recommendations and Reports, The Federal Administrative Judiciary 861, and nn. 350–351 (1992). These statutes are sometimes enacted in addition to, but often instead of, "the traditional civil enforcement statutes that permitted agencies to collect civil penalties only after federal district court trials." *Id.*, at 861. "By 1986, there were over 200 such statutes" and "[t]he trend has, if anything, accelerated" since then. *Id.*, at 861, and n. 351.

Similarly, there are, at the very least, more than two dozen agencies that can impose civil penalties in administrative proceedings. See Tr. of Oral Arg. 78–79 (Principal Deputy Solicitor General) (recognizing two dozen agencies with administrative civil-penalty authorities); see also, *e.g.*, 5 U. S. C. §1215(a)(3)(A)(ii) (Merit Systems Protection Board); 7 U. S. C. §§9(10)(C), 13a (Commodity Futures Trading Commission); §§499c(a), 586, 2279e(a) (Department of Agriculture); 8 U. S. C. §§1324c, 1324d (Department of Justice); 12 U. S. C. §§5563(a)(2), (c), (Consumer Financial Protection Bureau); 16 U. S. C. §823b(c) (Federal Energy Regulatory Commission); 20 U. S. C. §1082(g) (Department of Education); 21 U. S. C. §335b (Department of Health and Human Services/Food and Drug Administration); 29 U. S. C. §666(j) (Occupational Safety and Health Review Commission); 30 U. S. C. §§820(a) and (b) (Federal Mine Safety and Health Review Commission); 31 U. S. C. §5321(a)(2) (Department of the Treasury); 33 U. S. C. §§1319(d) and (g) (Environmental Protection Agency); 39 U. S. C. §3018(c) (Postal Service); 42 U. S. C. §3545(f) (Department of Housing and Urban Development); 46 U. S. C.

§41107(a) (Federal Maritime Commission); 47 U. S. C. §503(b)(3) (Federal Communications Commission); 49 U. S. C. §521 (Federal Railroad Administration); §46301 (Department of Transportation).

Some agencies, like the Consumer Financial Protection Bureau, the Environmental Protection Agency, and the SEC, can pursue civil penalties in both administrative proceedings and federal court. See, *e.g.*, 12 U. S. C. §§5563(a), 5564(a), 5565(a)(1), (2)(H), and (c) (Consumer Financial Protection Bureau); 33 U. S. C. §§1319(a), (b), and (g) (Environmental Protection Agency); *supra,* at 2 (SEC). Others do not have that choice. As the above-cited statutes confirm, the Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Department of Agriculture, and many others, can pursue civil penalties only in agency enforcement proceedings. For those and countless other agencies, all the majority can say is tough luck; get a new statute from Congress.

Against this backdrop, our coequal branches will be surprised to learn that the rule they thought long settled, and which remained unchallenged for half a century, is one that, according to the majority and the concurrence, my dissent just announced today. Unfortunately, that mistaken view means that the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress. Rather than acknowledge the earthshattering nature of its holding, the majority has tried to disguise it. The majority claims that its ruling is limited to "civil penalty suits for fraud" pursuant to a statute that is "barely over a decade old," *ante,* at 18, n. 2, 22, an assurance that is in significant tension with other parts of its reasoning. That incredible assertion should fool no one. Today's decision is a massive sea change. Litigants seeking further dismantling of the "administrative state" have reason to rejoice in their win

today, but those of us who cherish the rule of law have nothing to celebrate.

* * *

Today's ruling is part of a disconcerting trend: When it comes to the separation of powers, this Court tells the American public and its coordinate branches that it knows best. See, *e.g.*, *Collins* v. *Yellen*, 594 U. S. 220, 227 (2021) (concluding that the Federal Housing Finance Agency's "structure violates the separation of powers" because the Agency was led by a single Director removable by the President only "'for cause'"); *United States* v. *Arthrex, Inc.*, 594 U. S. 1, 6, 23 (2021) (holding that "authority wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to an inferior office"); *Seila Law*, 591 U. S., at 202–205 (holding that "the structure of the [Consumer Financial Protection Bureau] violates the separation of powers" because it was led by a single Director removable by the President only "for cause"); *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 483–484, 492 (2010) (holding "that the dual for-cause limitations on the removal of [Public Company Accounting Oversight] Board members contravene the Constitution's separation of powers"). The Court tells Congress how best to structure agencies, vindicate harms to the public at large, and even provide for the enforcement of rights created for the Government. It does all of this despite the fact that, compared to its political counterparts, "the Judiciary possesses an inferior understanding of the realities of administration" and how "political power . . . operates." *Free Enterprise Fund*, 561 U. S., at 523 (Breyer, J., dissenting).

There are good reasons for Congress to set up a scheme like the SEC's. It may yield important benefits over jury trials in federal court, such as greater efficiency and expertise, transparency and reasoned decisionmaking, as well as

uniformity, predictability, and greater political accountability. See, *e.g.*, Brief for Administrative Law Scholars as *Amici Curiae* 30–32. Others may believe those benefits are overstated, and that a federal jury is a better check on government overreach. See, *e.g.*, Brief for Cato Institute as *Amicus Curiae* 11–25. Those arguments take place against the backdrop of a philosophical (and perhaps ideological) debate on whether the number of agencies and authorities properly corresponds to the ever-increasing and evolving problems faced by our society.

This Court's job is not to decide who wins this debate. These are policy considerations for Congress in exercising its legislative judgment and constitutional authority to decide how to tackle today's problems. It is the electorate, and the Executive to some degree, not this Court, that can and should provide a check on the wisdom of those judgments.

Make no mistake: Today's decision is a power grab. Once again, "the majority arrogates Congress's policymaking role to itself." *Garland* v. *Cargill*, 602 U. S. 406, 442 (2024) (SOTOMAYOR, J., dissenting). It prescribes artificial constraints on what modern-day adaptable governance must look like. In telling Congress that it cannot entrust certain public-rights matters to the Executive because it must bring them first into the Judiciary's province, the majority oversteps its role and encroaches on Congress's constitutional authority. Its decision offends the Framers' constitutional design so critical to the preservation of individual liberty: the division of our Government into three coordinate branches to avoid the concentration of power in the same hands. The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). Judicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches.

Deeply entrenched in today's ruling is the erroneous belief that any "mistaken or wrongful exertion by the legislative department of its authority" can lead to "grave abuses"

and "it behooves the judiciary to apply a corrective by exceeding its own authority" through requiring civil-penalty claims to proceed before a federal jury. *Stranahan*, 214 U. S., at 340. As this Court said over a century ago in this public-rights context, that belief "mistakenly assumes that the courts can alone be safely intrusted with power, and that hence it is their duty to unlawfully exercise prerogatives which they have no right to exert, upon the assumption that wrong must be done to prevent wrong being accomplished." *Ibid.*

By giving respondents a jury trial, even one that the Constitution does not require, the majority may think that it is protecting liberty. That belief, too, is deeply misguided. The American People should not mistake judicial hubris with the protection of individual rights. Our first President understood this well. In his parting words to the Nation, he reminded us that a branch of Government arrogating for itself the power of another based on perceptions of what, "in one instance, may be the instrument of good . . . is the customary weapon by which free governments are destroyed." Farewell Address (1796), in 35 The Writings of George Washington 229 (J. Fitzpatrick ed. 1940) (footnote omitted). The majority today ignores that wisdom.

Because the Court disregards its own precedent and its coequal partners in our tripartite system of Government, I respectfully dissent.

Nat'l Ass'n of Mfrs. v. SEC

United States Court of Appeals for the District of Columbia Circuit

August 18, 2015, Decided

No. 13-5252

Reporter
800 F.3d 518 *; 419 U.S. App. D.C. 158 **; 2015 U.S. App. LEXIS 14455 ***; Fed. Sec. L. Rep. (CCH) P98,600; 43 Media L. Rep. 3216

NATIONAL ASSOCIATION OF MANUFACTURERS, ET AL., APPELLANTS v. SECURITIES AND EXCHANGE COMMISSION, ET AL., APPELLEES

Subsequent History: Rehearing, en banc, denied by, Motion granted by Nat'l Ass'n of Mfrs. v. SEC, 2015 U.S. App. LEXIS 19539 (D.C. Cir., Nov. 9, 2015)

Judgment entered by, Summary judgment granted by, Remanded by Nat'l Ass'n of Mfrs. v. United States SEC, 2017 U.S. Dist. LEXIS 135732 (D.D.C., Apr. 3, 2017)

Prior History: [*1]** On Petitions For Panel Rehearing.

Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 409 U.S. App. D.C. 210, 2014 U.S. App. LEXIS 6840 (Apr. 14, 2014)

Counsel: Peter D. Keisler, Jonathan F. Cohn, Erika L. Maley, Steven P. Lehotsky, Quentin Riegel, and Rachel L. Brand were on the briefs for appellants.

Michael A. Conley, Deputy General Counsel, Securities and Exchange Commission, Tracey A. Hardin, Senior Counsel, Benjamin L. Schiffrin, Senior Litigation Counsel, and Daniel Staroselsky, Senior Counsel were on the briefs for appellees.

Scott L. Nelson, Julie A. Murray, and Adina H. Rosenbaum were on the briefs for intervenors-appellees Amnesty International USA, et al.

Ronald A. Fein, David Hunter Smith, David N. Rosen, and Jodi Westbrook Flowers were on the brief for amici curiae Global Witness and Free Speech For People in support of appellees.

Judges: Before: SRINIVASAN, Circuit Judge, and SENTELLE and RANDOLPH, Senior Circuit Judges. Opinion for the Court filed by Senior Circuit Judge RANDOLPH. SRINIVASAN, Circuit Judge, concurring in part. Dissenting opinion filed by Circuit Judge SRINIVASAN.

Opinion by: RANDOLPH

Opinion

[159] [*519]** RANDOLPH, *Senior Circuit Judge*: We assume familiarity with our opinion in *National Association of Manufacturers v. SEC*, 748 F.3d 359, 409 U.S. App. D.C. 210 (D.C. Cir. 2014) ("*NAM*").[1]

The subject of this rehearing is the intervening decision in *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18, 411 U.S. App. D.C. 318 (D.C. Cir. 2014) (en banc) ("*AMI*"), and its treatment of *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985).

Justice White, writing for the majority in *Zauderer*, expressed the Court's holding with his customary precision: we "hold," he wrote, "that an advertiser's [First Amendment] rights are adequately protected

[1] For ease of reference, our original opinion and the accompanying concurrence are reprinted in an Appendix to this opinion after the dissent. **[***2]**

as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651 (italics added). In several opinions, our court therefore treated *Zauderer* as limited to compelled speech designed to cure misleading advertising. Government regulations forcing persons to engage in commercial speech for other purposes were evaluated under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564-66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), rather than *Zauderer*.[2] *See, e.g., R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213-17, 402 U.S. App. D.C. 438 (D.C. Cir. 2012); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.18, 405 U.S. App. D.C. 153 (D.C. Cir. 2013).[3]

[*520] **[**160]** Our initial opinion in this case adhered to circuit precedent and declined to apply *Zauderer* on the ground that the "conflict minerals"[4] disclosures, compelled by the Dodd-Frank law and the implementing regulations of the Securities and Exchange Commission, were unrelated to curing consumer deception. *NAM*, 748 F.3d at 370-71.

After our opinion in *NAM* issued, the en banc court in *AMI* decided that *Zauderer* covered more than a state's forcing disclosures in order to cure what would otherwise be misleading advertisements. *AMI*, 760 F.3d at 21-23. Some other governmental interests might suffice. Using *Zauderer*'s relaxed standard of review,[5] *AMI* held that the federal government had not violated the First Amendment when it forced companies to list on the labels of their meat cuts the country in which the animal was born, raised, and slaughtered. *Id.* at 23, 27. It was of no moment that the governmental objective the *AMI* court identified as sufficient — enabling "consumers to choose American-made products," *id.* at 23 — was one the government disavowed not **[***4]** only when the Department of Agriculture issued its regulations, but also when the Department of Justice defended them in our court, *id.* at 25; *id.* at 46-47 (Brown, J., dissenting).[6] The

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[2] The *Central Hudson* standard is more demanding than *Zauderer*'s but much less exacting than the Supreme Court's doctrines for evaluating non-commercial speech. *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).

[3] *See In re R.M.J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982), holding that when the commercial advertising "is not misleading" the State's regulations, including forced disclosures, must be tested under *Central Hudson*. The Supreme Court later interpreted *R.M.J.* to mean that when advertisements are "not inherently misleading," state-compelled disclosures are to be tested by **[***3]** "*Central Hudson*'s intermediate scrutiny," rather than by *Zauderer*'s looser standard. *Milavetz*, 559 U.S. at 250. *See also Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. at 491 (1997) (Souter, J., dissenting, joined by Chief Justice Rehnquist, and Justices Scalia and Thomas); *Spirit Airlines, Inc. v. Dep't of Transp.*, 687 F.3d 403, 412, 402 U.S. App. D.C. 70 (D.C. Cir. 2012).

[4] Gold, tantalum, tin, and tungsten.

[5] The *AMI* court held that *Zauderer* — unlike *Central Hudson* — does not require the government to prove that its disclosure requirement will accomplish its objective. *AMI*, 760 F.3d at 26.

[6] The en banc court framed the governmental interest in terms of enabling consumers to buy American products, *id.* at 23-24, but the government refrained from articulating any such interest. The only interest the government asserted in *AMI* was the open-ended, unbounded notion of providing consumers with information when they make their purchasing decisions.

The government's unwillingness to frame its interest in protectionist terms, as the en banc court did, is understandable. While *AMI* was pending before the panel, and then before the court en banc, the World Trade Organization was conducting a proceeding **[***5]** to determine whether the United States, by requiring country-of-origin labeling, violated its treaty obligations not to engage in protectionism. Canada and Mexico, joined by other countries, had filed a complaint so alleging.

On October 20, 2014, after the *AMI* en banc opinion issued, the WTO compliance panel ruled against the United States. The panel held that the statute and regulations at issue in the *AMI* case violated the treaty obligations of the United States because the regulations accord less favorable treatment to imported livestock than to domestic livestock. The WTO's Appellate Body rejected the United States' appeal on May 18, 2015. *GATT Dispute Panel on United States-Certain Country of Origin Labeling (COOL) Requirements*, Article 21.5 Panel Report (Oct. 20, 2014), Appellate Body Report (May 18, 2015), WT/DS384/RW, WT/DS386/RW. Canada has requested authorization to retaliate and some expect a trade war. *See* Gov't of Canada, *Canada to Seek WTO Authorization in Response to Country of Origin Labeling*; *Editorial: Time to Lose COOL. Avoid Trade War, After WTO Ruling*, HERALD NEWS (CAN.), May 19,

AMI court therefore overruled the portion of our decisions in *NAM*, *R.J. Reynolds*, and *National Association of Manufacturers v. NLRB* holding that the analysis in *Zauderer* was confined to government compelled disclosures designed to prevent the deception of consumers.

In light of the *AMI* decision, **[***6]** we granted the petitions of the Securities and Exchange Commission and intervenor Amnesty International for rehearing to consider what effect, if any, *AMI* had on our judgment that the conflict minerals disclosure requirement in 15 U.S.C. § 78m(p)(1)(A)(ii) & (E), and the Commission's final rule, 77 Fed. Reg. 56,274, 56,362-65, violated the First Amendment to the Constitution. **[*521]** **[**161]** *See* Order of November 18, 2014. For the reasons that follow we reaffirm our initial judgment.

Before we offer our legal analysis, a pervasive theme of the dissent deserves a brief response. To support the conflict minerals disclosure rule, the dissent argues that the rule is valid because the United States is thick with laws forcing "[i]ssuers of securities" to "make all sorts of disclosures about their products," Dissent at 1. Charles Dickens had a few words about this form of argumentation: "'Whatever is is right'; an aphorism that would be as final as it is lazy, did it not include the troublesome consequence, that nothing that ever was, was wrong." CHARLES DICKENS, A TALE OF TWO CITIES 65 (Signet Classics) (1859). Besides, the conflict minerals disclosure regime is not like other disclosure rules the SEC administers. This particular rule, the SEC determined, is "quite different from the economic or investor protection benefits **[***7]** that our rules ordinarily strive to achieve." Conflict Minerals, 77 Fed. Reg. 56,274, 56,350 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240.13p-1, 249b.400).[7]

As to the First Amendment, we agree with the SEC that "after *AMI*, whether *Zauderer* applies in this case is an open question." Appellee Supp. Br. 10-11. NAM, in its initial briefing and in its supplemental brief on rehearing, argued that *Zauderer* did not apply to this case, not only because the compelled disclosures here were unrelated to curing consumer deception, but also because this government-compelled speech was not within the Supreme Court's category of "commercial speech." Appellants Supp. Br. 18-19; Appellants Br. 53. NAM therefore argued that the commercial speech test of *Central Hudson*, 447 U.S. at 564-66, also did not govern the First Amendment analysis **[***8]** in this case.

In our initial decision we did not decide whether the compelled speech here was commercial speech;[8] we assumed *arguendo* **[*522]** **[**162]**

2015; Krista Hughes, *U.S. Loses Meat Labeling Case; Trade War Looms*, Reuters, May 18, 2015.

[7] The dissent likens the disclosures here to the "mine-run of uncontroversial requirements to disclose factual information to consumers." Dissent at 4. But consumer protection was not a reason for the conflict minerals disclosure regime. As the Commission noted, "unlike in most of the securities laws, Congress intended the Conflict Minerals Provision to serve a humanitarian purpose," 77 Fed. Reg. at 56,350, and that purpose was to reduce the trade in minerals from the DRC in order "to inhibit the ability of armed groups in the [DRC] to fund their activities." *Id.* at 56,276.

[8] It is easier to discern what the Supreme Court does not consider "commercial speech" than to determine what speech falls within that category. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 655, 123 S. Ct. 2554, 156 L. Ed. 2d 580 (2003) (per curiam) (writ of certiorari dismissed as improvidently granted).

For instance, even if "money is spent to project" speech, this does not make it commercial speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). Otherwise there is no explaining cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). Speech "carried in a form" sold for profit does not render it commercial speech under the Court's decisions. *Va. Pharmacy*, 425 U.S. at 761. Otherwise books, newspapers, and television programming would all be commercial speech. *Id.* Not all speech soliciting money is commercial speech. Otherwise, *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988), and other cases such as *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), would have been decided differently. The Court has also determined that just because the speech is **[***9]** about "a commercial subject," it does not fall into the category of commercial speech, otherwise "business section editorials would be commercial speech; and it isn't even factual speech on a commercial subject, or else business section news reporting would be

that it was. *NAM v. SEC*, 748 F.3d at 372. Now on rehearing the question looms again. But before we may confront that broad issue, we address a narrower subsidiary question: whether *Zauderer*, as now interpreted in *AMI*, reaches compelled disclosures that are unconnected to advertising or product labeling at the point of sale.

To put the matter differently, even if the conflict minerals disclosures are categorized as "commercial speech," it may not follow that *Zauderer*'s loose standard of review[9] rather than the more demanding standard of *Central Hudson* determines whether the law violates the First Amendment rights of those who are subject to the government's edicts.

Conflict minerals disclosures are to be made on each reporting company's website and in its reports to the SEC. In the rulemaking, the SEC acknowledged that the statute — and its regulations — were "directed at achieving overall social benefits," that the law was not "intended to generate measurable, direct economic benefits to investors or issuers," and that the regulatory requirements were "quite different from the economic or investor protection benefits that our rules ordinarily **[***10]** strive to achieve." 77 Fed. Reg. at 56,350.[10]

The SEC thus recognized that this case does not deal with advertising or with point of sale disclosures. Yet the Supreme Court's opinion in *Zauderer* is confined to advertising, emphatically and, one may infer, intentionally. In a lengthy opinion, the Court devoted only four pages to the issue of compelled disclosures. *Zauderer*, 471 U.S. at 650-53. Yet in those few pages the Court explicitly identified advertising as the reach of its holding no less than thirteen times.[11] Quotations in the preceding footnote prove that the Court was not holding that any time a government forces a commercial entity to state a message of the government's devising, that entity's First Amendment interest is **[***11]** minimal. Instead, the *Zauderer* Court — in a passage *AMI* quoted, 760 F.3d at 22 — held that the advertiser's "constitutionally protected interest in *not* providing any particular factual information *in his advertising* is minimal." *Zauderer*, 471 U.S. at 651 (last italics added).

[*523] **[**163]** For these reasons the Supreme Court has refused to apply *Zauderer* when the case before it did not involve voluntary commercial advertising.[12] In *Hurley v. Irish-American Gay*,

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commercial speech." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*?, 76 VA. L. REV. 627, 638 (1990) (citing *Va. Pharmacy*, 425 U.S. at 761-62).

[9] *See Milavetz, Gallop & Milavetz*, 559 U.S. at 249; and note 5 *supra.*

[10] *See* Mary Jo White, Chairwoman, Sec. & Exch. Comm'n, A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School (Oct. 3, 2013) ("Seeking to improve safety in mines for workers or to end horrible human rights atrocities in the Democratic Republic of the Congo are compelling objectives, which, as a citizen, I wholeheartedly share. But, as the Chair of the SEC, I must question, as a policy matter, using the federal securities laws and the SEC's powers of mandatory disclosure to accomplish these goals.").

[11] Consider the following excerpts from *Zauderer* with our italics added: "the Dalkon Shield *advertisement*," *id.* at 650; "the *advertisement*, absent the required disclosure," *id.*; "In requiring attorneys who *advertise*," *id.*; "The State has attempted only to prescribe what shall be orthodox in commercial *advertising*," *id.* at 651; "a requirement that appellant include in his *advertising* purely factual and uncontroversial information," *id.*; "appellant's constitutionally protected interest in *not* providing any particular factual information in his *advertising* is minimal," *id.*; "an *advertiser's* interests," *id.*; "the *advertiser's* First Amendment rights," *id.*; "an *advertiser's* rights," *id.*; "attorney *advertising*," *id.* at 652; "Appellant's *advertisement*," *id.*; "The *advertisement*," *id.*; "The State's position that it is deceptive to employ *advertising*," *id.*

[12] Whatever the commercial speech doctrine entails, commercial advertising is at least at the heart of the matter. *See, e.g., Central Hudson*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973) ("The critical feature of the advertisement [making it commercial speech] was that . . . it did no more than propose a commercial transaction . . .."); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983) ("[T]he core notion of commercial speech [is] speech which does no more than propose a commercial transaction." (internal quotation marks omitted)); *Spirit Airlines*, 687 F.3d at 412 ("The **[***13]** speech at

Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), a **[***12]** unanimous Supreme Court treated *Zauderer* as a decision permitting the government "at times" to "'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information.'" *Hurley*, 515 U.S. at 573. But *Hurley* went on to stress that "*outside that context*" (commercial advertising) the "general rule" is "that the speaker has the right to tailor the speech" and that this First Amendment right "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.* (italics added). The Court added that this constitutional rule was "enjoyed by business corporations generally." *Id.* at 574.

United States v. United Foods, Inc., 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001), distinguished *Zauderer* for much the same reason. United Foods claimed that a federal law compelling it to fund generalized advertising for mushrooms violated the company's First Amendment rights. United Foods thought the mushrooms it produced were superior to others. Although the Court indicated that the United Foods' forced contribution was commercial speech, the First "Amendment may prevent the government from compelling individuals to express certain views **[***14]** or from compelling certain individuals to pay subsidies for speech to which they object." *Id.* at 410 (internal citations omitted). As to *Zauderer*, the Court found that decision inapplicable because — as in this case — *United Foods* did not deal with "voluntary advertising" or advertising by the company's "own choice." *Id.* at 416.[13]

[*524] **[**164]** In answer to the SEC's "open question," we therefore hold that *Zauderer* has no application to this case.[14] This puts the case in the same posture as in our initial opinion when **[***15]** we determined that *Zauderer* did not apply, but for a different reason. As we ruled in our initial decision, we need not decide whether "strict scrutiny or the *Central Hudson* test for commercial speech" applies. *NAM*, 748 F.3d at 372. For the reasons we gave in that opinion, *id.* at 372-73, the SEC's "final rule does not survive even *Central Hudson*'s intermediate standard." *Id.* at 372. We need not repeat our reasoning in this regard.

But given the flux and uncertainty of the First Amendment doctrine of commercial speech,[15] and the conflict in the circuits regarding the reach of

issue here — the advertising of prices — is quintessentially commercial insofar as it seeks to do no more than propose a commercial transaction." (internal quotation marks omitted)); *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 97 (2d Cir. 1998) ("The 'core notion' of commercial speech includes 'speech which does no more than propose a commercial transaction.' Outside this so-called 'core' lie various forms of speech that combine commercial and noncommercial elements. Whether a communication combining those elements is to be treated as commercial speech depends on factors such as whether the communication is an advertisement, whether the communication makes reference to a specific product, and whether the speaker has an economic motivation for the communication." (internal citations omitted)).

[13] The *AMI* en banc majority did not mention *Hurley*'s or *United Foods*' distinction of *Zauderer*. Perhaps the cases escaped attention or perhaps the *AMI* majority believed that product labeling at the point of sale was simply an adjunct of advertising, to which *Zauderer* did apply. The dissent in this case would dismiss *Hurley* and *United Foods* on the ground that both opinions were merely describing "*Zauderer*'s factual context." Dissent at 11-12. This will not wash. Of course both opinions describe *Zauderer*. The important point is why *Hurley* and *United Foods* do so — to explain that *Zauderer* did not apply because the case before the Court did not involve commercial advertising (*Hurley*) or voluntary advertising (*United Foods*).

[14] In calling our holding a "newly minted constriction of *Zauderer*" to advertising, Dissent at 9, the dissent distorts not only the language of *Zauderer* itself, but also the Supreme Court's decisions in *Hurley* and *United Foods* distinguishing *Zauderer* on the ground that it applied only to commercial or voluntary advertising.

The dissent also detects an anomaly: if the conflict minerals disclosure were required at the point of sale of the company's product, *Zauderer* would apply but if, as here, the disclosure is required once a year on the company's website, *Central Hudson* applies. Dissent at 9-10. What the dissent fails to see is that this dichotomy results from the *AMI* decision stretching *Zauderer* to

Zauderer,[16] we think it prudent to add an alternative ground for our decision. It is this. Even if the compelled disclosures here are commercial speech and even if *AMI*'s view of *Zauderer* governed the analysis, we still believe that the statute and the regulations violate the First Amendment.

To evaluate the constitutional validity of the compelled conflict minerals disclosures, the first step under *AMI* (and *Central Hudson*) is to identify and "assess the adequacy of the [governmental] interest motivating" the disclosure requirement. *AMI*, 760 F.3d at 23. Oddly, the SEC's Supplemental Brief does not address this subject. In the first round of briefing the SEC described the government's interest as "ameliorat[ing] the humanitarian crisis in the DRC." Appellee Br. 26.[17] We will treat this as a sufficient interest of the United States under *AMI* and *Central Hudson* ***[***17]*** .

After identifying the governmental interest or objective, we are to evaluate the effectiveness of the measure in achieving **[*525] [**165]** it. *AMI*, 760 F.3d at 26; *see, e.g., Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 146, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994); *Central Hudson*, 447 U.S. at 564-66.[18] Although the burden was on the government, *see Ibanez*, 512 U.S. at 146, here again the SEC has offered little substance beyond citations to statements by two Senators and members of the executive branch, and a United Nations resolution. The government asserts that this is a matter of foreign affairs and represents "the type of 'value judgment based on the common sense of the people's representatives' for which this Court has not required more detailed evidence." Appellee Br. 64 (quoting *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 16, 388 U.S. App. D.C. 190 (D.C. Cir. 2009)). As the government notes, in the area of foreign relations, **[***18]** "conclusions must often be based on informed judgment rather than concrete evidence." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010).

But in the face of such evidentiary gaps, we are forced to assume what judgments Congress made when crafting this rule. The most obvious stems from the cost of compliance, estimated to be $3 billion to $4 billion initially and $207 million to $609 million annually thereafter,[19] *see* 77 Fed. Reg. at 56,334, and the prospect that some companies will therefore boycott mineral suppliers having any connection to this region of Africa.[20] How would

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cover laws compelling disclosures at the time of sale for reasons other than preventing consumer deception. In other words if **[***16]** there is something anomalous, it is attributable to *AMI*, not our decision here, which follows Supreme Court precedents confining the *Zauderer* standard to "voluntary advertising." *United Foods*, 533 U.S. at 416.

[15] *See AMI*, 760 F.3d at 43 (Brown, J., dissenting).

[16] *See Dwyer v. Cappell*, 762 F.3d 275, 282-85 (3d Cir. 2014); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (opinion for the court by Stranch, J.); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651-53 (7th Cir. 2006); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

[17] The SEC said much the same in the rulemaking — that the interest was "the promotion of peace and security in the Congo," rather than "economic or investor protection benefits that [SEC] rules ordinarily strive to achieve." 77 Fed. Reg. at 56,350; *see also id.* at 56,276. In fact, the statute and rule "may provide significant advantage to foreign companies that are not reporting in the United States" and may place public companies in this country at a "competitive disadvantage" against private companies who are not subject to the SEC's reporting rules. *Id.* at 56,350.

[18] Show us not the aim without the way.

> For ends and means on earth are so entangled That changing one, you change the other too; Each different path brings other ends in view.

ARTHUR KOESTLER, DARKNESS AT NOON 241 (1940).

[19] A recent study suggests companies spent "roughly $709 million and six million staff hours last year to comply with" the conflict minerals **[***19]** rule. Emily Chasan, *U.S. Firms Struggle to Trace 'Conflict Minerals'*, THE WALL STREET JOURNAL, Aug. 3, 2015.

[20] The SEC made this point in the rulemaking:

> The high cost of compliance provides an incentive for issuers to choose only suppliers that obtain their minerals exclusively from outside the Covered Countries, thereby avoiding the need to prepare a Conflict Minerals Report. To the extent that Covered Countries are the lowest cost suppliers of the minerals

that reduce the humanitarian crisis in the region? The idea must be that the forced disclosure regime will decrease the revenue of armed groups in the DRC and their loss of revenue will end or at least diminish the humanitarian crisis there. But there is a major problem with this idea — it is entirely unproven and rests on pure speculation.[21]

[*526] **[**166]** Under the First Amendment, in commercial speech cases the government cannot rest on "speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993). But that is exactly what the government is doing here. Before passing the statute, Congress held no hearings on the likely impact of § 1502. The SEC points to hearings Congress held on prior bills addressing the conflict in the DRC, but those hearings did not address the statutory provisions at issue in this case. When Congress held hearings after § 1502's enactment, the testimony went both ways — some suggested the rule would alleviate the conflict, while others suggested it had "had a significant adverse effect on innocent bystanders in the DRC." *The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing Before the Subcomm. on Monetary Policy and Trade of the H. **[***21]** Comm. on Financial Services*, 113th Cong. (May 21, 2013) (Statement of Rep. Campbell).

Other post-hoc evidence throws further doubt on whether the conflict minerals rule either alleviates or aggravates the stated problem. As NAM points out on rehearing, the conflict minerals law may have backfired. Because of the law, and because some companies in the United States are now avoiding the DRC, miners are being put out of work or are seeing even their meager wages substantially reduced, thus exacerbating the humanitarian crisis and driving them into the rebels' camps as a last resort. Appellants Supp. Br. 17; *see, e.g.*, Sudarsan Raghavan, *How a Well-Intentioned U.S. Law Left Congolese Miners Jobless*, WASH. POST, Nov. 30, 2014; Lauren Wolfe, *How Dodd-Frank is Failing Congo*, FOREIGN POL'Y, Feb. 2, 2015.[22]

Our original opinion pointed out that the SEC was unable to quantify any benefits of the forced disclosure regime itself. *NAM*, 748 F.3d at 364. *See* 77 Fed. Reg. at 56,335 ("The statute therefore aims to achieve compelling social benefits, which we are unable to readily quantify with any precision."). The Government Accountability Office has refrained from addressing the issue, even though the conflict minerals statute required it to assess the effectiveness of the required disclosures in relieving the humanitarian crises. 15 U.S.C. § 78m(p)(1)(A)(ii) & (E); *see* U.S. G.A.O., CONFLICT MINERALS: STAKEHOLDER OPTIONS FOR RESPONSIBLE SOURCING ARE EXPANDING, BUT

> affected by the statute, [such] issuers . . . would have to increase the costs of their products to recoup the higher costs.

Conflict Minerals, 77 Fed. Reg. at 56,351.

[21] This problem was raised by one of the SEC Commissioners during an open meeting:

> The SEC's conflict minerals rulemaking suffers from an analytical gap that I cannot overlook — namely, there is a failure to assess whether and, if so, the extent to which the final rule will in fact advance its humanitarian goal as opposed to unintentionally making matters worse. Indeed, based on some of the comment[s] that the Commission has received, there is reason to worry that, contrary to the aims of Section 1502, a chief consequence of the final rule could be that it actually worsens conditions in the DRC. . . . Because this rulemaking lacks any **[***20]** analysis of whether the benefits will materialize — failing to assess how the choices the Commission has made will impact life on the ground in the DRC — I am unable to support the recommendation and respectfully dissent.

Troy A. Paredes, Commissioner, Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt a Final Rule Regarding Conflict Minerals Pursuant to Section 1502 of the Dodd-Frank Act, Washington, D.C. (Aug. 22, 2012).

[22] *See* Aloys Tegera et al., *Open Letter*, Sept. 9, 2014, ("[T]he conflict minerals movement has yet to lead to meaningful improvement on the ground, and has had a number of unintended and damaging consequences. Nearly four years after the passing of the Dodd-Frank Act, only a small fraction of the hundreds of mining sites in the eastern DRC have been reached by traceability or certification efforts. **[***22]** The rest remain beyond the pale, forced into either illegality or collapse as certain international buyers have responded to the legislation by going 'Congo-free.' This in turn has driven many miners into the margins of legality . . . and in areas where mining has ceased, local economies have suffered.").

MORE INFORMATION ON SMELTERS IS NEEDED 3 (June 26, 2014) ("[W]e have not yet addressed the effectiveness of SEC's conflict minerals rule as required under the legislation.").[23]

[*527] [167]** That is not to say that we know for certain that the conflict minerals rule will not help — other sources contend the rule will do so.[24] But it is to say that whether § 1502 will work is not proven to the degree required under the First Amendment to compel speech.

All of this presents a serious problem for the SEC because, as we have said, the government may not rest on such speculation or conjecture. **[***24]** *Edenfield v. Fane*, 507 U.S. at 770. Rather the SEC had the burden of demonstrating that the measure it adopted would "in fact alleviate" the harms it recited "to a material degree." *Id.* at 771; *see, e.g., Ibanez*, 512 U.S. at 146; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (plurality opinion); *Pearson v. Shalala*, 164 F.3d 650, 659, 334 U.S. App. D.C. 71 (D.C. Cir. 1999); *Action for Children's Television v. FCC*, 58 F.3d 654, 665, 313 U.S. App. D.C. 94 (D.C. Cir. 1995) (en banc). The SEC has made no such demonstration in this case and, as we have discussed, during the rulemaking the SEC conceded that it was unable to do so.

This in itself dooms the statute and the SEC's regulation. If that were not enough, we would move on to evaluate another aspect of *AMI*, an aspect of the opinion on which two of the supplemental briefs on rehearing (those of the SEC and NAM) focus — namely, whether the compelled disclosures here are "purely factual and uncontroversial," *AMI*, 760 F.3d at 26 (quoting *Zauderer*, 471 U.S. at 651). The intervenors, although supporting the SEC, write in their supplemental brief that *AMI* "sheds little light on whether *Zauderer*'s reference to 'purely factual and uncontroversial information' states a legal standard and, if so, what the standard means." Intervenors Supp. Br. 8. They continue: "*Zauderer* itself used the phrase . . . to characterize the particular information subject to disclosure in that case, not to articulate a legal test," *id.* at 9. They add that the term "uncontroversial" is "ill-suited **[***25]** to establishing an element of a legal standard," *id.* at 11. In support, the intervenors cite the Sixth Circuit's decision that the "purely factual and uncontroversial" phrase from *Zauderer*, which the Supreme Court's opinion mentioned only once and not in its statement of the holding, was merely descriptive and not a legal standard. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (opinion for the court by Stranch, J.).

However persuasive we might find the intervenors' argument,[25] we see no way to read *AMI* except as holding that — to quote *AMI* — *Zauderer* "requires the disclosure to be of 'purely factual and uncontroversial information' about the good or service being offered." *AMI*, 760 F.3d at 27. We are therefore bound to follow that holding. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393, 318 U.S. App. D.C. 380 (D.C. Cir. 1996) (en banc).

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[23] The Department of Commerce is charged in Dodd-Frank with compiling a list of "all known conflict mineral processing facilities worldwide." **[***23]** Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(d)(3)(C), 124 Stat. 1376, 2217 (2010). Instead, it compiled a list of "all known processing facilities" for gold, tantalum, tin, or tungsten, but did "not indicate whether a specific facility processes minerals that are used to finance conflict in the [DRC] or an adjoining country." The Department confessed that it "do[es] not have the ability to distinguish such facilities." International Trade Administration, Department of Commerce, Reporting Requirements Under Section 1502(d)(3)(C) of the Dodd-Frank Act World-Wide Mineral Processing Facilities, Sept. 5, 2014.

[24] *See* John Prendergast et al., *Suffocating Congo's War*, FOREIGN POL'Y, Feb. 7, 2015, (responding to Wolfe, *How Dodd-Frank is Failing Congo*); Zainab Hawa Bangura, *Sexual Violence and Conflict Minerals: International Demand Fuels Cycle*, THE GUARDIAN, June 18, 2014.

[25] In our initial opinion we quoted the holding in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988), that the cases dealing with forced ideological messages "cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact.'" *NAM*, 748 F.3d at 371 (quoting *Riley*, 487 U.S. at 797); *see also Va. Pharmacy*, 425 U.S. at 762.

[*528] [168]** Even so, the intervenors are correct that the *AMI* majority "made no attempt to define those terms precisely." Intervenors Supp. Br. 9. *AMI* did speak of "controversial in the sense that [the compelled speech] communicates a message that **[***26]** is controversial for some reason other than [a] dispute about simple factual accuracy." *AMI*, 760 F.3d at 27. Judge Kavanaugh, concurring in the judgment in *AMI*, wrote that "it is unclear how we should assess and what we should examine to determine whether a mandatory disclosure is controversial." *Id.* at 24 (Kavanaugh, J., concurring in the judgment).

One clue is that "uncontroversial," as a legal test, must mean something different than "purely factual." Hence, the statement in *AMI* we just quoted, describing "controversial in the sense that [the compelled speech] communicates a message that is controversial for some reason other than [a] dispute about simple factual accuracy." *AMI*, 760 F.3d at 27. Perhaps the distinction is between fact and opinion. But that line is often blurred, and it is far from clear that all opinions are controversial. Is Einstein's General Theory of Relativity fact or opinion, and should it be regarded as controversial? If the government required labels on all internal combustion engines stating that "USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING" would that be fact or opinion? It is easy to convert many statements of opinion into assertions of fact simply by removing the words "in my opinion" or removing **[***27]** "in the opinion of many scientists" or removing "in the opinion of many experts."[26] *Cf. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 191 L. Ed. 2d 253 (2015); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010). It is also the case that propositions once regarded as factual and uncontroversial may turn out to be something quite different.[27] What time frame should a court use in assessing this? At the time of enactment of the disclosure statute? At the time of an agency's rulemaking implementing the disclosure statute? Or at some later time when the compelled disclosures are no longer considered "purely factual" or when **[*529] [**169]** the disclosures have become "controversial"?

That the en banc court viewed the country-of-origin disclosures at issue in *AMI* as "uncontroversial" poses another puzzle. A controversy, the dictionaries tell us, is a dispute, especially a public one.[28] Was there a dispute about the country-of-

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[26] The conflict minerals provisions contain a "Sense of Congress" preamble, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010), which strikes us not as a statement of fact but a statement of opinion. Some courts treat such provisions as precatory. *See, e.g., Yang v. Cal. Dep't of Social Servs.*, 183 F.3d 953, 958 (9th Cir. 1999); *Monahan v. Dorchester Counseling Ctr.*, 961 F.2d 987, 994-95 (1st Cir. 1992); *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 909 (3d Cir. 1990). We have previously noted that a "sense of Congress provision" may be used by that body to voice disagreement with an opinion of this court, *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 877, 374 U.S. App. D.C. 111 (D.C. Cir. 2006), and that such a provision may be non-binding, *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 14 n.6, 383 U.S. App. D.C. 223 (D.C. Cir. 2008).

[27] To illustrate, consider *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), a case cited in *Zauderer*, 471 U.S. at 645. The Seventh Circuit upheld the FTC's order requiring petitioners to cease placing newspaper advertisements stating **[***28]** that eating eggs does not increase a person's cholesterol level and to make certain disclosures. Petitioners' advertisements, and other statements like it, were considered false and misleading. *Nat'l Comm'n on Egg Nutrition*, 570 F.2d at 160-61. But the tables have turned. In its 2015 report, the Dietary Guidelines Advisory Committee of the Department of Agriculture found that there was "no appreciable relationship between consumption of dietary cholesterol and serum [blood] cholesterol." U.S. Dep't of Agric., *Scientific Report of the 2015 Dietary Guidelines Advisory Committee*, Part D Ch. 1, 17 (2015).

[28] The dissent claims that under *AMI*, "purely factual and uncontroversial" means "purely factual" and "accurate." Dissent at 12-15. In so twisting the phrase, the dissent turns it into a redundancy. Is there such a thing as a "purely factual" proposition that is not "accurate"? The en banc majority in *AMI*, which used the phrase as a First Amendment test, did not think so. *AMI* described an unconstitutional compelled disclosure as one "communicat[ing] a message that is *controversial for some reason other than dispute about simple factual accuracy*." *AMI*, 760 F.3d at 27 (italics added).

In struggling to provide content to this portion of *AMI*, the dissent asserts that a "misleading disclosure, by definition, would not convey accurate information to a consumer" and therefore would not be

origin disclosures in *AMI* or as *AMI* put it, was there a controversy "for some reason other than [a] dispute about simple factual accuracy"? *AMI*, 760 F.3d at 27. One would think the answer surely was yes. As we explained earlier, while *AMI* was pending a panel of the World Trade Organization was conducting a proceeding in which other nations charged that the country-of-origin labeling law violated the treaty obligations **[***29]** of the United States, a controversy that later resulted in a ruling against the United States. *See supra* n.6.

In its Supplemental Brief, the SEC invoked for the first time *Meese v. Keene*, 481 U.S. 465, 107 S. Ct. 1862, 95 L. Ed. 2d 415 (1987), describing the case as one in which "the Supreme Court rejected a First Amendment challenge to compelled disclosures accompanying materials that met the statutory definition of 'political propaganda,'" Appellee Supp. Br. 16. The SEC's description is not accurate. *Keene* was not a compelled speech case. An agency of the Canadian government distributed films the Department of Justice considered "political propaganda" under the Foreign Agents Registration Act. This triggered the requirement that the foreign agent — Canada — affix a label to the material identifying its source. The label did not contain the words "political propaganda." *Keene*, 481 U.S. at 470-71. The Court made clear that the constitutionality of this disclosure regime was "not at issue in this case." *Id.* at 467. The plaintiff — an attorney and state legislator — wanted to show the films and claimed that the *government's* considering the films "propaganda" violated his First Amendment rights, a claim the Court rejected. The attorney **[***31]** was under no disclosure obligations and he was free to remove the label the Canadian government had affixed to the film packaging. As NAM's Supplemental Brief points out, *Keene* "did not suggest, much less hold, that it would be constitutionally permissible for Congress to force filmmakers to label their own films as 'political propaganda' — or not 'propaganda free' — however the term was defined." Appellants Supp. Br. 13.

We agree with NAM that the statutory definition of "conflict free" cannot save this **[*530]** **[**170]** law. *See Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006); *cf. Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965-67 (9th Cir. 2009). As NAM forcefully puts it, "[i]f the law were otherwise, there would be no end to the government's ability to skew public debate by forcing companies to use the government's preferred language. For instance, companies could be compelled to state that their products are not 'environmentally sustainable' or 'fair trade' if the government provided 'factual' definitions of those slogans — even if the companies vehemently disagreed that their [products] were 'unsustainable' or 'unfair.'" Appellants Supp. Br. 12.[29]

In our initial opinion we stated that the description at issue — whether a product is "conflict free" or "not conflict free" — was hardly "factual and non-ideological." *NAM*, 748 F.3d at 371.[30] We put it this way: "Products and minerals do not fight conflicts. The label '[not] conflict free' is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an

"uncontroversial." Dissent at 16. But as Mark Twain wrote, "Often, the surest way to convey misinformation is to tell the strict truth." *Pudd'nhead Wilson's New Calendar* in MARK TWAIN, FOLLOWING THE EQUATOR 567 (1st ed. 1897). *See Bronston v. United States*, 409 U.S. 352, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973). It is also worth noting that the attorney in *Zauderer* provided, as the dissent puts it, "factually accurate information" to consumers: his advertisement **[***30]** informed potential clients that if there were "no recovery, no legal fees are owed by our clients." *Zauderer*, 471 U.S. at 631. The trouble was that he did not mention that they would still be liable for other expenses.

[29] A famous example of governmental redefinition comes to mind:

> WAR IS PEACE
>
> FREEDOM IS SLAVERY
>
> IGNORANCE IS STRENGTH

GEORGE ORWELL, NINETEEN EIGHTY-FOUR 4 (Signet Classic) **[***32]** (1949).

[30] *See Entm't Software Ass'n v. Blagojevich*, 469 F.3d at 652.

issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that 'message' through 'silence.' *See Hurley*, 515 U.S. at 573. By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment. *See id.*" *NAM*, 748 F.3d at 371.

We see no reason to change our analysis in this respect. And we continue to agree with NAM[31] that "[r]equiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less **[***33]** so." Appellants Reply Br. 27-28.

For all these reasons, we adhere to our original judgment "that 15 U.S.C. § 78m(p)(1)(A)(ii) & (E), and the Commission's final rule, 77 Fed. Reg. at 56,362-65, violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be 'DRC conflict free.'"'[32] *NAM*, 748 F.3d at 373.

So ordered.

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[31] Two of the five SEC Commissioners have expressed the same sentiment: "Requiring persons to presume their guilt by association with the current tragedy in the Congo region unless proven otherwise is neither factual nor uncontroversial." Yin Wilczek, *SEC Argues Its Conflict Minerals Rule Survives First Amendment Scrutiny*, BLOOMBERG BNA, Dec. 12, 2014 (quoting Joint Statement of Commissioners Gallagher and Piwowar).

[32] As we stated in our initial opinion, the "requirement that an issuer use the particular descriptor 'not been found to be 'DRC conflict free'" may arise as a result of the Commission's discretionary choices, and not as a result of the statute itself. We only hold that the statute violates the First Amendment to the extent that it imposes that description requirement. If the description is purely a result of the Commission's rule, then our First Amendment holding leaves the statute **[***34]** itself unaffected." *NAM*, 748 F.3d at 373 n.14. The Commission has not shed any light on this in its recent filings with our court.

Dissent by: SRINIVASAN

Dissent

[171] [*531]** SRINIVASAN, *Circuit Judge, dissenting*: Issuers of securities must make all sorts of disclosures about their products for the benefit of the **[***35]** investing public. No one thinks that garden-variety disclosure obligations of that ilk raise a significant First Amendment problem. So here, there should be no viable First Amendment objection to a requirement for an issuer to disclose the country of origin of a product's materials—including, say, whether the product contains specified minerals from the Democratic Republic of the Congo (DRC) or an adjoining country, the site of a longstanding conflict financed in part by trade in those minerals. Such a requirement provides investors and consumers with useful information about the geographic origins of a product's source materials. Indeed, our court, sitting en banc, recently relied on "the time-tested consensus that consumers want to know the geographical origin of potential purchases" in upholding a requirement for companies to identify the source country of food products. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 24, 411 U.S. App. D.C. 318 (2014) (internal quotation marks omitted). It is hard to see what is altogether different about another species of "geographical origin" law requiring identification of products whose minerals come from the DRC or adjoining countries.

If an issuer's products contain minerals originating in those conflict-ridden countries, the Conflict Minerals Rule **[***36]** requires the issuer to determine whether the products are "DRC conflict free," where "DRC conflict free" is a statutorily defined term of art denoting products that are free of "conflict minerals that directly or indirectly finance or benefit armed groups" in the DRC or adjoining countries. 15 U.S.C. § 78m(p)(1)(D). If the issuer cannot conclude, after investigating the sourcing of its minerals, that a product is "DRC conflict free" under the statutory definition, it must

say so in a report disclosing that the product has "not been found to be 'DRC conflict free.'" The requirement to make that disclosure, in light of the anticipated reaction by investors and consumers, aims to dissuade manufacturers from purchasing minerals that fund armed groups in the DRC region. That goal is unique to this securities law; but the basic mechanism—disclosure of factual information about a product in anticipation of a consumer reaction—is regular fare for governmental disclosure mandates. Many disclosure laws, including the law upheld in *AMI*, operate in just that way.

Appellants raise no First Amendment objection to the obligation to find out which of their products fail to qualify as "DRC conflict free" within the meaning of the statutory **[***37]** definition. Nor do they challenge the obligation to list those products in a report for investors. Appellants also presumably would have no problem with a requirement to list the products by parroting the statutory definition, *i.e.*, as products that have not been determined to be free of conflict minerals that "directly or indirectly finance or benefit armed groups" in the DRC region. At least some issuers in fact have been making essentially that sort of disclosure, without apparent objection, under the partial stay of the Rule in effect since our original panel decision. *See* Exchange Act Rule 13p-1 and Form SD, Exchange Act Release No. 72,079 (May 2, 2014); *e.g.*, Canon Inc., Conflict Minerals Report (Form SD Ex. 1.01) § 5 (May 29, 2015).

Appellants' challenge instead is a more targeted one: they object only to the Rule's requirement to describe the listed products with the catchphrase "not been found to be 'DRC conflict free.'" But if there is no First Amendment problem with **[*532]** **[**172]** an obligation to identify and list those products, or to describe them by quoting the statutory definition, it is far from clear why the prescribed use of a shorthand phrase for that definition—in lieu of the technical definition itself—would **[***38]** materially change the constitutional calculus.

Perhaps one might object that the meaning of the shorthand description "DRC conflict free" would not necessarily be known to a reader. But that descriptor comes amidst a set of mandated disclosures about the measures undertaken to determine the source of minerals originating in the DRC or adjoining countries. So the meaning of "DRC conflict free" would seem quite apparent in context. And even if otherwise, an investor or consumer coming across that term for the first time would, with little effort, learn that it carries a specific meaning prescribed by law.

But that's not all. To eliminate any possibility of confusion, the Rule's disclosure obligation enables the issuer to elaborate on the prescribed catchphrase however it sees fit. So, for example, the issuer could say that the listed products have "not been found to be 'DRC conflict free,' *which is a phrase we are obligated to use under federal securities laws to describe products when we are unable to determine that they contain no minerals that directly or indirectly finance or benefit armed groups in the DRC or an adjoining country*." At that point, there would seem to be nothing arguably **[***39]** confusing or misleading about the content of the Rule's mandated disclosure.

The First Amendment, under the Supreme Court's decisions, poses no bar to the Rule's disclosure obligation. The Court has emphasized that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985). Correspondingly, when the government requires disclosure of truthful, factual information about a product to consumers, a company's First Amendment interest in withholding that information from its consumers is "minimal." *Id.* That is why countless disclosure mandates in the commercial arena—country of origin of products and materials, calorie counts and nutritional information, extensive reporting obligations under

the securities laws, and so on—raise no serious First Amendment question.

The sum of the matter is this: in the context of commercial speech, the compelled disclosure of truthful, factual information about a product to consumers draws favorable review. That review takes the form of the permissive standard laid down by the Supreme Court in *Zauderer*. I would apply that approach here. Like the mine-run of uncontroversial requirements to disclose factual information **[***40]** to consumers in the commercial sphere, the descriptive phrase "not been found to be 'DRC conflict free'" communicates truthful, factual information about a product to investors and consumers: it tells them that a product has not been found to be free of minerals originating in the DRC or adjoining countries that may finance armed groups.

Appellants challenge the prescribed catchphrase for such a product—"not been found to be 'DRC conflict free'"—on the ground that it ostensibly brands issuers with a "scarlet letter." Appellant Br. 52. Appellants' invocation of a "scarlet letter" is out of place. If they mean to suggest that issuers would prefer to avoid the label "not found to be 'DRC conflict free'" because it invites public scrutiny, the same is true of all sorts of entirely permissible requirements to disclose factual information **[*533] [**173]** to consumers (high calorie counts or low nutritional value, for instance). When a law mandates disclosure of that sort of "particular factual information" about a company's product, the Supreme Court has said, the company has only a "minimal" cognizable interest in withholding public disclosure. *Zauderer*, 471 U.S. at 651. By contrast, the scarlet "A" affixed to Hester Prynne's gown **[***41]** conveyed personal information that she had a strong and obvious interest in withholding from the public. In that sense, requiring a company to disclose product information in the commercial marketplace is not the same as requiring Hester Prynne to "show [her] scarlet letter in the [town] market-place." Nathaniel Hawthorne, The Scarlet Letter 63 (Laird & Lee 1892).

I would therefore hold that the favored treatment normally afforded to compelled factual disclosures in the commercial arena applies to the Conflict Minerals Rule. The obligation to use the term "not been found to be 'DRC conflict free'" should be subject to relaxed *Zauderer* review, which it satisfies. Even under the less permissive test for restrictions on commercial speech established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), I would find that the Rule survives. Because I would conclude that the Conflict Minerals Rule works no violation of the First Amendment, I respectfully disagree with the contrary decision reached by my colleagues.

I.

An understanding of the unique treatment afforded to compelled disclosures in the area of commercial speech substantially informs the proper resolution of the First Amendment challenge in this case. As we recognized in *AMI*, 760 F.3d at 21-22, and as the Supreme Court has emphasized, **[***42]** the starting premise in all commercial speech cases is the same: the First Amendment values commercial speech for different reasons than non-commercial speech.

Until 1976, commercial speech received no constitutional protection at all. *See Valentine v. Chrestensen*, 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942), *overruled by Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). When the Supreme Court eventually extended "First Amendment protection to commercial speech," it did so primarily because of the "value to consumers of the information such speech provides." *Zauderer*, 471 U.S. at 651. The Court protected commercial speech against unwarranted restriction through the framework set out in *Central Hudson*. 447 U.S. at 564.

Outside the context of commercial speech, the

protections applicable to *restrictions* on speech directly mirror the protections applicable to *compelled* speech. Compelled speech, the Supreme Court has observed, generally is "as violative of the First Amendment as prohibitions on speech." *Zauderer*, 471 U.S. at 650. That symmetry does not exist, however, in the area of commercial speech. In that context, there are "material differences between disclosure requirements and outright prohibitions on speech." *Id.* When the government requires disclosure of "purely factual and uncontroversial information" about products in the commercial sphere, "the First Amendment interests implicated . . . are substantially weaker than those at stake **[***43]** when speech is actually suppressed." *AMI*, 760 F.3d at 22 (quoting *Zauderer*, 471 U.S. at 652 n.14).

[*534] [174]** In particular, because the First Amendment's protection of commercial speech lies in the speech's value to consumers, there is only a "minimal" interest in resisting disclosure of product information to the public. *Zauderer*, 471 U.S. at 651; *see Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010). Laws "requiring a commercial speaker to make purely factual disclosures related to its business affairs . . . facilitate rather than impede the free flow of commercial information." *Beeman v. Anthem Prescription Mgmt.*, 58 Cal. 4th 329, 165 Cal. Rptr. 3d 800, 315 P.3d 71, 89 (Cal. 2013) (internal quotation marks omitted); *see generally* Robert Post, Compelled Commercial Speech, 117 W. Va. L. Rev. 867 (2015). As a result, government compulsion of "purely factual and uncontroversial" commercial speech is subject to a more lenient constitutional standard than the *Central Hudson* framework applicable to restrictions on commercial speech. *Zauderer*, 471 U.S. at 651. The government can require disclosure of factual and uncontroversial information in the realm of commercial speech as long as the disclosure "reasonably relate[s]" to an adequate interest. *Id.*

The key to deciding whether to apply *Zauderer* or *Central Hudson*, then, turns on the effect of the challenged government regulation. Does the regulation restrict the flow of truthful commercial information, in which case it triggers more searching review **[***44]** under *Central Hudson*? Or does the regulation expand the flow of truthful commercial information by requiring its disclosure, in which case it occasions less demanding review under *Zauderer*?

II.

To answer that question for the Conflict Minerals Rule, we must first address a threshold issue: whether the challenged disclosure involves "commercial speech." The relaxed standard of *Zauderer*, according to the logic (and letter) of the Court's opinion, applies only in the context of "commercial speech." 471 U.S. at 651.

The Conflict Minerals Rule meets that condition. The Rule requires manufacturers of commercial products to disclose information to the public about the composition of their products—in particular, sourcing information about component minerals contained in the products. In that sense, the disclosure resembles the country-of-origin labeling this court deemed "commercial speech" in *AMI*. 760 F.3d at 21. Like the labels at issue in *AMI*, the conflict minerals disclosure informs investors and consumers about the geographic origins of products for sale in the commercial marketplace.

It is true that the conflict minerals disclosure appears in annual reports made available on manufacturers' websites (and filed with the Securities **[***45]** and Exchange Commission) rather than in product labels or conventional advertisements. But under our precedents, the precise form of the speech does not determine whether it qualifies as "commercial speech." In *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 386 U.S. App. D.C. 49 (D.C. Cir. 2009) (per curiam), we treated corrective statements about products required to be included on the company's website as commercial speech. *Id.* at 1138, 1142-45. Philip Morris argued that disclosures on its

website could not be considered commercial speech because they were unattached to advertisements. We disagreed. *Id.* at 1143. Commercial speech, we held, "include[s] material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose **[*535] [**175]** of persuading the public to purchase" (or, given the corrective disclosures at issue, *not* to purchase) "the product." *Id.*

The Conflict Minerals Rule likewise calls for website disclosures about a company's products with an eye towards a potential commercial purchase. The conflict minerals disclosure, the Commission explained in announcing the Rule, "provide[s] information" about a product "that is material to an investor's understanding of the risks in an issuer's reputation and supply chain." Conflict Minerals, 77 Fed. Reg. 56,274, 56,276 (Sept. 12, 2012). That information self-evidently **[***46]** aims at a prospective commercial transaction: an investor's decision whether to purchase or invest in the issuer's securities. The Rule's disclosure obligation therefore should be eligible for relaxed review under *Zauderer*.

My colleagues in the majority, however, hold that it is insufficient to conclude that the conflict minerals disclosure involves "commercial speech." In their view, the permissive review normally afforded to commercial disclosure mandates under *Zauderer* extends only to a *sub*-category of commercial speech: advertisements and product labels. *Ante* at 7-8. No other court has ever identified such a limit under *Zauderer* (or for any other purpose under commercial-speech law). *See United States v. Wenger*, 427 F.3d 840 (10th Cir. 2005) (applying *Zauderer* to compelled disclosure in newsletter and radio program). The majority's newly minted constriction of *Zauderer* to those particular forms of commercial speech contradicts that decision's core rationale.

For starters, confining *Zauderer* to advertising and product labels gives rise to highly curious results. Suppose, for instance, that the Conflict Minerals Rule required companies to include the designation "not been found to be 'DRC conflict free'" in prominent text on product packaging **[***47]** rather than in a once-a-year report posted on a website. The majority would subject that requirement only to *Zauderer*'s less demanding form of review. It would be strange, though, if the same compelled commercial disclosure—providing the same information about the same product—commanded more demanding First Amendment scrutiny if it appeared in a single yearly report on the seller's website instead of on every product label. After all, if faced with the choice between an annual website report and product packaging, a seller would predictably opt for the former. Not only would the company prefer to post the disclosure once a year instead of printing it on every product label, but even as to a single product label, the limited physical space on a product's packaging makes for a less desirable forum for a compelled commercial disclosure than the unlimited virtual space on a company website.

The majority's approach, though, would run in the opposite direction. It would impose a *more* searching First Amendment standard on a disclosure that imposes a *less* burdensome requirement on the speaker. The anomaly in that result, contrary to the majority's suggestion, *ante* at 11 n.14, has little to do with *AMI*'s application of ***[***48]*** *Zauderer* to contexts beyond prevention of consumer deception. After all, if a requirement to include a disclosure on every product label was aimed to prevent consumer deception, the majority would still subject that requirement only to deferential *Zauderer* review. But if the same compelled disclosure appeared in a once-a-year website report, the majority would apply a *more* searching First Amendment standard to that *less* restrictive obligation. It is entirely unclear why that should be so.

Nothing in *Zauderer* supports that counter-intuitive result. To the contrary, *Zauderer*'s **[*536] [**176]** basic rationale holds no less true across the full range of commercial speech than in the sub-

category consisting of advertisements and product labels. The decision, by its terms, is grounded in the recognition that "the extension of First Amendment protection to *commercial speech* is justified principally by the value to consumers of the information *such speech* provides." 471 U.S. at 651 (emphasis added). That is why a commercial speaker has only a "minimal" interest in withholding disclosure of factual information about its products. *Id.* That reason for a permissive approach to disclosure obligations in the commercial sphere applies to every form of "commercial **[***49]** speech," all of which yields the "value to consumers" animating the Court's approach. *Id.*

To be sure, the *Zauderer* Court unsurprisingly used the word "advertising" numerous times in the relevant part of the opinion, *see ante* at 8-9, but only because that was the particular factual context in which the case arose. For what it's worth, the Court also used "commercial speech" and "commercial speaker" a number of times in the same part of the opinion when explaining the rationale for the relaxed First Amendment standard it set forth, 471 U.S. at 650-52, and it also did so when framing the question it addressed in that part of its opinion, *id.* at 629. What matters is that the Court's driving rationale, as the Court itself said, applies to "commercial speech" writ large, not just (and not any more so) to advertising alone. *Id.* at 651.

Indeed, the majority would extend *Zauderer* beyond traditional advertising to encompass product labels, as it must after *AMI*. But tellingly, *AMI* itself did not conceive of the possibility that *Zauderer* might apply only to that decision's specific factual context of advertising (in which event *AMI* would have needed to assess whether *Zauderer* also applies to product labels). Rather, *AMI* examined the range of **[***50]** government interests to which *Zauderer* pertains on the natural assumption that, whatever the scope of those interests, *Zauderer* applies to "commercial speech," 760 F.3d at 21, not just to certain forms of commercial speech.

Contrary to the majority's suggestion, *ante* at 9-11, the Supreme Court's post-*Zauderer* decisions do not indicate otherwise. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, a case that had nothing to do with commercial speech, the Court simply quoted *Zauderer*'s observation that the government may at times "prescribe what shall be orthodox in commercial advertising." 515 U.S. 557, 573, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (quoting *Zauderer*, 471 U.S. at 651). In *United States v. United Foods, Inc.*, the Court described *Zauderer* as "involving attempts by a State to prohibit certain voluntary advertising by licensed attorneys." 533 U.S. 405, 416, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001). The Court then restated *Zauderer*'s outcome, *i.e.*, that it permitted "a rule requiring that attorneys who advertised by their own choice and who referred to contingent fees should disclose that clients might be liable for costs." *Id.* Those references in *United Foods* and *Hurley* accurately describe *Zauderer*'s factual context. But there is no reason to think that the references to "advertising" in any way confined *Zauderer* ***[***51]*** 's holding.

In short, nothing in *Zauderer* or any subsequent decision suggests that *Zauderer* review applies only to conventional advertisements, much less to advertisements plus product labels. *Zauderer* is a decision about compelled commercial speech. This is such a case.

[*537] **[**177]** III.

Once we conclude that the Conflict Minerals Rule regulates "commercial speech," the next question is whether the Rule should be examined under the relaxed standard set forth in *Zauderer* or the more restrictive test of *Central Hudson*. Because the Rule compels rather than restricts commercial speech, it triggers permissive review under *Zauderer* as long as it requires disclosure of "purely factual and uncontroversial information." *AMI*, 760 F.3d at 27 (quoting *Zauderer*, 471 U.S. at 651). And while

AMI reaffirmed that only "purely factual and uncontroversial" disclosures qualify for *Zauderer* review, we had no occasion in *AMI* to define precisely what that standard entails. *See* 760 F.3d at 27. Inasmuch as "the criteria triggering the application of *Zauderer*" were "substantially unchallenged," we reasoned, whatever may be the precise meaning of "purely factual and uncontroversial," the country-of-origin labeling at issue met that standard. *Id.*

There was no question, for instance, **[***52]** that the country-of-origin disclosure was "purely factual." As to "controversial," we understood that a disclosure might be "controversial" in the "sense" of "disagree[ment] with the truth of the facts required to be disclosed," but the challengers raised no claim that the country-of-origin disclosure was "controversial in that sense." *Id.* Nor did we perceive how the disclosure might be seen as "controversial" in any other sense, *i.e.*, "for some reason other than dispute about simple factual accuracy." *Id.* We made no effort to identify any such additional meaning of "controversial" that might matter under *Zauderer*, other than to note that a disclosure "could be so one-sided or incomplete" as to fall outside *Zauderer*'s zone. *Id.* But the challengers had made no argument along those lines. *Id.* The upshot is that *AMI* left it to a future panel to expound on the contours of "purely factual and uncontroversial."

In assessing whether the conflict minerals disclosure squares with the phrase "purely factual and uncontroversial," it is important to bear in mind that phrase comes from a judicial opinion, not a statute. And the "language of an opinion is not always to be parsed as though we were dealing with **[***53]** language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). Language in a judicial opinion should be "read in context," *id.*, taking into account the whole of the court's analysis. Here, that context starts with *Zauderer's* firm grounding in the reason for protecting commercial speech in the first place: its value in providing consumers with useful information about products and services. 471 U.S. at 651; *Milavetz*, 559 U.S. at 249-50.

That purpose is honored when a disclosure mandate calls for dissemination to consumers of "purely factual" and "accurate" information about a product, as *Zauderer* itself indicates. *Zauderer*, 471 U.S. at 651 & n.14. That means, at the least, that the "factual" disclosure must be non-deceptive. It also means that the government cannot attempt to prescribe, under the guise of requiring disclosure of "purely factual" information, "what shall be orthodox in politics, nationalism, religion, or other *matters of opinion*." *Id.* at 651 (emphasis added) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)). If a compelled statement communicates a "matter of opinion," it of course would not be "purely factual." To qualify as "purely factual and uncontroversial," in short, the disclosed information must in fact be "factual," and it must also be "uncontroversially" so, in the **[**178]** sense **[*538]** that that there could be no "disagree[ment] with the **[***54]** truth of the facts required to be disclosed." *AMI*, 760 F.3d at 27.

Both pieces of that inquiry do important work. The "purely factual" inquiry looks to the nature of the information disclosed—is it entirely factual or does it communicate subjective opinion? If the disclosure communicates subjective opinion, or something other than "purely factual" information, *Zauderer* does not apply. But even if the disclosure qualifies as "purely factual," it would still fall outside of *Zauderer* review if the accuracy of the particular information disclosed were subject to dispute. The requirement that disclosures be "uncontroversial" in addition to "purely factual" thereby removes from *Zauderer*'s purview disclosures whose accuracy is contestable. *AMI* in fact assumes "controversial" in this context means exactly that: a "dispute about . . . factual accuracy." 760 F.3d at 27.

That reading draws support from the Supreme Court's most recent invocation of the *Zauderer*

standard in *Milavetz*, 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79. There, the Court applied the *Zauderer* standard without once reciting the phrase "purely factual and uncontroversial." Instead, the Court concluded that the challenged disclosure mandate shared "the essential features of the rule at issue in *Zauderer*"—namely, **[***55]** that the disclosure involved "only an *accurate* statement" of "*factual* information." *Id.* at 249-50 (emphasis added). That approach is consistent with a reading of "purely factual and uncontroversial" that refrains from giving "uncontroversial" a meaning wholly untethered to the core question of whether the disclosure is "factual." If a disclosure is factual, and if the truth of the disclosed factual information is incontestable (*i.e.*, if the facts are indisputably accurate), the interest in arming consumers with truthful, factual information about products calls for relaxed review under *Zauderer*.

It is also worth noting what "purely factual and uncontroversial" does *not* mean. While it might be said that the Conflict Minerals Rule's disclosure requirement touches on a "controversial" topic, that alone cannot render the disclosure "controversial" in the sense meant by *Zauderer*. Otherwise, our decision in *AMI* presumably would have turned out differently. The country-of-origin disclosure in that case—as the majority points out, *ante* at 21-22—could be seen to involve a "controversial" issue. And while *AMI* recognizes that a disclosure could be conceived of as "controversial" for "some reason other than **[***56]** dispute about simple factual accuracy," 760 F.3d at 27, the court did not say that any such broader understanding of "controversial" would necessarily count under *Zauderer*. In fact, the court described only one such example of "controversial"—a disclosure that is "one-sided or incomplete," *id.*—and an understanding of "controversial" centered on factual accuracy would comfortably deal with that sort of misleading disclosure.

Applying those principles here, I would conclude that the requirement to identify whether a product has "been found to be 'DRC conflict free'" calls for disclosure of "purely factual and uncontroversial" information. The term "DRC conflict free" is a term of art defined in the Rule and statute: a product is "DRC conflict free" if it contains no "conflict minerals" originating in the DRC or adjoining countries that finance armed groups in those countries. *See* 15 U.S.C. § 78m(p)(1)(A)(ii), (D); 77 Fed. Reg. at 56,321. The question whether a product has been "found to be 'DRC conflict free'" thus calls for a "factual" response: the product either has, or has not, been "found to be 'DRC conflict free'" **[*539] [**179]** under the statutory definition. There is nothing non-factual about the required disclosure, nor is the factual accuracy of the disclosure **[***57]** subject to dispute. If geographic information about the sourcing of meat products qualifies as "purely factual and uncontroversial," as we held in *AMI*, 760 F.3d at 27, so, too, does geographic information about the sourcing of a product's component minerals.

Appellants contend that the mandated catchphrase "not been found to be 'DRC conflict free'" is "highly misleading" and therefore should be ineligible for *Zauderer* review. NAM Supp. Br. 16. Appellants are correct that misleading disclosures would not qualify for *Zauderer*'s relaxed standard. A misleading disclosure, by definition, would not convey accurate information to a consumer, and it therefore would fail to qualify as "uncontroversial" in the sense discussed above. In fact, a misleading disclosure would run into a more basic First Amendment problem still. Because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising," misleading speech in the commercial realm gets no constitutional protection in the first place. *Central Hudson*, 447 U.S. at 563-64.

The conflict minerals disclosure, however, is not misleading. The phrase "not been found to be 'DRC conflict free,'" even considered in isolation, seems unlikely to be misunderstood. At worst, the language would elicit **[***58]** some uncertainty about its meaning, which would just direct the reader to the statutory definition. After all, the

words "DRC conflict free" appear in quotation marks within the broader description "not been found to be 'DRC conflict free,'" *see* 77 Fed. Reg. at 56,321, alerting an uninitiated reader to the phrase's status as a term of art.

Any possibility of misperception seems especially remote in light of the setting in which the catchphrase appears. The phrase "not been found to be 'DRC conflict free'" is embedded within a broader set of disclosures about an issuer's due-diligence measures. Before characterizing any product as having "not been found to be 'DRC conflict free,'" the Commission obligates an issuer to provide "[a] description of the measures the [issuer] has taken to exercise due diligence on the source and chain of custody" of the minerals used in its products. Securities and Exchange Commission, OMB No. 3235-0697, Form SD Specialized Disclosure Report 3 (2014). Those due-diligence measures assess whether a product's sources in the DRC or an adjoining country come from mines that finance or benefit armed groups. When the phrase "not been found to be 'DRC conflict free'" appears in the midst **[***59]** of an extensive discussion of measures aimed to ascertain the origins of a product's minerals in conflict-ridden countries in the DRC region, it seems readily apparent how the phrase is to be understood.

An issuer, in any event, retains the ability to eliminate all doubt about the phrase's meaning. The Rule allows an issuer to elaborate on the catchphrase's meaning in any manner it would like. As the Supreme Court has noted, a speaker's ability to "convey[] any additional information" it desires is a factor weighing in favor of *Zauderer* review. *Milavetz*, 559 U.S. at 250. Here, the Commission explicitly instructs issuers that they may include in their disclosures any explanatory information they deem warranted. As the Commission understood, "[t]his allows issuers to include the statutory definition of 'DRC conflict free' in the disclosure to make clear that 'DRC conflict free' has a very specific meaning." 77 Fed. Reg. at 56,322.

[*540] [180]** The Commission also provided illustrative language. An "issuer could state: 'The following is a description of our products that have not been found to be "DRC conflict free" (where "DRC conflict free" is defined under the federal securities laws to mean . . .).'" *Id.* at 56,322 n.562. And if an issuer is unable to pinpoint the **[***60]** source of the minerals in certain of its products, the Commission further explained, an issuer could say something like the following:

> Because we cannot determine the origins of the minerals, we are not able to state that products containing such minerals do not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Therefore, under the federal securities laws we must describe the products containing such minerals as having not been found to be 'DRC conflict free.' Those products are listed below.

Id. It is difficult to understand what could be seen as misleading or non-factual about that kind of disclosure.

That language does not "require[] an issuer to tell consumers that its products are ethically tainted," much less "to confess blood on its hands." *Ante* at 24. It instead communicates a statement of fact about the geographic source of the minerals in its products—*i.e.*, that the issuer could not determine with certainty whether component minerals directly or indirectly finance armed groups in the DRC region, thus obligating the issuer to describe the products as having "not been found to **[***61]** be 'DRC conflict free.'"

To be sure, an issuer presumably would prefer to avoid making any such disclosure. But the same could be said of a host of commonplace (and entirely unobjectionable) requirements to disclose factual information about products to consumers. A company presumably would rather avoid reporting calorie counts and nutritional information about unhealthy food products, *see New York State*

Restaurant Ass'n v. New York City Board of Health, 556 F.3d 114 (2d Cir. 2009), or disclosing that its product contains mercury, *see National Electronic Manufacturers Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001). Such disclosures of course can elicit a reaction by consumers—that is often the point, as with the country-of-origin rule upheld in *AMI*, *see* 760 F.3d at 24—but the disclosures still remain factual and truthful. And while it is true that a company would be required to make the conflict minerals disclosure even if it "condemns the atrocities of the Congo war in the strongest terms," *ante* at 24, there is no possibility of investor confusion about the company's views in that regard: the Rule gives a company full leeway to state its position explicitly, in the strongest terms, in its disclosure.

None of this is to grant the government carte blanche to compel commercial speakers to voice any prescribed set of words as long as the words are defined by statute or regulation. **[***62]** *Zauderer* does not grant the government that kind of license. The government, for instance, could not misleadingly redefine "peace" as "war," and then compel a factual statement using the term "peace" on the theory that a consumer could consult the government's redefinition to learn that "peace" in fact means "war" in the specific circumstances. *See ante* at 23 n.29. A consumer would have no reason to suppose that the word "peace" is a stylized term of art misleadingly redefined to be something far different from its ordinary meaning.

Nor, for similar reasons, could the government compel expression of a "matter[] of opinion," *Zauderer*, 471 U.S. at 651, **[*541] [**181]** by redefining the matter in factual terms, especially if (unlike here) there were no opportunity for the speaker to elaborate as it sees fit on the relationship between the term of art and the statutory definition. So a statement that immediately rings as a matter of opinion (*e.g.*, "this product is environmentally unsustainable," *see ante* at 23) would remain outside the fold of *Zauderer* even if it were reconceptualized as factual in a statutory definition (*e.g.*, a product qualifies as "environmentally unsustainable" if, as a factual matter, it releases *x* units **[***63]** of ozone in *y* hours). Insofar as the unelaborated label "environmentally unsustainable" could then be characterized as "factual," it still would not count as "purely" factual because it continues fundamentally to come across as a matter of opinion.

Of course, there could well be difficult questions of application at the margins, some hypothetical and others perhaps actual. *See ante* at 20-22. That is not entirely uncommon in the area of the First Amendment, in which standards at times have been characterized as "elusive" in their application. *AMI*, 760 F.3d at 23. In certain situations, moreover, constitutional protections outside of the First Amendment might constrain the government's ability to compel disclosures—for instance, if the disclosures facilitated private discrimination. *See Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984). But whatever may be the complexities of applying the standard in discrete situations, as a matter of precedent, an obligation in the commercial sphere to disclose "purely factual and uncontroversial" information about a product draws deferential First Amendment review. *Zauderer*, 471 U.S. at 651. The Conflict Minerals Rule, in my view, falls within that category. *Zauderer* therefore should govern.

IV.

Although I think *Zauderer*'s permissive standard provides the governing framework for review **[***64]** of the Conflict Minerals Rule, I would conclude that the Rule satisfies even the more demanding standard set forth in *Central Hudson*. And of course, if the Rule passes muster under *Central Hudson*, it necessarily survives the "less exacting scrutiny described in *Zauderer*." *Milavetz*, 559 U.S. at 249.

A.

To satisfy *Central Hudson*, the Commission must first demonstrate that the disclosure requirement advances a substantial governmental interest. The

parties agree that Congress's overarching purpose in enacting the conflict minerals statute was to "promote peace and security" in the DRC. But *Central Hudson* calls for identifying the "substantial state interest" advanced by the challenged law "with care" and precision. *Edenfield v. Fane*, 507 U.S. 761, 767-68, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993). Defining the governmental interest at a high level of abstraction (*i.e.*, promotion of peace) naturally can make it challenging to assess whether the law "directly advances" that interest, *Central Hudson*, 447 U.S. at 566, a burden that remains unsatisfied by "mere speculation or conjecture," *Edenfield*, 507 U.S. at 770.

Here, the Conflict Minerals Rule's disclosure requirement does not aim simply to "promote peace and security" in the DRC in some highly general sense. The statute and the Rule both manifest a more specific intention to promote peace and security **[***65]** in the DRC *by reducing funding to armed groups in the DRC region from trade in conflict minerals*. Congress thus determined that "the exploitation and trade of conflict minerals originating in the **[*542] [**182]** Democratic Republic of the Congo is helping to finance" violent conflict in the region and is "contributing to an emergency humanitarian situation therein." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010). Additionally, the statute defines the term "DRC conflict free" by reference to a product that "does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country." 15 U.S.C. § 78m(p)(1)(D). And the statute defines the term "conflict mineral" to include any "mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country." Dodd-Frank Act § 1502(e)(4). The Commission therefore understood "Congress's main purpose to have been to attempt to inhibit the ability of armed groups . . . to fund their activities by exploiting the trade in conflict minerals." 77 Fed. Reg. at 56,275-76.

The Commission observed, as the majority points out, *ante* at 6 & n.7, that the purpose **[***66]** promoted by the statute—and hence the Rule— is "different from the economic or investor protection benefits that [the Commission's rules] ordinarily strive to achieve." 77 Fed. Reg. at 56,350. The Commission, tasked with implementing the statute through a disclosure rule, *see* 15 U.S.C. § 78m(p)(1), had little choice about the Rule's purpose. Even if that purpose differs from the interests usually served by disclosures in the securities realm, it does not differ from the kind of interests frequently promoted by governmental disclosure requirements more generally. The country-of-origin labeling requirement we upheld in *AMI*, for example, was adopted in part on the expectation that consumers would prefer meat with a certain geographic origin and would act on that preference when given the information. *See* 760 F.3d. at 24. The Conflict Minerals Rule likewise operates on the basis of assumptions about the reaction of investors to disclosures about a product's place of origin.

At any rate, the ultimate question is whether the interest promoted by the Rule, however unique, satisfies *Central Hudson* review. I would conclude that interest qualifies as a substantial one under *Central Hudson*. We have noted "the pedestrian nature of those interests affirmed **[***67]** as substantial," and have even asked "whether *any* governmental interest—except those already found trivial by the [Supreme] Court—could fail to be substantial." *Kansas v. United States*, 16 F.3d 436, 443, 305 U.S. App. D.C. 14 (D.C. Cir. 1994); *see AMI*, 760 F.3d at 23. The parties here agree that the overarching interest in promoting peace and security in the DRC region readily qualifies as substantial. The more focused objective of reducing funding to armed groups in that region from trade in conflict minerals should likewise count as substantial, particularly given that it operates in direct service of the concededly substantial interest in promoting peace and security there.

B.

Once we conclude that the Rule aims to promote a "substantial" interest, *Central Hudson* calls on us to assess whether the disclosure obligation "directly advance[s] the state interest involved," and does so in a way that is reasonably tailored to serve that end. 447 U.S. at 564. Applying those standards, I, like the district court, would hold that the conflict minerals disclosure requirement passes constitutional muster.

First, the Rule "directly advances" the government's substantial interest in reducing **[*543] [**183]** the flow of funds to armed groups in the DRC region from trade in conflict minerals. "[E]videntiary parsing," we recognized in *AMI*, "is hardly **[***68]** necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait." 760 F.3d at 26. Here, the Rule shines a light on a manufacturer's use of conflict minerals from the DRC region. As the Commission explained, the Rule (and statute) "use the securities laws disclosure requirements to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains." 77 Fed. Reg. at 56,275.

By requiring issuers to perform due diligence on their product supply chains and to disclose the results of that examination to investors and consumers, the Rule encourages manufacturers voluntarily to reduce their reliance on conflict minerals from the DRC and adjoining countries. And by making information about mineral sourcing readily available to investors and consumers, the disclosure regime enables them to exert pressure on manufacturers to minimize the use of conflict minerals from the DRC region. The Rule therefore makes conflict minerals from that area substantially less appealing to manufacturers, diminishing the market for those minerals.

With regard to the means-ends fit, the Supreme Court **[***69]** "has made clear that the government's burden . . . is to show [only] a 'reasonable fit' or a 'reasonable proportion' between means and ends." *AMI*, 760 F.3d at 26 (citations omitted). "What [the Court's] decisions require is a 'fit between the legislature's ends and the means chosen to accomplish those ends'—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986), and *In re R.M.J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982)). "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*

Here, the disclosure rule is at least reasonably designed to encourage manufacturers to reduce their reliance on conflict minerals from the DRC region, thereby diminishing the extent to which armed groups in the area gain funding through trade in those minerals. As we observed in *AMI*, "[t]o the extent that the government's interest is in assuring that consumers receive particular information" about products, "the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose 'purely factual and uncontroversial information' about **[***70]** attributes of the product or service being offered." 760 F.3d at 26. Consequently, that "particular method of achieving a government interest will almost always demonstrate a reasonable means-ends relationship." *Id.*

This case is no exception. The inference that the disclosure obligations would affect manufacturers in a manner tending to reduce the overseas trade in conflict minerals rests on "sound reasoning." *Century Communications Corp. v. FCC*, 835 F.2d 292, 304, 266 U.S. App. D.C. 228 (D.C. Cir. 1987). Deference to the political branches' predictive judgment to that effect is all the more warranted because it arises in the arena of foreign affairs. *See*

Holder v. Humanitarian Law Project, 561 U.S. 1, 33-36, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010). "[W]hen it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the **[*544] [**184]** part of the courts is marked,' and respect for the Government's conclusions is appropriate." *Id.* at 34 (citation omitted) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 65, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981)). "In this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government." *Id.* at 34-35. Here, there is more than an adequate foundation for concluding that the conflict minerals disclosure requirement reasonably furthers its aims.

Nor is there a basis for finding a lack of a "reasonable means-ends relationship" **[***71]** on the ground that the challenged disclosure mandate could be seen as "'unduly burdensome' in a way that 'chills protected commercial speech.'" *AMI*, 760 F.3d at 26 (quoting *Zauderer*, 471 U.S. at 651). The Rule mandates the use of the contested phrase "not found to be 'DRC conflict free'" as part of an effort to "present the information in a standardized manner," so that investors and consumers "will benefit from the standardization and simplification of the disclosure." 77 Fed. Reg. at 56,348. Obligating issuers to use a uniform, shorthand phrase—in lieu of a technical and lengthy statutory definition—directly furthers that objective. The requirement for issuers to post the disclosure report on their websites likewise promotes the ability of investors and consumers to access information about manufacturers' use of conflict minerals. I would therefore find the requisite "reasonable fit" between the challenged disclosure regime and the government's interest in reducing funding to armed groups in the DRC region from the trade in conflict minerals.

C.

My colleagues in the majority approach the matter differently. They invalidate the Rule based on doubts about whether its disclosure obligation in fact will alleviate the conflict in the DRC region. *Ante* **[***72]** at 15-17. Those doubts are grounded in "[p]ost-hoc evidence" that, in their eyes, gives rise to "uncertainty about whether the conflict minerals rule either alleviates or aggravates the stated problem." *Id.* at 16. In my respectful view, the majority's approach is flawed on multiple levels.

First, even if there were uncertainty about the merits of Congress's and the Commission's predictive judgments concerning the effects of the disclosure requirement on the conflict in the DRC region, we should defer to the political branches' assessments. Congress determined "that the exploitation and trade of conflict minerals originating in the Democratic Republic of Congo is helping to finance conflict characterized by extreme levels of violence in the Democratic Republic of Congo, particularly sexual- and gender-based violence." Dodd-Frank Act § 1502(a). Congress therefore called for "disclosures relating to conflict minerals originating in the Democratic Republic of the Congo" to ameliorate the situation. 15 U.S.C. § 78m(p) (title). Predictive judgments about matters such as the overseas trade in conflict minerals lie uniquely within the expertise of Congress and the Executive. The Supreme Court stressed the need to respect such judgments even when rejecting a First Amendment challenge under strict scrutiny. *Humanitarian Law Project*, 561 U.S. at 33-36. There is all the more cause for doing so when applying less rigorous scrutiny under *Central **[***73]** *Hudson*. *See AMI*, 760 F.3d at 25-26.

Second, it seems particularly unwarranted to question the political branches' predictive judgments on the basis of *post hoc* **[*545] [**185]** assessments of a law's ongoing effects on the ground (let alone in the face of other post hoc assessments pointing in the opposite direction, *ante* at 16-17). I would think the proper frame of reference for assessing the means-ends fit involves an ex ante examination of Congress's and the Commission's outlook when enacting the statute

and promulgating the Rule. Whatever may be the actual effect of the statute and Rule—including the possibility that they may have had unanticipated consequences—their constitutionality would not turn on a post hoc referendum on their effectiveness at a particular point in time. Otherwise, a law's constitutionality might wax and wane depending on the precise time when its validity is assessed. I would think the relevant question is whether the disclosure regime, at the time of its establishment, was reasonably designed to reduce the flow of funding to armed groups in the DRC through the conflict minerals trade. I believe it was.

Finally, the particular post hoc concerns given effect by the majority should afford no basis **[***74]** for invalidating the Rule. The Rule seems to have had its desired effect even as a matter of after-the-fact assessment, with "companies in the United States . . . now avoiding the DRC," *ante* at 16, substantially reducing the money entering the country through the sale of conflict minerals. The law, in other words, is working as anticipated. The problem seen by some observers is that the law nonetheless has had unintended ripple effects. For instance, some workers who lost their jobs because of the reduced demand for minerals occasioned by the law may have then turned around and joined armed groups in the region, adding to the strength of those groups.

Those sorts of unintended, tertiary consequences should not form a basis for invalidating the Rule. Even assuming Congress (and the Commission in implementing Congress's mandate) did not foresee all of the repercussions of the disclosure regime which might someday come to pass, the law was reasonably designed to further its aim of reducing funding for armed groups through the conflict minerals trade. Indeed, the law has done precisely that. If unanticipated downstream effects eventually call into question the ongoing desirability of a **[***75]** law working as intended, it should be up to the political branches to alter or repeal it, not to the judicial branch to invalidate it. For that reason, as well as the others explained in this opinion, I would uphold the Conflict Minerals Rule's disclosure mandate against appellants' First Amendment challenge.

APPENDIX

National Association of Manufacturers v. SEC

No. 13-5252

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

January 7, 2014, Argued

April 14, 2014, Decided

748 F.3d 359, 409 U.S. App. D.C. 210

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What Twenty-First-Century Free Speech Law Means for Securities Regulation

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WHAT TWENTY-FIRST-CENTURY FREE SPEECH LAW MEANS FOR SECURITIES REGULATION

*Helen Norton**

Securities law has long regulated securities-related speech—and until recently, it did so with little, if any, First Amendment controversy. Yet the antiregulatory turn in the Supreme Court's twenty-first-century Free Speech Clause doctrine has inspired corporate speakers' increasingly successful efforts to resist regulation in a variety of settings, settings that now include securities law. This doctrinal turn empowers courts, if they so choose, to dismantle the securities regulation framework in place since the Great Depression. At stake are not only recent governmental proposals to require companies to disclose accurate information about their vulnerabilities to climate change and other emerging risks, but also longstanding governmental efforts to inform and protect investors while serving broader public interests.

This Article takes seriously this threat to the securities law framework, and defends that framework's constitutionality. It describes why and how securities law regulates speech to inform and protect investors—functions that also achieve public-regarding goals by facilitating stable and efficient markets, encouraging corporate accountability, and ameliorating the systemic economic risks of market collapse. As we'll see, key differences between securities and other goods and services leave the securities market especially vulnerable to asymmetries of information, thus intensifying the importance of accurate securities-related information to investors as listeners. The Article then maps this securities law framework onto First Amendment law, demonstrating why and how this regulatory framework aligns with Free Speech Clause theory and doctrine. Key to this alignment are securities law's listener-centered functions.

More specifically, this Article makes the case for identifying securities-related speech as a category of speech unprotected by the First Amendment. The Court has long

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* University Distinguished Professor and Rothgerber Chair in Constitutional Law, University of Colorado School of Law. Special thanks to Erik Gerding and Sarah Haan for so generously sharing their insights on securities law. Thanks too for thoughtful questions and comments from RonNell Andersen Jones, Marc Blitz, Fred Bloom, Alan Chen, John Coates, James Cox, Jennifer Hendricks, Sharon Jacobs, Margot Kaminski, Mark Loewenstein, Toni Massaro, Nadav Orian Peer, Mike Pappas, Frank Partnoy, Robert Post, Andrew Schwartz, Miriam Seifter, Amanda Shanor, Scott Skinner-Thompson, Harry Surden, Jeremy Telman, and Alex Tsesis. Finally, my thanks to Simon Furney and Brittany Porter for excellent research assistance.

considered the regulation of certain categories of speech as exempt from First Amendment review, and it has more recently announced a backwards-facing methodology for determining these categories that turns on identifying a longstanding regulatory tradition of restricting speech within a category without triggering traditional First Amendment scrutiny. We can trace a lengthy regulatory tradition of responding to the informational asymmetries endemic to securities markets by prohibiting companies from making false and misleading statements and by requiring them to make certain accurate disclosures.

Securities law remains faithful to this tradition when it regulates securities-related speech to serve these listener-centered functions. For this reason, securities law stays consistent with this regulatory tradition (and thus regulates within a category of unprotected speech) when it responds to the realities that the risks to investors change over time, and that investors evaluate those risks through a variety of methodologies. Think, for instance, of disclosures that inform investors about risks and methodologies that were unknown to, or unrecognized by, past generations—think of asbestos and fentanyl, and also of climate change and cybersecurity. That new risks to investors will arise (as well as new investor approaches to evaluating those risks) is foreseeable, even if the specific content of those risks and methodologies is not. In other words, today's securities laws address problems of informational asymmetries that are far from new. So too do they deploy a set of solutions, like mandatory disclosures, to those problems that are also far from new.

This Article asserts that the securities market is sufficiently distinct from other markets in its susceptibility to information asymmetries to justify recognizing securities-related speech as its own category of unprotected speech. Nevertheless, it also considers the possibility that the Court will instead turn to an entirely separate doctrine for considering the constitutionality of securities law: the very different rules that apply to the government's regulation of commercial speech. Here too securities regulation's listener-centered functions do important First Amendment work, as much of the securities law framework satisfies review under commercial speech doctrine so long as we continue to tether commercial expression's constitutional protection to that expression's capacity to inform listeners' decisionmaking.

INTRODUCTION 100
I. WHY AND HOW SECURITIES LAW REGULATES SPEECH 106
A. *Securities Law's Rationales* 107
B. *Restrictions on False or Misleading Speech ("Antifraud Rules")* 111
C. *Mandatory Disclosure Rules* 111
D. *Gun-Jumping Rules* 113
II. SECURITIES-RELATED SPEECH AS A CATEGORY OF UNPROTECTED SPEECH 115
A. *The Court's History-Only Approach* 116
1. Justifications for, and Critiques of, the Court's History-Only Approach 119
2. A Functional Approach to Assessing Regulatory History 126
B. *What This Means for Securities Law* 128
III. SECURITIES-RELATED SPEECH AS COMMERCIAL SPEECH 136
A. *Commercial Expression's First Amendment Protection Through a Listener-Centered Lens* 136
B. *What This Means for Securities Law* 140
1. Antifraud Rules 141
2. Mandatory Disclosures 142
a. Deferential or Skeptical Review? 142
b. Does the Disclosure Unduly Burden the Commercial Actor's Speech? 146
c. Has the Government Justified the Disclosure's Value to Listeners? 148
3. Gun-Jumping Rules 150
CONCLUSION 150

INTRODUCTION

As the nation reeled from the 1929 stock market crash and the ensuing misery of the Great Depression, the New Deal Congress enacted major federal securities laws. Among other things, these laws regulate securities-related speech by prohibiting securities issuers from making false and misleading statements and by requiring companies to make a variety of accurate disclosures about their firms. Through these efforts, securities law seeks to inform and protect investors in their decisions about buying, selling, and holding securities as well as their decisions about electing directors and otherwise exercising their corporate governance functions. In so doing, securities law also advances broader public-regarding goals by facilitating stable and efficient markets, encouraging corporate accountability, and ameliorating the systemic economic risks of market collapse.

Notwithstanding its description as "essentially the regulation of speech,"[1] this federal regulatory framework has endured for the better part of a century with little (if any) First Amendment controversy. While the Supreme Court has yet squarely to consider the constitutionality of securities law, it suggested in dicta that the Free Speech Clause poses no bar to the regulation of securities-related speech. In the 1970s, for instance, the Court cited "[n]umerous examples" of "communications that are regulated without offending the First Amendment, such as the exchange of information about securities [and] corporate proxy statements."[2] In the same vein, the Court earlier noted that "neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares."[3] Many thoughtful commentators similarly described the government's regulation of securities-related speech as exempt from traditional Free Speech Clause review.[4]

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1 Roberta S. Karmel, *The Third Abraham L. Pomerantz Lecture: The First Amendment and Government Regulation of Economic Markets—Introduction*, 55 BROOK. L. REV. 1, 1 (1989).

2 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (citation omitted).

3 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985) (plurality opinion) (describing the content-based regulation of securities-related speech as consistent with the First Amendment even though similar content-based speech restrictions would be impermissible in other contexts).

4 *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1770 (2004) ("[N]o First Amendment–generated level of scrutiny is used to determine whether the content-based advertising restrictions of the Securities Act of 1933 are constitutional . . . ."); *see also* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 651 (2006) (asserting that "the institutional importance of the securities regulation regime" supports the constitutionality of that regime's regulation of speech).

But in what has sometimes been characterized as the "weaponization" of the First Amendment,[5] the antiregulatory turn in twenty-first-century free speech law now inspires corporate speakers' increasingly successful efforts to resist a variety of regulatory frameworks.[6] Newly vulnerable targets of this antiregulatory turn include the Food and Drug Administration's framework for approving medical drugs and devices,[7] various consumer health and safety warnings,[8] and longstanding laws that require employers to make certain disclosures to workers about the terms and conditions of employment, including the legal protections available to workers.[9]

Several doctrinal shifts (described at length elsewhere)[10] accomplish the antiregulatory turn: the Court increasingly characterizes the target of government regulation as constitutionally protected speech rather than unprotected economic conduct;[11] scrutinizes the government's compelled informational disclosures with growing skepticism;[12]

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5 *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (describing the majority as "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy"); *see also* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) ("It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable.").

6 *See* Nathan Cortez & William Sage, *The Disembodied First Amendment*, 100 WASH. U. L. REV. 707, 711–51 (2023) (describing these developments).

7 *See* Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 189–95 (2018).

8 *See* Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 233–36 (2021).

9 *See* Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. CHI. LEGAL F. 209, 223–25; Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 43–45 (2016) [hereinafter Norton, *Truth and Lies in the Workplace*].

10 *See, e.g.*, Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323–26 (2016); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 134.

11 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557, 564–65 (2011) (striking down a Vermont law that regulated the sale of information about doctors' prescribing practices to pharmaceutical marketers on the grounds that statute burdened "disfavored speech by disfavored speakers," *id.* at 564); *see also* Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 394 (2014) ("[*Sorrell*] gives speech status to data; it treats the effort to regulate access to the data as regulation of expression rather than conduct; and it rejects the justifications offered by Vermont for treating detailers differently than other 'speakers' as insufficient, despite their commercial interest in, and ultimate use of, the data.").

12 *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021) (invalidating California law that required charitable organizations to disclose information about their finances and the identity of their major donors); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371–78 (2018) (invalidating California law that required licensed

and threatens to apply its most suspicious review whenever the government regulates on the basis of expression's content, even absent indications of the government's self-interested, intolerant, or other illicit motive.[13]

Reed v. Town of Gilbert illustrates this turn.[14] When considering a First Amendment challenge to a town's sign ordinance that prohibited some signs and permitted others for less-than-obvious reasons, all nine Justices found this head-scratcher of a law to fail even rational basis scrutiny (the most deferential level of review that requires only that the government's choice be rationally related to a legitimate interest).[15] In so doing, however, a majority announced its plans to apply strict scrutiny—almost always fatal to the government's action because it requires the government to prove that its choice is necessary to a compelling interest—*whenever* the government's regulation of expression focuses on particular content or particular types of speakers.[16]

Yet *Reed*'s majority made no effort to explain or distinguish the many examples identified by concurring Justices—examples that include securities law—where the government has long regulated on the basis of content or speaker identity without triggering First Amendment attention, much less concern.[17] Indeed, the government regulates expression on the basis of content or speaker identity in many contexts with good reason: the government's thoughtful selection of regulatory targets can reflect quality policymaking. As legal scholar Toni Massaro observes: "[I]t is *commonplace* for government to distinguish among types of speakers in this manner—i.e. based upon their very different occupational roles, motivations, control over the uses of information, market power, institutional commitment to speech values, and so on."[18] Justice Breyer's concurrence in *Reed* highlighted a few of the many available illustrations: "governmental

pregnancy centers to inform women seeking pregnancy-related services that California offers free or low-cost family planning services, prenatal care, and abortion, as well as California law that required unlicensed pregnancy centers to disclose that they were in fact unlicensed because they had no health care professionals on site).

13 *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

14 *Id.*

15 *See id.* at 179–80 (Kagan, J., concurring in judgment).

16 *See id.* at 163–65 (majority opinion).

17 *See id.* at 177–78 (Breyer, J., concurring in judgment) ("Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity." *Id.* at 177.).

18 Massaro, *supra* note 11, at 396.

regulation of securities, of energy conservation labeling practices, . . . of doctor-patient confidentiality, of income tax statements," and more.[19]

Absent limiting principles that the Court has yet to identify, this turn in contemporary free speech law now empowers the dismantling of the securities regulation framework in place since the Great Depression.[20] First Amendment attacks on current governmental efforts to inform investors about companies' vulnerabilities to climate change may offer courts the opportunity to do just that,[21] as several state attorneys general have announced plans to challenge proposed securities rules that would require companies to disclose information about the impacts of climate-related risks on their businesses, their businesses' greenhouse gas emissions, and their risk management processes for governing climate-related risks.[22] Also at stake are much older regulatory measures to inform and protect investors.[23]

This Article takes this threat seriously, and defends the constitutionality of the securities law framework in the wake of this antiregulatory turn. It describes why and how securities law regulates speech to inform and protect investors as listeners. It then maps this regulatory framework onto free speech law, demonstrating why and how that framework's listener-centered functions align with First Amendment theory and doctrine. In so doing, it suggests principled limits on the contemporary antiregulatory turn.

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19 *Reed*, 576 U.S. at 177 (Breyer, J., concurring in judgment) (citations omitted).

20 *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2360 (2020) (Breyer, J., concurring in judgment with respect to severability and dissenting in part) ("[T]he regulatory spheres in which the Securities and Exchange Commission or the Federal Trade Commission operate are defined by content. Put simply, treating all content-based distinctions on speech as presumptively unconstitutional is unworkable and would obstruct the ordinary workings of democratic governance.").

21 *See* Letter from Patrick Morrisey, W. Va. Att'y Gen., to Allison Herren Lee, Acting Chair, SEC 3 (Mar. 25, 2021) ("If you choose to pursue this course, we will defeat it in court."); *see also* Michael R. Siebecker, *The Incompatibility of Artificial Intelligence and* Citizens United, 83 OHIO ST. L.J. 1211, 1258 (2022) (describing recent First Amendment challenges to securities laws and related corporate regulation).

22 *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022), (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

23 For a sampling of arguments suggesting that various longstanding securities rules should be subjected to, and struck down under, heightened First Amendment scrutiny, see Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 278–323 (1990); Susan B. Heyman, *The Quiet Period in a Noisy World: Rethinking Securities Regulation and Corporate Free Speech*, 74 OHIO ST. L.J. 189, 218–24 (2013); Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 802–06 (2007); Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 299–301 (1988).

More specifically, this Article makes the case for identifying securities-related speech as a category of speech unprotected by the First Amendment. The Court has long identified the regulation of certain categories of speech as exempt from First Amendment review, and more recently, the Court has insisted upon a backwards-facing methodology for determining these categories that turns entirely on identifying a longstanding regulatory tradition of restricting speech within a category free from traditional First Amendment scrutiny.[24] The Court has yet, however, to offer any guidance on this methodology's application in the Free Speech Clause context.[25]

To be sure, historical analysis is by no means the only nor the best of tools for constitutional decisionmaking.[26] But because the Court has made clear that history—and history alone—now controls its understanding of the categories of speech unprotected by the Free Speech Clause, this Article proposes a principled application of this methodology to leverage its strengths while managing its limitations. More specifically, this Article proposes that, for Free Speech Clause purposes, we start by focusing on *why* the government has long regulated speech in a particular category: What are the functions that the government has sought to achieve? It then suggests that we delimit the relevant category of unprotected speech as that which has long been regulated to serve those functions. This functional approach attends to the core free speech value of democratic self-governance by defining the requisite regulatory tradition to permit the people's representatives to learn from time and experience when responding to stubborn problems of long standing as well as to newer manifestations of those problems. This is what Joseph Blocher and Reva Siegel have, in other settings, described as "democracy's competence."[27]

As we'll see, key differences between securities and other goods and services leave the securities market especially vulnerable to asymmetries of information, thus intensifying the importance of accurate securities-related information to investors as listeners. We can trace a lengthy regulatory tradition of responding to those asymmetries (and the harms they threaten) by prohibiting those selling securities from

24 *See infra* notes 80–96 and accompanying text.

25 *See infra* notes 114–22 and accompanying text.

26 *See infra* notes 111–24 and accompanying text.

27 Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. (forthcoming Dec. 2023) (manuscript at 106), https://ssrn.com/abstract=4355024 [https://perma.cc/PPF3-3ZZ3]; *see also* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming 2023) (manuscript at 71), https://ssrn.com/abstract=4408228 [https://perma.cc/BZ5A-9E7V] (observing that the Court has "instructed courts to heed historical regulatory traditions in Second Amendment cases, and legislative deference may very well be an important part of that tradition").

making false and misleading statements and by requiring companies to make certain accurate disclosures. The threads that stitch this regulatory tradition together are the functions the tradition has long sought to achieve: informing and protecting investors in their decisions to buy, sell, or hold securities and in their exercise of corporate governance responsibilities (functions that also serve broader public-regarding interests in facilitating stable and efficient markets, encouraging corporate accountability, and ameliorating the systemic economic risks of market collapse).

Securities law remains faithful to this tradition when it regulates securities-related speech to serve these listener-centered functions. For this reason, securities law stays consistent with this regulatory tradition (and thus regulates within a category of unprotected speech) when it responds to the realities that the risks to investors change over time, and that investors evaluate those risks through a variety of methodologies. Think, for instance, of disclosures that inform investors about risks and methodologies that were unknown to, or unrecognized by, past generations—think of asbestos and fentanyl, and also of climate change and cybersecurity. That new risks to investors will arise (as well as new investor approaches to evaluating those risks) is foreseeable, even if the specific content of those risks and methodologies is not. In other words, today's securities laws address problems of informational asymmetries that are far from new. So too do they deploy a set of solutions to those problems, like mandatory disclosures, that are also far from new.

This Article asserts that the securities market is sufficiently distinct from other markets in its susceptibility to information asymmetries (and their attendant harms) to justify recognizing securities-related speech as its own category of unprotected speech. Nevertheless, this Article also considers the possibility that the Court will instead turn to an entirely separate doctrine for considering the constitutionality of securities law: the very different rules that apply to the government's regulation of commercial speech. Here too securities regulation's listener-centered functions do important First Amendment work, as much of the securities law framework satisfies review under commercial speech doctrine so long as we continue to tether commercial expression's constitutional protection to that expression's capacity accurately to inform listeners' autonomous decisionmaking.

To these ends, Part I explains why and how the government regulates securities-related speech. As we'll see, this regulatory framework responds to key differences between securities and other products available in the commercial marketplace, differences that intensify investors' vulnerability to information asymmetries and thus amplify the value of accurate securities-related information. Parts II and III then

explain why and how this framework aligns with free speech law notwithstanding the antiregulatory turn in First Amendment law. More specifically, Part II makes the case for understanding securities-related speech as a category of speech unprotected by the First Amendment, and Part III describes how the securities regulation framework remains consistent with the theory and doctrine of commercial speech law.

Ubiquitous in human relationships, speech is complicated because human relationships are themselves so complicated.[28] Recognizing these complexities requires that we treat speaker-listener relationships differently when in fact they are differently situated.[29] And despite the contemporary Court's protestations to the contrary, First Amendment law has long tolerated the government's content- and speaker-based distinctions that serve important functions—for example, to inform and protect listeners who experience disadvantage at the hands of speakers who enjoy greater information, power, or both.[30] The next Part describes the (necessarily) content- and speaker-specificity of securities regulation in attending to these complicated relationships.

I. WHY AND HOW SECURITIES LAW REGULATES SPEECH

This Part explains the "why" of securities law (its overarching rationales) before turning to the "how" of securities law (its operational structure). In so doing, it examines how securities law regulates speech through antifraud rules that prohibit false and misleading speech about securities-related matters; mandatory disclosure rules that require accurate and comparable disclosures about securities-related matters; and "gun-jumping" rules that tie the timing of securities offers and sales to the submission, review, and delivery of required disclosures to ensure that these disclosures are made at a time and in a way that meaningfully informs investors' decisions.

28 *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting) ("Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech.").

29 *See* Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1671 (2021) ("[T]he Court's purported insistence on formal neutrality is normatively misguided in failing to acknowledge the ways in which factual distinctions sometimes *should* make a legal difference. Indeed, identifying such distinctions is the project of much legal analysis . . . ." (footnote omitted)).

30 *See supra* notes 17–19 and accompanying text.

A. Securities Law's Rationales

Now nine decades old, federal securities statutes empower the Securities and Exchange Commission (SEC) to issue and enforce regulations consistent with the statutes' multiple functions of informing and protecting investors; maintaining fair, orderly, and efficient markets; facilitating capital formation; and advancing the public interest.[31] These functions overlap with and reinforce each other. For example, providing investors with accurate, reliable, and comparable information about available investment opportunities also promotes capital formation by safeguarding investors' confidence in capital markets' integrity.[32] And supplying shareholders with accurate, reliable, and comparable information about a firm's management not only informs those shareholders' decisions about corporate governance but also advances the public's interest by ameliorating the systemic economic threats posed by market collapse.[33]

Understanding how securities law regulates speech to achieve these interlocking functions requires that we recognize several key differences between securities and other goods and services available in the commercial marketplace—differences that intensify the importance of accurate securities-related information to investors as listeners. For these purposes, note more specifically that *protecting* investors is a securities regulation function related to, but distinct from, *informing* investors: for example, mandatory disclosures not only *protect* investors from companies' (and their managers') deception and self-

31 *E.g.*, Securities Act of 1933 § 2(b), 15 U.S.C. § 77b(b) (2018); Securities Exchange Act of 1934 §§ 14(a)(1), 23(a)(2), 15 U.S.C. §§ 78n(a)(1), § 78w(a)(2) (2018); Investment Company Act of 1940 § 2(c), 15 U.S.C. § 80a-2(c) (2018).

32 *See* Erik F. Gerding, *The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation*, 38 CONN. L. REV. 393, 419 (2006) ("If investors fear being defrauded by issuers, broker dealers, exchanges or other market intermediaries, or that the investment odds are otherwise rigged, they will no longer invest in the stock market."); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1210 (1999) (describing securities laws' functions to include promoting "market efficiency so that the prices of securities would more accurately reflect the underlying values of the securities").

33 *See* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 296 (describing how securities laws seek to ameliorate systemic risks to fair and efficient markets, where "[s]ystemic risk is financial risk both *within* and *to* the financial system itself that investors cannot shield themselves from through diversification").

dealing but also *inform* investors' autonomous choices about which investment options best align with their values and preferences (even absent any bad behavior by companies and their management).[34]

First, securities (in other words, shares in business opportunities[35]) are what economists call "credence" goods: goods characterized by especially pronounced informational asymmetries between sellers and buyers.[36] Potential buyers of credence goods (like medical services) cannot assess those goods' value through traditional means like inspection before purchase (as is the case with "search goods" like clothing) or experience after purchase (as is the case of "experience goods" like wine).[37] Because this pudding cannot be tested by its tasting,[38] an investor may not realize a security's economic value until she receives dividends from the company or sells the security. Until then, securities law helps fill these informational gaps by requiring the sellers of securities to disclose information about their companies to buyers and potential buyers.[39]

Second, investors rarely make a simple yes-or-no decision about whether to invest in a single company; they instead more commonly select among numerous investment options. For this reason, investors need comparable information about competing opportunities—information that, again, is of particular value when assessing credence goods like securities. Akin to "governmentally defined weights and

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34 *See* Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1095–96 (2007) (explaining that informing investors to improve the functioning of financial markets is a regulatory function distinct from protecting investors from deception).

35 *See* SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946) (defining a security as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of" others).

36 *See* Arthur R. Pinto, *The Nature of the Capital Markets Allows a Greater Role for the Government*, 55 BROOK. L. REV. 77, 84–85 (1989) ("Securities can be classified as a credence good." *Id.* at 85.); *see also* Uwe Dulleck, Rudolf Kerschbamer & Matthias Sutter, *The Economics of Credence Goods: An Experiment on the Role of Liability, Verifiability, Reputation, and Competition*, 101 AM. ECON. REV. 526, 526 (2011) (describing the characteristics of credence goods).

37 *See* Dulleck et al., *supra* note 36, at n.1 (distinguishing "[s]earch" and "[e]xperience" goods). In contrast, consumers know the value of "[o]rdinary goods" (like gasoline) without inspecting them in advance or testing their quality through use and experience. *Id.*

38 My thanks to James Cox for suggesting this metaphor.

39 *See* Pinto, *supra* note 36, at 83–84 ("Securities represent interests in a business, but the instruments themselves have no intrinsic value. They can be issued in unlimited amounts because value depends upon the business that issues them. The security itself cannot be consumed, inspected, or verified. . . . The security's value depends upon information, much of which is about the business and comes directly from the business. Thus, the value of securities is substantially dependent upon the ability of the business issuing the securities to supply the firm-specific information to the buyers.").

measures,"[40] accurate and standardized disclosures help investors distinguish well-managed companies from poorly managed ones. Enabling investors to make meaningful comparisons among firms not only informs and empowers those investors, but also supports deep and broad capital markets.[41]

Third, investors are heterogeneous: not all investors rely on the same information nor do they all use the same information in the same way. More specifically, different investors have different priorities[42] and use different methodologies for assessing the values and risks most salient to them.[43] Illustrations include investors who choose among a variety of asset pricing models consistent with contemporary finance theory, like those that apply discounted cash flow models to adjust projections of a company's future cash flows into present value, or others that emphasize ratios of a company's earnings to its share price.[44] Other investors are interested not just *that* a company generates profits but also in *how* a company generates profits.[45] Through mandatory disclosures, securities law seeks to deliver a range of information relevant to heterogeneous investors with diverse preferences and methodologies for assessing value and risk.[46]

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40 Ralph K. Winter, *A First Amendment Overview*, 55 BROOK. L. REV. 71, 74 (1989) ("[T]he function of securities legislation transcends ordinary discourse between a speaker and an audience. It mandates standard disclosure for all the firms it governs, so every firm is assured that its competitors and everyone else will generate and disclose information, too. It is analogous to governmentally defined weights and measures because it insures that everyone makes standardized disclosures."); *see also* Michael P. Dooley, *The First Amendment and the SEC: A Comment*, 20 CONN. L. REV. 335, 339 (1988) ("To 'let a thousand flowers bloom' in the realm of financial disclosure is to increase information costs by a similar magnitude. . . . [T]he market for financial information is very different from the 'free marketplace of ideas.' Whereas the latter demands diversity, the former depends upon some measure of uniformity to function at all.").

41 *See* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 884 (2015) ("These purposes are primarily aimed at decreasing information costs and promoting the efficiency and stability of capital markets. They have helped to make American stock markets the envy of the world.").

42 *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 9 (2012) (explaining that "different shareholders have different values").

43 *See* BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET: INCLUDING A LIFE-CYCLE GUIDE TO PERSONAL INVESTING 115–300 (13 ed. 2023) (discussing a wide range of investor methodologies for assessing securities' risk and value).

44 *See* ROBERT J. RHEE, ESSENTIAL CONCEPTS OF BUSINESS FOR LAWYERS 97–98, 187–247 (3d ed. 2020) (describing different methodologies for valuation).

45 *See* Williams, *supra* note 32, at 1201.

46 *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 21–22 (Del. 2017) (recognizing that a range of different methodologies are available to investors when assessing a company's value, and that these methodologies may yield different results); Dalley, *supra* note 34, at 1094 ("Pricing risk is one of the essential functions of the

Next, unlike those who purchase other goods and services, the buyers of securities acquire governance rights and responsibilities along with their share of the business. Think, for instance, of shareholders' power to elect the corporation's board of directors, to approve or disapprove mergers and acquisitions, and to bring shareholder-based suits to hold managers accountable for their performance. Mandatory disclosures inform shareholders' decisions about how to govern the firms in which they own shares in addition to their decisions about whether and when to buy, sell, or hold those shares.[47]

Finally, that public companies are owned by shareholders but controlled by managers means that managers may arrogate the firm's resources or dodge their duties to their own benefit and to shareholders' detriment.[48] The disclosures required by securities law help shield investors from the dangers that accompany such divergent incentives by obliging the firm's managers to share accurate and standardized information that enables those dissatisfied with the firm's performance to exercise exit (by selling shares) or voice (by greater engagement in corporate governance).[49] In this way, mandatory disclosures attend to asymmetries of power as well as of information: when left to fend for themselves, numerous and widely diffused shareholders face substantial collective-action barriers to their efforts to negotiate with a firm's management for full, accurate, and standardized disclosures.[50]

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securities markets, and disclosure of information improves market participants' ability to assess and price risk.").

47 We might understand these rules as compelling the disclosure of information that literally "belongs" to shareholders as the company's "owners." On the other hand, some commentators challenge the notion that public companies "belong" to their shareholders. *See, e.g.*, STOUT, *supra* note 42, at 37, 42 ("[F]rom a legal perspective, shareholders do not, and cannot, own corporations. Corporations are independent legal entities that own themselves . . . . Shareholders own shares of stock [which create] a contract that gives the shareholder very limited rights [the right to vote, the right to sue, and the right to sell their shares] under limited circumstances." (emphasis omitted)).

48 *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 119–25, 277–87 (1932) (describing information as a tool for addressing the concerns raised by the separation of ownership and control); Williams, *supra* note 32, at 1216 (describing the "divergence of interests between shareholders and managers, and potential lack of accountability to the shareholders" as "preoccup[ying] corporate law scholars ever since" Berle and Means observed the tensions created by the separation of a corporation's ownership from its control).

49 *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970) (describing the strategies of exit and voice).

50 *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 206–07 (2018) (describing how shareholders "[w]idely dispersed throughout the nation" faced daunting collective action problems because of "their sheer numbers: they could not be easily organized, and any one vote against management was

The remainder of this Part turns from *why* securities law regulates securities-related speech to examine more specifically *how* it does so.

B. Restrictions on False or Misleading Speech ("Antifraud Rules")

A variety of securities laws forbid certain false or misleading statements in connection with the purchase or sale of securities. Most commonly, these rules prohibit securities issuers and marketers from making "any untrue statement of a material fact," and bar them from omitting "a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."[51] Rooted in common-law tort and contract claims for fraud and misrepresentation, these rules seek to deter, and provide remedies to the victims of, fraud.[52] These rules also promote market efficiency and capital formation by preventing the "lemons" markets that can develop when the absence of accurate information about products' quality undermines, and sometimes destroys, the market for those products.[53]

Antifraud rules are necessarily both content-based and speaker-based. In other words, they regulate only certain expression (that is, securities-related speech that is false or misleading) by certain speakers (securities issuers and other market participants) precisely because those distinctions are relevant to the expression's potential for harm.

C. Mandatory Disclosure Rules

Securities laws also require companies and their agents to make a variety of accurate disclosures about securities-related matters.[54] To illustrate, securities issuers must file registration statements with the SEC that provide a range of information (information that is then made available to the public on the SEC's website) before offering securities to the public for sale—and issuers must later provide a sales

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inconsequential"); Harper Ho, *supra* note 33, at 294 ("Corporate managers are also particularly reticent to disclose negative information unless they are clearly required to do so, given the potential effect on the company's stock price.").

51 17 C.F.R. § 240.10b-5(b) (2022).

52 *See* Amanda Marie Rose, *The Shifting Raison d'Être of the Rule 10b-5 Private Right of Action*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 39, 39–44 (Sean Griffith et al. eds., 2018) (describing Rule 10b-5's common-law roots).

53 *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495–500 (1970) (describing this dynamic).

54 These disclosures are also governed by the antifraud rules described *supra* notes 51–53 and accompanying text. In other words, securities law not only requires regulated entities to make these disclosures but also requires them to ensure the disclosures' accuracy.

document called a "prospectus" (drawn from the registration statement) to investors when selling those securities through public offerings.[55] Public companies[56] must also file quarterly and annual reports with the SEC (information that, again, is made publicly available to investors),[57] along with reports of certain key corporate events like bankruptcies or company earnings announcements.[58]

These required disclosures include information about the company's operations, financial condition, and risk factors; descriptions of the company's property; legal proceedings in which the company is involved; factors that increase the risk of investing in the company; the company's securities performance (like the dividends it has paid); the management's discussion of the factors it believes have affected past performance and will affect future performance; and board members' and officers' identities and compensation.[59] (Securities law also leaves companies free to provide additional texture and nuance through voluntary disclosures of their own, and many companies choose to make disclosures beyond those required by law.)[60]

Federal securities law also requires companies to provide various disclosures to shareholders relevant to their governance decisions. For example, in advance of an election of a public company's directors, that company must make certain disclosures that inform shareholders' votes, most commonly through proxy statements delivered electronically or through the mail.[61] More specifically, these proxy statements must include the company's annual report and audited financial statements, along with information about voting procedures, information about the compensation of directors and officers, and background information about candidates for director.[62] Similar disclosure requirements apply to shareholders who seek to nominate candidates

55 15 U.S.C. § 77e (2018); *see also id.* § 77d(a)(2) (exempting "transactions by an issuer not involving any public offering").

56 *See id.* §§ 78*l*(a), (g), 78*o*(d) (providing the thresholds for determining when a company is "public" for these purposes—thresholds that include listing its securities on a national exchange, conducting a registered offering, or possessing total assets in excess of $10 million).

57 *Id.* § 78m(a).

58 *See* SEC Form 8-K, Information to Be Included in the Report: Item 1.03(a), at 6 (Sept. 2023).

59 *See, e.g.*, 17 C.F.R. pts. 210, 229 (2022).

60 Even so, a variety of rules and doctrines seek to discourage issuers from burying bad news or otherwise frustrating investor decisionmaking by flooding investors with distracting or useless information. *See* Erik F. Gerding, *Disclosure 2.0: Can Technology Solve Overload, Complexity, and Other Information Failures?*, 90 TUL. L. REV. 1143, 1151 (2016).

61 *See* 15 U.S.C. § 78n(c) (2018); 17 C.F.R. §§ 240.14a-3, 240.14a-16 (2022).

62 *See* 17 C.F.R. §§ 240.14a-3, 240.14a-101 (2022); *see also* Williams, *supra* note 32, at 1207 (describing these processes).

of their own or to submit other matters to a shareholder vote.[63] Along the same lines, federal securities laws also require public companies involved in potential mergers or acquisitions to provide information material to shareholders' decisions about those transactions.[64]

These mandatory disclosure rules are necessarily both content-based and speaker-based, in that they regulate only certain speech (by requiring disclosures only of certain securities-related matters) by certain speakers (like securities issuers or company management) because those distinctions are relevant to the expression's potential for value to investors as listeners. In this way, these distinctions serve the regulatory framework's multiple and overlapping functions of informing investors' decisions about buying, selling, and holding securities as well as their decisions about corporate governance matters.

D. Gun-Jumping Rules

A related set of federal securities laws tie the timing of securities offers and sales to the submission, review, and delivery of required disclosures to ensure that those disclosures are made at a time and in a way that meaningfully informs investors' decisions. Collectively known as the "gun-jumping rules" (to prevent a company from "jumping the gun" to sell securities before the SEC has reviewed the company's registration statement and its required disclosures), these provisions of the Securities Act of 1933 work together to ensure that investors receive, before investing, the required disclosures that provide investors with accurate (and comparable) descriptions of businesses and their past financial performance, as well as an assessment of the risks they may face in the future.

Here's how the gun-jumping rules work: First, they prohibit an issuer from making "offers" to sell a security to the public until the issuer has filed a registration statement (and its various disclosures)

63 *See* 17 C.F.R. § 240.14a-8 (2022); *see also* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 272–77 (2016) (describing the shareholder proposal process). Under certain circumstances, securities law also requires the incumbent management to distribute those shareholders' proxy statements—together with the company's own proxy statements—to the other shareholders. 17 C.F.R. § 240.14a-8.

64 Among other things, a firm seeking to acquire a public company without the support of that target company's management (in what's called a hostile takeover) must also provide mandatory disclosure to the target's shareholders. *See* 15 U.S.C. § 78n(d)–(f). For related reasons, federal securities law also requires that shareholders who have acquired above a certain threshold of stock disclose their ownership stake to other shareholders through an SEC filing. *Id.* § 78m(d), (g).

with the SEC.[65] Next, SEC staff review the registration statement to ensure that it includes the required disclosures; this period of time after the company has filed a registration statement with the SEC but before the agency has completed its review is known as the "waiting period."[66] As law professor Paula Dalley explains, "This waiting period prevents issuers and underwriters from engaging in aggressive, abbreviated, and misleading selling efforts while the market (or, more specifically, analysts and other professionals) digests the information in the preliminary prospectus. The waiting period also gives individuals time to consider before investing."[67] Finally, when the SEC's review finds the disclosures satisfactory, its staff declares the registration statement "effective," which then permits the issuer to sell those securities once it has delivered the prospectus (with its various disclosures) to potential buyers.[68] This architecture seeks to focus investors' attention, at key decision points, on the information disclosed in the registration statement and the prospectus.[69]

In enacting the gun-jumping rules, the New Deal Congress sought to forestall the abusive marketing practices that it considered partially responsible for the 1929 stock market crash and the ensuing Great Depression.[70] History offers examples aplenty of high-pressure sales tactics that undermined investors' capacity to assess risk, with consequences that extended beyond individual investors' losses to include stock market crashes that led to prolonged economic downturns and

65 *See id.* § 77e; *see also* Securities Act Release No. 3844, 22 Fed. Reg. 8359, 8359 (Oct. 24, 1957) (interpreting an "offer" to mean any communication that "may in fact contribute to conditioning the public mind or arousing public interest in the issuer or in the securities of an issuer in a manner which raises a serious question whether the publicity is not in fact part of the selling effort").

66 *See Filing Review Process*, U.S. SEC. & EXCH. COMM'N (Sept. 27, 2019), https://www.sec.gov/divisions/corpfin/cffilingreview [https://perma.cc/XJ6J-92MF].

67 Dalley, *supra* note 34, at 1100 (footnote omitted).

68 *See* 15 U.S.C. § 77e(c) (prohibiting any person using instrumentalities of interstate commerce from selling a security unless a registration statement is in effect for that sale); *id.* § 77e(b)(2) (requiring that securities delivered to investors be accompanied or preceded by a final prospectus); *see also* Winter, *supra* note 40, at 75 ("By prohibiting sales without a written prospectus, [federal securities law] reduces the number of claims of oral misrepresentation.").

69 SEC rules also create certain "safe harbors" that permit certain communications by securities issuers prior to the SEC's completion of its review. *See* Heyman, *supra* note 23, at 193–206 (describing various safe harbors).

70 *See* MICHAEL PERINO, THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA'S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE 135–49, 237–55, 288–94 (2010) (describing how congressional oversight hearings revealed a variety of abusive sales practices that contributed to the Great Crash and how these discoveries influenced the enactment of the Securities Act of 1933 and its gun-jumping rules); JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 1–2, 13–38 (1982) (same).

sometimes even depressions.[71] The gun-jumping rules' rationales are thus the same as those underlying the mandatory disclosure rules—and for the same reasons too, those rules are necessarily content- and speaker-specific.

* * *

As we've seen, the multiple and interrelated functions underlying securities law explain that regulatory framework's focus on specific speakers and specific content to inform and protect investors as listeners. The remainder of this Article explores why and how this securities law framework aligns with free speech theory and doctrine. Key to this alignment, as we'll see, are securities law's listener-centered functions.

II. SECURITIES-RELATED SPEECH AS A CATEGORY OF UNPROTECTED SPEECH

Not all speech is protected by the First Amendment. Nor could it be, as the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language."[72] What categories of speech lie beyond the reach of the Free Speech Clause? True threats, incitement to imminent illegal action, fighting words, obscenity, fraud, child pornography, and speech integral to criminal conduct, the Court tells us.[73] (But not, according to the Court, images of animal cruelty.[74] Nor violent video games sold to children.[75] Nor many intentional falsehoods.[76])

Some sort of categorical approach is understandable—maybe even unavoidable—as a mechanism for managing the tension between protecting speech and averting the harms inflicted by certain expression. For this reason, First Amendment scholar Geof Stone describes this categorical approach as "an essential concomitant of an effective

71 *See* Gerding, *supra* note 32, at 403–13 (detailing six historical cycles where widespread manipulation and fraud by securities' marketers contributed to stock market bubbles and ensuing economic crises).

72 *See* Frohwerk v. United States, 249 U.S. 204, 206 (1919).

73 *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) ("Among these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain." (citations omitted)); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011) (offering examples "such as" obscenity, incitement, and fighting words); United States v. Stevens, 559 U.S. 460, 468–70 (2010) (identifying these categories to include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct).

74 *Stevens*, 559 U.S. at 468–70.

75 *Brown*, 564 U.S. at 805.

76 *Alvarez*, 567 U.S. at 718 (plurality opinion).

system of free expression, for unless we are prepared to apply the same standards to private blackmail, for example, that we apply to public political debate, some distinctions in terms of constitutional value are inevitable."[77]

At the same time, however, a categorical approach demands that we identify a methodology for determining which categories of speech should be treated as unprotected by the First Amendment. This is no easy trick.

A. The Court's History-Only Approach

The Court initially explained its approach to identifying categories of unprotected speech in terms akin to cost-benefit analysis, balancing the contested expression's First Amendment value against the harms threatened by that expression. Consider this, from the Court's 1942 decision in *Chaplinsky v. New Hampshire*:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[78]

For decades, many understood *Chaplinsky* to mean that the Court characterized a category of expression as unprotected when it found that the speech within that category threatened injury that substantially outweighed its First Amendment value.[79]

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77 Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 195 n.24 (1983).

78 315 U.S. 568, 571–72 (1942) (footnotes omitted).

79 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) ("From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (quoting *Chaplinsky*, 315 U.S. at 572)); *see also id.* at 400 (White, J., concurring in judgment) ("[T]he Court has held that the First Amendment does not apply to [certain content-based categories] because their expressive content is worthless or of *de minimis* value to society. We have not departed from this principle, emphasizing repeatedly that, 'within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no

The Court now insists, however, that its methodology for identifying categories of unprotected speech turns entirely on whether the regulation of speech within that category has been historically treated as exempt from First Amendment review. More specifically, the contemporary Court asserts that every category of such speech must be based on either "a previously recognized, long-established category of unprotected speech"[80] or a "categor[y] of speech that ha[s] been historically unprotected, but ha[s] not yet been specifically identified or discussed as such in [the] case law."[81] A "long-settled tradition of subjecting that speech to regulation" is thus key, the twenty-first-century Court tells us, to identifying historically unprotected categories of speech.[82]

The Court first articulated this exclusive emphasis on history in *United States v. Stevens*, where it insisted that longstanding regulatory tradition is—and always has been—the only way to identify a category of expression unprotected by the Free Speech Clause.[83] There the Court considered a First Amendment challenge to a federal law that criminalized the commercial creation, sale, or possession of depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed."[84] In so doing, the Court rejected as "startling and dangerous" what it characterized as the government's "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing

process of case-by-case adjudication is required.'" (third and fourth alterations in original) (citation omitted) (quoting New York v. Ferber, 458 U.S. 747, 763–64 (1982))).

80 United States v. Stevens, 559 U.S. 460, 471 (2010).

81 *Id.* at 472; *see also Alvarez*, 567 U.S. at 717 (plurality opinion) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" (second alteration in original) (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment))); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011) (requiring "persuasive evidence . . . of a long (if heretofore unrecognized) tradition of proscription"). Steve Shiffrin described this as "the frozen categories approach." Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1493 (2014).

82 *Stevens*, 559 U.S. at 469.

83 *Id.* at 471. To be sure, the Court had sometimes considered historical analysis as among the available tools for solving other Free Speech Clause problems. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009) (identifying the government's historical use of monuments to express itself as a factor in identifying the contested speech as the government's for Free Speech Clause purposes); Burson v. Freeman, 504 U.S. 191, 200 (1992) (drawing from "the evolution of election reform" to "demonstrate[] the necessity," and thus the constitutionality, of content-based bans on campaigning in and around polling places). But *Stevens* reflects the Court's first insistence that history is the *only* legitimate approach to deciding a specific Free Speech Clause question.

84 *Stevens*, 559 U.S. at 465 (quoting 18 U.S.C. § 48(c)(1) (2006)).

of relative social costs and benefits."[85] Absent evidence of a longstanding tradition of banning images of animal cruelty (distinct from a tradition of banning animal cruelty itself), the Court held that the contested speech did not fall within a category of unprotected speech and invalidated the law as substantially overbroad.[86] Acknowledging that "this Court has often *described* historically unprotected categories of speech as being 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,'"[87] the *Stevens* Court nevertheless asserted that

> such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor. When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis . . . [but we have instead] grounded [our] analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.[88]

Shortly thereafter, in *Brown v. Entertainment Merchants Ass'n*, the Court again insisted on a history-only methodology for identifying categories of unprotected speech when it struck down a state law that prohibited selling or renting—to minors—video games with depictions of "killing, maiming, dismembering, or sexually assaulting an image of a human being."[89] Absent evidence of a longstanding tradition of restricting minors' access to violent images, the majority held that the law prohibited speech protected by the First Amendment (thus triggering, and failing, strict scrutiny): "[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'"[90]

As noted above, the twenty-first-century Court's illustrative lists of the categories of unprotected speech encompassed incitement, true threats, obscenity, defamation, speech integral to criminal conduct,

85 *Id.* at 470.
86 *Id.* at 471–72, 482.
87 *Id.* at 470 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)).
88 *Id.* at 471.
89 564 U.S. 786, 789 (2011) (quoting CAL. CIV. CODE § 1746(d)(1) (West 2009)).
90 *Id.* at 792 (second alteration in original) (quoting *Stevens*, 559 U.S. at 470).

child pornography, fighting words, and fraud.[91] It did not, however, specifically mention securities law, despite its earlier dicta observing that the regulation of securities-related speech triggered no First Amendment review.[92] This may not mean much, as the Court did not claim to be exhaustively cataloguing all categories of unprotected speech. Indeed, it made no mention of other areas of law where the government's longstanding restriction of speech has never prompted Free Speech Clause scrutiny—like antitrust law that restricts the use and exchange of information for anticompetitive purposes,[93] evidence and professional responsibility laws that prohibit the use and disclosure of certain information,[94] and contract law that "consists almost entirely of rules attaching liability to various uses of language."[95]

Indeed, in announcing regulatory tradition as the only appropriate means of identifying categories of unprotected speech, Chief Justice Roberts observed: "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[96] The remainder of this Part makes the case for identifying securities-related speech as just such a category.

1. Justifications for, and Critiques of, the Court's History-Only Approach

The twenty-first-century Court justifies its history-only[97] approach (also known as "traditionalism"[98]) as an objective and principled curb

91 *See supra* notes 72–76 and accompanying text.

92 *See supra* notes 2–4 and accompanying text.

93 *See* United States v. Container Corp. of Am., 393 U.S. 333, 335–38 (1969) (holding that competitors' exchange of pricing information violated antitrust law).

94 *See* Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 689 (1997) (describing how evidence law routinely regulates speech on the basis of content without triggering First Amendment review); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998) (describing how professional responsibility law routinely regulates speech on the basis of content without triggering First Amendment review).

95 Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 386 (1979).

96 United States v. Stevens, 559 U.S. 460, 472 (2010).

97 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2164 (2022) (Breyer, J., dissenting) (using the term "history-only" to describe this approach to constitutional problem-solving); *see also* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 1, 1 (2023) (using the term "history and tradition").

98 *See* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1653 (2020) (using the term "traditionalism" to describe this approach).

on politically unaccountable judges.[99] (Even more recently, the Court has also announced that historical analysis now controls its approach to constitutional questions involving the Second Amendment,[100] unenumerated fundamental rights,[101] and the Establishment Clause[102]—although these developments' influence, if any, on the Court's approach to Free Speech Clause problems remains to be seen.)[103] More generally, advocates of backwards-looking methodologies like traditionalism and originalism often defend their interpretive preferences as relying on what they characterize as more determinate[104] and more

99 *See Stevens*, 559 U.S. at 472 ("[Those decisions] cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. . . . We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them."); *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022) (justifying a history-only approach to identifying the scope of fundamental rights to curb what the Court described as "freewheeling judicial policymaking"); *Bruen*, 142 S. Ct. at 2130 ("[R]eliance on history to inform the meaning of [the Second Amendment's] constitutional text . . . is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field." (third alteration in original) (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010) (plurality opinion))).

100 *Bruen*, 142 S. Ct. at 2126 (requiring the government to demonstrate that a challenged regulation is "consistent with this Nation's historical tradition of firearm regulation" to satisfy Second Amendment review).

101 *Dobbs*, 142 S. Ct. at 2248 (asserting that historical analysis is the only means of identifying unenumerated fundamental rights for Due Process Clause purposes to prevent courts from falling "into the freewheeling judicial policymaking that characterized discredited decisions").

102 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (asserting that "historical practices and understandings" now control the Court's interpretation of the Establishment Clause (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))).

103 *See* Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59 (2023) (discussing uncertainties of applying these analyses to Free Speech Clause questions); Cass R. Sunstein, Dobbs *and the Travails of Due Process Traditionalism* 10–12 (Harv. Pub. L. Working Paper No. 22-14, 2022) (identifying questions about whether these history-only holdings will or should apply in other constitutional contexts); *see also* Blocher & Ruben, *supra* note 27 (describing how the contemporary Court's approach to historical analysis in the Second Amendment context departs from its approach to historical analysis in other constitutional settings).

104 *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 5 (2021) ("[Originalism is the search for] the meaning that the constitutional text conveyed to *most* people when it was ratified. And that meaning is *objective*, in the sense that whether X is the original public meaning of a given provision turns on facts about *prevailing* linguistic practice that are independent of the contents of the minds of *individual* speakers or interpreters."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (explaining that reliance on original

democratically legitimate[105] baselines to constrain judicial decisionmaking.[106] While originalist and traditionalist approaches share the same rationales, they often focus on different baselines. Originalism's gaze remains fixed on a specific snapshot in time: the public's understanding of textual meaning at the time the relevant constitutional provision was ratified—be it 1788, 1791, 1868, or some other date.[107] History-only approaches instead scan a longer period—generations and often longer—for evidence of what our longstanding practice reveals about our constitutional values.[108]

The Court's history-only approach to identifying categories of unprotected speech has plenty of critics, and deservedly so. On the descriptive front, a careful canvassing of the caselaw shows "how little the [pre-*Stevens*] Court actually relied upon history to distinguish low- from high-value speech."[109] Instead, as Genevieve Lakier explains, the Court "employed what we might describe as a 'purpose-based' approach: one that identified low-value speech by looking at whether its content-based regulation threatened to undermine the goals the First Amendment was intended to advance."[110]

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understanding "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself").

105 *See* Edwin Meese III, *Our Constitution's Design: The Implications for Its Interpretation*, 70 MARQ. L. REV. 381, 387 (1987) (describing judicial reliance on original meaning as "properly" enforcing "the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue").

106 To be sure, the premise that history-only methodologies are more determinate and more legitimate than other interpretive methodologies is vigorously contested, and appropriately so. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("But, of course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation.").

107 Some originalists look to historical practice at the time of ratification—that is, how the original readers behaved at that time—as evidence of what they understood it to mean. *See* Barnett & Solum, *supra* note 97, at 13.

108 *See* DeGirolami, *supra* note 98, at 1655–56 (describing the justifications for the Court's reliance on history and tradition to include an interpretive justification that "enduring practices presumptively inform the meaning of the words that they instantiate" and a democratic-populist justification "that in a democracy, people who engage in practices consistently and over many years in the belief that they are constitutional have endowed those practices with political legitimacy"); *see also* Barnett & Solum, *supra* note 97, at 13–14 (distinguishing traditionalism from originalism).

109 Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2210 (2015).

110 *Id.*; *see also* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 85–86 (2012) (criticizing as "fundamentally illusory" the *Stevens* Court's claim that the Court had always engaged in historical analysis to identify low-value categories of speech, *id.* at 85); Genevieve Lakier, *The Non–First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2300 (2021) (describing the Court's

And on the normative front, courts and commentators have repeatedly underscored the limitations of history-only approaches to assessing the constitutionality of present-day policy solutions to problems largely unknown to, or unappreciated by, past generations.[111] Among other things, a community's traditions do not always reveal that community's wisest judgments: at times those traditions simply represent what's easiest and most convenient.[112] And the all-too-familiar dynamics of inertia and groupthink mean that at times a community's longstanding customs instead reflect the interests of the powerful at the expense of the vulnerable. For precisely these reasons, some constitutional provisions—like the Equal Protection Clause—expressly reject longstanding historical practices.[113]

Just as the Court's threshold choice of a history-only methodology remains contested, so too does its application of this methodology when deciding specific cases.[114] For instance, the Court offered no

"impoverished" historical accounts as leading to "a deeply inconsistent body of First Amendment law that relies on a false view of both our regulatory present and our regulatory past—and is therefore able to proclaim a commitment to laissez-faire principles that, in reality, it has never been able to sustain").

111 *See* Am. Meat Inst. v. USDA, 760 F.3d 18, 48–50 (D.C. Cir. 2014) (Brown, J., dissenting) ("[I]n the First Amendment context, which has been steadily evolving since the late 1800s, history is not 'telling'; rather, it is an especially poor substitute for reasoned judgment." *Id.* at 48 (citation omitted).); Lakier, *supra* note 109, at 2220 ("But why should it matter whether eighteenth- and nineteenth-century legislatures passed rules to restrict the disclosure of speech of this kind? Given how recently the technology to store personal information on a mass scale emerged, the absence of a tradition of regulating speech of this kind tells us very little about whether courts and legislatures would have believed it constitutionally permissible to do so. All it tells us is that the problem of information disclosure had not yet emerged as something legislatures and courts had to concern themselves with." (footnote omitted)).

112 *See* CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 212 (2009) ("[The limitations of tradition include the possibility that such traditions] may suffer from a systematic bias. If so, their views are entitled to less respect, not more, as their numbers increase. [They also] may reflect far less in the way of independent judgment than first appears. Many people may be following the crowd, depriving the collective wisdom of its epistemic credentials.").

113 *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023) (manuscript at 24), https://ssrn.com/abstract=4366019 [https://perma.cc/8KMQ-EZGS] (describing the Equal Protection Clause's function as to "*interrogate* our traditions," so we can't use those very traditions to guide its application).

114 *See* DeGirolami, *supra* note 98, at 1666 ("[M]any questions remain: How narrowly or broadly can a court draw any given practice to construct a tradition? What criteria does it use to exclude new practices as not conforming to the tradition, or to include new practices as more broadly within 'the tradition' long followed?"); John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 21–22 (2014) ("There is a decided lack of guidance as to the appropriate 'jurisprudential methodology' that courts should apply when determining whether a speech category is historically unprotected. Phrased differently, if history is to be decisive, how is history to be decided? Perhaps more

guidance about how specific or how lengthy the relevant regulatory tradition must be to be considered "long,"[115] "long-established,"[116] or "long familiar to the bar" [117] for Free Speech Clause purposes.

Moreover, the Court undertook no effort to document the nature or length of any regulatory tradition for the categories of speech it has identified as unprotected.[118] As just one illustration, when in 1982 the Court held child pornography to be a category of unprotected speech, it made no search for a longstanding history of restricting sexual images of children.[119] It instead emphasized the harms such images posed to children's physical and emotional well-being, especially in contrast to those depictions' "exceedingly modest" First Amendment value.[120]

And when the Court more recently emphasized, in *National Institute of Family and Life Advocates v. Becerra*, the value of tradition when assessing Free Speech Clause challenges to the government's compelled disclosures, it again offered no guidance on the requisite specificity or length of the relevant regulatory tradition.[121] There the majority stated, without elaboration, that the Free Speech Clause poses no bar to the government's compelled "health and safety warnings

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on point, which historical period should be determinative? The founding? The ratification of the Fourteenth Amendment? The precedents that exist in the modern age?" *Id.* at 22 (footnote omitted).).

115 Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011).

116 United States v. Stevens, 559 U.S. 460, 471 (2010).

117 United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" (second alteration in original) (quoting *Stevens*, 559 U.S. at 468)).

118 *See supra* note 73 and accompanying text.

119 *See* New York v. Ferber, 458 U.S. 747, 756–64 (1982); *cf.* GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 273-74 (2017) (explaining that obscenity is also treated as a category of unprotected speech despite the absence of government efforts to regulate obscenity at the time of the First Amendment's ratification). The *Ferber* Court instead relied on social-science literature along with the fact of extensive contemporary (rather than historic) regulation as evidence of the harm threatened by the regulated speech:

> Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating "child pornography." The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

458 U.S. at 758.

120 *Ferber*, 458 U.S. at 762, 756–63.

121 138 S. Ct. 2361, 2376 (2018).

long considered permissible."[122] Does a tradition of requiring the disclosure of health and safety hazards more generally suffice to support contemporary warnings of newly discovered dangers to health and safety (and, if so, a regulatory tradition of what duration)? Or must the government instead identify a tradition (of some as-yet-undetermined length) of requiring warnings about the specific risk identified in a contemporary disclosure requirement? (The Court's own (often inconsistent) practice suggests that we need not go back to the ratification of the First Amendment in 1791 or the Fourteenth Amendment's Due Process Clause in 1868 to identify traditions that can valuably inform constitutional decisionmaking.[123] Recall, as just one illustration, the Court's reliance on a regulatory tradition dating to the 1890s when upholding state laws restricting the distribution of campaign literature in the immediate vicinity of polling places, laws that themselves had evolved in responses to changes in the ways in which voters experienced coercion.[124])

Long story short, history-only is neither the only nor the best of approaches to constitutional decisionmaking.[125] Yet the twenty-first-

122 *Id.*

123 *See* Lakier, *supra* note 109, at 2222 ("The fact that the Court has not specified how long a history of regulation must be to qualify as 'long-settled' means that *Stevens* could be interpreted so as to avoid conflicting with these or any other by-now familiar regulatory schemes.").

124 *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion). As another example (outside of the free speech context), the Court has credited "three-quarters of a century of settled practice" as "long enough to entitle a practice" to "great" weight for purposes of interpreting the President's authority to fill vacancies in certain offices while the Senate is in "recess." NLRB v. Noel Canning, 573 U.S. 513, 533 (2014) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)). Relatedly, some notable originalists remain open, in certain constitutional settings, to the value of traditions measured in a generation rather than in centuries. *See* BARNETT & BERNICK, *supra* note 104, at 29–30 ("[T]he Court has not specified rules for determining deep-rootedness. We suggest that if individual citizens have for at least a generation—that is, thirty years or more—been entitled to enjoy a right as a consequence of the positive constitutional, statutory, or common law of a supermajority of the states, it ought to be presumptively a privilege of US citizenship.").

125 *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (identifying multiple modalities of constitutional interpretation and argument that include historical, textual, structural, doctrinal, prudential, and ethical approaches); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987) (describing the available approaches to constitutional argument to include "arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy").

century Court has made clear that history, and history alone, will control its understanding of the categories of speech unprotected by the Free Speech Clause.[126]

Here, as in so many other areas of the law, courts (along with the rest of us) have learning curves. Legal scholars, policymakers, lawyers, historians, and judges all have a role to play in sculpting the shape and slope of these curves. There's reason to think that lower courts now charged with implementing the Court's history-only pronouncements may be receptive to efforts to identify principled guardrails on this turn. For instance, a number of scholars have documented lower courts' reluctance, in the Free Speech Clause context, to deploy the Court's sweeping antiregulatory rhetoric to dismantle sensible regulatory frameworks.[127] And such guardrails may be of interest to some of the Justices who have contributed to the antiregulatory turn but have to yet to engage with its implications for longstanding economic regulation.[128]

In other words, here I work within the twenty-first-century Court's history-only directive even as I remain critical of it. Others have undertaken related projects in other constitutional settings. For instance, Joseph Blocher and Eric Ruben note that they find the contemporary Court's Second Amendment traditionalist methodology to be problematic even as they "write from the internal perspective, attempting

126 And more recently, of course, the Court has insisted on a history-only approach to a growing number of other constitutional questions. *See supra* notes 100–02 and accompanying text.

127 *See* David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 69 (2017) (noting that "over forty years of experience with the strict scrutiny default rule has revealed courts' consistent willingness to surreptitiously evade the formal doctrinal framework" to preserve what they considered sensible regulation of harmful speech); Dan V. Kozlowski & Derigan Silver, *Measuring* Reed*'s Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMMC'N L. & POL'Y 191, 261–69 (2019) (concluding that lower courts have been reluctant to apply *Reed* to unsettle longstanding law).

128 *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2347 (2020) (plurality opinion) (stating that its decision is "not intended" to affect "traditional or ordinary economic regulation of commercial activity"); *id.* at 2361 (Breyer, J., concurring in judgment with respect to severability and dissenting in part) ("The idea that broad language in any one case (even *Reed*) has categorically determined how content discrimination should be applied in *every single context* is both wrong and reflects an oversimplification and over-reading of our precedent. The diversity of approaches in this very case underscores the point that the law here is far from settled. Indeed, the plurality itself disclaims the idea that its rule would apply to unsettle 'traditional or ordinary economic regulation of commercial activity,' indicating that the plurality presumably thinks there are some outer bounds to its broad language.").

to make the most of what the Court has given us," thus combining "critique with a positive vision for coherent implementation."[129] And Reva Siegel counsels that it is important to document "outsiders[']" history when implementing the Court's newly announced history-only approach to identifying fundamental rights even as she challenges that approach.[130]

To this end, even under the contemporary Court's exclusive focus on regulatory tradition in identifying categories of unprotected speech, choices remain when framing the relevant regulatory tradition. The remainder of this Part proposes that we choose a functional approach to assessing the relevant regulatory history that remains attentive to democratic self-governance as a core Free Speech Clause value.

2. A Functional Approach to Assessing Regulatory History

At its best, history and tradition can reveal the time-tested reflections of "many minds" over "many years"[131] about the categories of speech that do little to advance First Amendment values while threatening significant harm—categories of speech that have thus long been regulated without triggering First Amendment scrutiny.[132] More specifically, historical analysis at its best recognizes that our traditions are often evolutionary, and appropriately so. What's historically constant is not always, and certainly not only, what's historically important.[133]

A history-only approach that credits only linear and uncomplicated regulatory traditions as valuably informing constitutional

129 Blocher & Ruben, *supra* note 27 (manuscript at 38); *see also id.* ("Judges, litigators, and scholars must all be able to make arguments within *Bruen*'s framework, even if they believe it to be fundamentally flawed.").

130 Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1198, 1197–98 (2023) (highlighting the drawbacks of the Court's history-only approach to fundamental-rights analysis, while urging that we identify "ways to democratize our claims on constitutional memory—to depict the plural sources of the nation's history and traditions," *id.* at 1197).

131 *See* SUNSTEIN, *supra* note 112, at 94–95 (describing "many minds" arguments as advocating that "the persistence of a practice across many minds and many years makes it more likely to be correct, wise, or good").

132 *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011) ("[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'" (second alteration in original) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010))).

133 *See* ANNETTE GORDON-REED, ON JUNETEENTH 120 (2021) (describing "change over time" as "the heart of a historian's work"); CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 96 (1969) ("History, in sum, tells us what to avoid and whom to accept.").

problem-solving denies the reality that a particular problem's nature and scope often change over time in ways that demand changes in our response. As Bill Eskridge reminds us, "[t]radition is rarely simple and univocal; it is multifarious, evolving, and complicated."[134] So too does a history-only approach that credits only linear and uncomplicated regulatory traditions ignore communities' efforts to learn from experience in wrestling with longstanding problems.[135] Framing the requisite regulatory tradition too narrowly thus offers no room for political bodies to newly recognize, or to grapple with new manifestations of, problems that have long troubled those bodies and the people they represent.[136]

Better to delimit the relevant regulatory tradition by crediting the evolution of policymakers' solutions to complex problems over time. More specifically, for Free Speech Clause purposes, better that we focus on *why* the government has long regulated speech in a particular category, and then define the relevant category of unprotected speech as that which has long been regulated to serve those functions. Under this approach, we look to see whether contemporary speech regulations serve the same functions as those served by longstanding regulations (say, protecting public health and safety by requiring warnings)—even if they regulate risks that were unrecognized decades or centuries ago (like the health dangers of asbestos, or fentanyl). Think too of antitrust law that has long restricted the exchange and use of certain information to facilitate market competition, evidence law that has long prohibited the use of certain information (like information about a defendant's prior bad acts or information learned through hearsay) to protect the fairness and integrity of legal decisionmaking processes, and professional responsibility law that has long barred the

134 William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 193, 194 (2009); *see also id.* ("Lawyers and judges tend to interpret 'tradition' statically and instrumentally, to mean legal practices or norms that have persevered over a long period of time *and* that provide stable meaning that can be used to resolve a legal issue. The static understanding is related to the instrumental use, because lawyers and judges prefer simplicity to complexity. In contrast, historians approach tradition dynamically and non-instrumentally, to mean legal practices or norms that as a general principle have persevered in some ways and evolved in others.").

135 *See* Sunstein, *supra* note 103, at 12 (observing the failure of the Court's historical analysis to acknowledge "some forms of moral progress"); *see also* MILLER, *supra* note 133, at 27–28 (emphasizing the value of history as shedding light not only on "contemporaneous meaning but also as potential for growth" and on the importance of studying "the stream and the flow, not merely the source").

136 Others have recognized the dangers of too narrow a framing of the relevant regulatory tradition in other constitutional settings. In Second Amendment contexts, for example, Joseph Blocher and Eric Ruben counsel that we operate at higher levels of generality and look for broad principles of similarity rather than insist on historical models that are nearly identical. *See* Blocher & Ruben, *supra* note 27 (manuscript at 61–65).

use or disclosure of confidential communications to protect attorney-client and doctor-patient relationships.

This sort of functional approach for identifying the requisite regulatory tradition permits policymakers to learn from time and experience when responding to stubborn problems of long standing. Such an approach remains attentive to democratic self-governance as a core Free Speech Clause value when it respects evolving responses within that tradition by policymakers accountable to the people for their successes and failures in addressing enduring problems.[137] The next Section applies this functional approach specifically to securities regulation.

B. What This Means for Securities Law

This functional approach explains a category of unprotected securities-related speech that encompasses the speech that has long been regulated to serve the related but distinct functions of informing and protecting investors. (Recall again that *protecting* investors from companies' and managers' deception and self-dealing is a function distinct from *informing* investors' autonomous choices about which investment options best align with their interests even absent corporate deception.)[138] More specifically, the contemporary securities law framework continues a lengthy regulatory tradition responsive to securities markets' unusual vulnerability to information asymmetries.[139] To address those asymmetries and their attendant harms, securities laws have long regulated securities-related speech not only by prohibiting false and misleading speech but also by requiring certain disclosures. For instance, New Jersey required a variety of securities disclosures in

137 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517–18 (1996) (Scalia, J., concurring in part and concurring in judgment) ("I will take my guidance as to what the Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of 'the freedom of speech,' and where the core offense of suppressing particular political ideas is not at issue, from the long accepted practices of the American people." *Id.* at 517 (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting)).); *see also* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1475 (2022) ("Where we adhere to the teachings of history, experience, and precedent, the dissent would hold that tens of thousands of jurisdictions have presumptively violated the First Amendment, some for more than half a century, and that they have done so by use of an on-/off-premises distinction this Court has repeatedly reviewed and never previously questioned. For the reasons we have explained, the Constitution does not require that bizarre result.").

138 *See supra* note 34 and accompanying text.

139 *See* STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860, at 4 (1998) (summarizing this tradition).

1846,[140] Kansas in 1911 enacted the first in a wave of state "blue sky" laws that prohibit companies' fraudulent statements and require basic disclosures to investors,[141] and Congress first enacted federal securities law in 1933.[142]

These laws continue an even more extended regulatory tradition.[143] As legal scholar Stuart Banner recounts,

> The belief that the sellers of securities were more likely to be deceitful than the sellers of other kinds of property, and that the sale of securities accordingly needed to be more closely supervised by government than the sale of other things, was widely held as early as the 1690s, and had never disappeared. The associated opinion that the securities market was unusually susceptible to domination by insiders, who could control prices by controlling the flow of information, was equally old."[144]

For this reason, "the perceived differences between securities and older kinds of property, especially the enhanced ability of sellers to manipulate prices and otherwise deceive buyers, led English and then American regulators gradually to develop special statutory schemes targeted only at the transfer of securities."[145] As Adam Winkler has also documented, these laws responded to growing public concerns that (what Berle and Means described as) the separation of companies' ownership from their control too often empowered corporate managers to appropriate the company's resources in self-interested ways to the disadvantage of shareholders.[146]

In other words, today's securities laws neither address a new problem nor deploy a new set of solutions to those problems. Instead, they regulate securities-related speech for reasons and in ways "long familiar to the bar,"[147] when they respond to the realities that the risks to

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140 *See* Act of Feb. 25, 1846, 1846 N.J. Laws 64 (prescribing manufacturing companies' duties to include disclosing the amount of their capital stock fixed and paid in, the amount of increases to their capital stock, any reductions in their capital stock, and their annual reports).

141 Act of Mar. 10, 1911, ch. 133, 1911 Kan. Sess. Laws 210.

142 Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2018)). The 1933 Act's disclosure requirements were themselves inspired by the United Kingdom Joint Stock Companies Act 1844, 7 & 8 Vict. c. 110. *See* Simon Gleeson & Harold S. Bloomenthal, *The Public Offer of Securities in the United Kingdom*, 27 DENV. J. INT'L L. & POL'Y 359, 359 (1999); *see also* Bishop C. Hunt, *The Joint-Stock Company in England, 1830–1844*, 43 J. POL. ECON. 331 (1935) (discussing the securities-related concerns that led to the nineteenth-century enactment of the United Kingdom's Companies Act).

143 *See* BANNER, *supra* note 139, at 4.

144 *Id.* at 281–82.

145 *Id.* at 283.

146 WINKLER, *supra* note 50, at 205–07.

147 United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined

investors change over time, and that investors evaluate those risks through a variety of methodologies that may also change with time. "Most of today's regulatory techniques, including prohibitions of certain types of transactions, mandatory disclosure rules, minimum holding periods, and rules forbidding deception and price manipulation, were tried or at least suggested in the eighteenth and early nineteenth centuries," Professor Banner explains.[148] "The market and the government were both much smaller, but a good part of the landscape would be familiar to a twentieth-century lawyer."[149]

The threads that stitch this regulatory tradition together are the functions it has long sought to achieve: informing and protecting investors (functions that also serve broader public-regarding interests). Again, this regulatory tradition is necessarily speaker- and content-based: it regulates certain expression (by requiring accurate disclosures and prohibiting false and misleading speech) by certain speakers (securities issuers and other market participants) precisely because those distinctions are relevant to the expression's potential for harm and value.

As we've seen, we can trace this tradition of regulating securities-related speech back nearly a century for federal law, even longer for state law, and longer still within the Anglo-American tradition. Securities law stays faithful to this tradition, and thus should remain exempt from First Amendment scrutiny, when it regulates securities-related speech to serve these listener-centered functions. More specifically, contemporary securities law remains consistent with this regulatory tradition when it responds to the realities that the risks to, and preferences of, investors change over time by requiring disclosures that inform investors about new risks (like climate change and cybersecurity) even when those risks were unknown to, or unrecognized by, past generations. Think, as one of many examples, of asbestos: "For years, asbestos-related risks were invisible, and information about asbestos would likely have been called 'non-financial.' Over time, those risks went from invisible to visible to extremely clear, and clearly financial."[150] That new risks to investors will arise (as well as new investor

to the few 'historic and traditional categories [of expression] long familiar to the bar.'" (second alteration in original) (quoting United States v. Stevens, 559 U.S. 460, 468 (2010))).

148 BANNER, *supra* note 139, at 4.

149 *Id.*

150 John Coates, *ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets*, U.S. SEC. & EXCH. COMM'N (Mar. 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121 [https://perma.cc/JTH3-ED82]; *see also id.* ("Not surprisingly, disclosure about these risks did not initially show up in SEC filings, but there too they went from invisible to increasingly disclosed.").

approaches to evaluating those risks) is foreseeable, even if the specific content of those risks and methodologies is not.

Consider, for instance, contemporary investor demand for information about companies' vulnerabilities and contributions to climate change.[151] Disclosures of these sorts continue securities law's regulatory tradition by informing investors' decisions in several ways. First, some investors find that such disclosures provide them with information material to their valuation of a company's potential for profit or loss.[152] More specifically, some investors worry that environmental damage caused by a company may lead to its legal liability or reputational loss, or feel that disclosures about companies' risk to climate change informs them about "a potential source of systemic risk."[153] Along these lines, as securities law scholar Virginia Harper Ho observes, "[T]he current lack of investment-grade information about the financial impacts of climate change may create pricing distortions that expose global markets to destabilizing and unpredictable volatility when these hidden risks materialize, resulting in financial shock and sudden asset loss."[154]

Second, some investors rely on climate change disclosures to help them invest in companies and elect management aligned with their social values.[155] Recall that many investors have long made investment decisions based on factors unrelated to a company's future earnings or cash flow, and that some investors care about *how* a company makes money and not just that it makes money.[156] These investors are sometimes described as having a "double" or even "triple" bottom line

151 *See* Sarah C. Haan, The First Amendment and the SEC's Proposed Climate Risk Disclosure Rule 4–6 (June 16, 2022) (unpublished manuscript), https://ssrn.com/abstract=4138712 [https://perma.cc/T7XD-82CZ] (describing such proposals).

152 *See id.* at 11–12 (discussing investor demand for ESG disclosures); Williams, *supra* note 32, at 1278–87 (same); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (making clear that a fact is "material" for securities law purposes when there is a substantial likelihood that it would affect a reasonable investor's decisionmaking).

153 Harper Ho, *supra* note 33, at 296; *see also id.* at 280 (describing "evidence of the financial materiality of many ESG factors and rising demand for better information on the financial effects of climate change" (footnote omitted)); U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 9 (2020) (finding that most institutional investors interviewed "seek ESG information to enhance their understanding of risks that could affect companies' value over time").

154 Harper Ho, *supra* note 33, at 296–97.

155 *See* Jill E. Fisch et al., Comment Letter on Climate Change Disclosures 5 (June 11, 2021) (explaining how institutional and other investors "use ESG information to evaluate reporting companies with respect to their nonfinancial preferences"); *id.* at 6 (explaining how investors use ESG information in exercising their voting rights to oversee management).

156 *See supra* notes 42–46 and accompanying text.

because they make investment choices aligned with their environmental and social interests along with their financial interests.[157]

Not all investors agree, to be sure. But we can expect such disagreement when we recall investors' heterogeneity and thus their diverse preferences and priorities.[158] Disclosures that reflect the diversity of investors' informational interests about new risks remain consistent with securities law's longstanding regulatory tradition of informing and protecting investors.

To be sure, some assert that the relevant regulatory tradition should be defined narrowly to include only disclosures about certain traditional "financial" measures of securities' value or risk—asserting that not all investors value other sorts of disclosures or that investors that *do* value those disclosures are wrong to do so.[159] To the extent that such arguments suggest that requiring disclosures about nonfinancial matters reflects regulators' ideological preferences rather than listeners' informational interests, they are rooted in a "negative theory" of the Free Speech Clause that "understands the First Amendment to be more about our fears of the government than about our affirmative

157 *See* Timothy F. Slaper & Tanya J. Hall, *The Triple Bottom Line: What Is It and How Does It Work?*, IND. BUS. REV., Spring 2011, at 4, 4 ("The ['triple bottom line'] TBL is an accounting framework that incorporates three dimensions of performance: social, environmental and financial."); Williams, *supra* note 32, at 1277 ("The discussion has been separated into types of investors primarily for simplicity. It is unlikely that people are pure economic investors or pure social investors, however. Rather, different mixtures of economic and noneconomic preferences inform investors' views. Most 'economic' investors would recoil from even extraordinarily profitable investments in slave-labor camps, for instance, were such things legal in another country, just as most 'social' investors would recoil from investments that promised no return." (footnotes omitted)). Note that some investment managers offer funds geared to right-leaning investors. *See* Joshua Green, *The Anti-Woke Investors*, BLOOMBERG BUSINESSWEEK, Nov. 15, 2021, at 38.

158 *See* Williams, *supra* note 32, at 1207 (advocating for SEC disclosures "both from the perspective of the 'economic' investor, who is primarily interested in financial returns, and from the perspective of the 'social' investor, who is concerned with the social and environmental effects of corporate conduct").

159 *See* Lawrence A. Cunningham et al., Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors 2–8, 10–12 (Apr. 25, 2022) (expressing doubt that individual investors, as opposed to institutional investors, care about ESG disclosures along with doubt that ESG metrics help predict companies' performance). For discussion of institutional and individual investors and the various ways in which they engage with management (or not), see Alon Brav, Matthew Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. FIN. ECON. 492 (2022); Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019); Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 UC DAVIS L. REV. 1913 (2021). Others offer evidence that many investors do seek this information and that they have good reason for doing so, see *supra* notes 151–57 and accompanying text.

aspirations of the good."[160] As I have written elsewhere, however, "negative theory should pack less power in settings where the government's discretion is limited, where we don't see evidence of its self-interest or incompetence, or where listeners can't protect themselves from powerful private speakers such that we distrust nongovernmental parties even more than the government."[161] As we've seen, securities law reflects a regulatory tradition responsive to the harms threatened by nongovernmental speakers who hold advantages of information (and sometimes power) over their listeners.

In short, the categorical boundaries anticipated by this functional approach are justifiable on normative as well as historical grounds. This functional approach returns democratic self-governance to the core of free speech law by defining the requisite regulatory tradition to permit the people's representatives to learn from time and experience when responding to stubborn problems of long standing as well as to newer manifestations of those problems.[162] Securities regulation's emphasis on information-forcing disclosures additionally advances listeners' First Amendment interests not only in autonomy but also in democratic self-governance "because citizens must have accurate information not only to knowledgeably participate at the ballot box but also to have meaningful freedom in economic life itself."[163]

At the core of the tradition identified here is the regulation of speech by securities issuers and company management to inform and protect investors as listeners. The decisions of politically accountable governmental bodies serve these functions (and thus regulate within a category of unprotected speech) so long as they regulate securities-related speech to inform heterogeneous investors' assessments of risk and value. As a constitutional matter, this means that these actors' assessments of what's valuable to listeners should generally face rational

160 HELEN NORTON, DISTRUST, NEGATIVE FIRST AMENDMENT THEORY, AND THE REGULATION OF LIES 3 (2022).

161 *Id.* at 6; *see also id.* at 5 ("[A]lthough our experience frequently leads us to distrust the government . . . , sometimes our experience leads us to distrust powerful private speakers even more.").

162 This is what Joseph Blocher and Reva Siegel describe as "democracy's competence." Blocher & Siegel, *supra* note 27.

163 Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2033 (2022); *see also id.* ("When listeners are epistemically dependent for information on commercial speakers, regulation of such speech for truthfulness is consistent with the First Amendment . . . ."); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1371–74 (2019) (explaining how securities disclosures advance investors' First Amendment autonomy and self-governance interests).

basis review (with the exception of disclosures that threaten third parties' equality, privacy, or other constitutionally protected rights).[164] At the same time, important nonconstitutional mechanisms, like Administrative Procedure Act requirements and political accountability, remain available to check those bodies' choices.

Even as we frame this category of unprotected securities-related speech, however, work remains to be done in sanding and shaping its contours. For example, we can expect disagreement about whether the regulation of speech by those who play an intermediary role between securities issuers and investors lies closer to this tradition's periphery or to its core: examples include the regulation of certain speech by credit rating agencies (services that rate companies' ability to pay back debt)[165] and proxy advisers (services that review corporate disclosures and provide research and advice to inform shareholders' voting decisions).[166] In my view, these remain plausibly within the functional tradition that I've suggested because they seek to inform and protect investors by regulating the securities-related speech of speakers who enjoy advantages of information (and sometimes power) over those investors.[167]

* * *

As we've seen, securities differ from other goods and services available in the commercial marketplace in ways that intensify the importance of accurate securities-related information to investors as listeners. These differences, in turn, support the treatment of securities-related speech as a category of speech unprotected by the First Amendment.[168] Note that I do not assert that the securities setting is the only environment in which the strength of listeners' interests is key

164 *See* Post, *supra* note 41, at 893 (noting "that courts ought to be cautious about approving compelled commercial speech in the presence" of a "conflict with other constitutional values" like equal protection or privacy). Contrast, for example, investors' interest in a CEO's compensation package to any such interest in the CEO's pregnancy status or pregnancy history. Disclosures of the latter, but not the former, sort implicate individuals' privacy and equality interests.

165 *See* Frank Partnoy, *What's (Still) Wrong with Credit Ratings?*, 92 WASH. L. REV. 1407, 1408–19 (2017) (discussing and critiquing the regulation of credit rating agencies as insufficient to address their potential for contributing to systemic economic harm).

166 *See* Concept Release on the U.S. Proxy System, Exchange Act Release No. 62495, Investment Advisers Act Release No. 3052, Investment Company Act Release No. 29340, 75 Fed. Reg. 42982 (July 22, 2010).

167 These sorts of definitional challenges are not uncommon. Think, for instance, of the Court's fifty-year learning curve before it settled on a definition of unprotected "incitement" to capture a close and direct connection between speech and violence (or other illegal activity). *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (defining unprotected incitement as speech "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action").

168 *See supra* notes 31–50 and accompanying text.

to First Amendment law.[169] Instead, I observe that securities are different from other commercially available goods and services in meaningful ways—and that the history of securities regulation recognizes and reflects these differences in ways that matter for First Amendment law.[170]

If the Court chooses not to treat securities-related speech as a category of speech unprotected by the First Amendment, however, it may well turn to the very different rules that apply to the government's regulation of commercial speech.[171] Such a choice would require case-by-case adjudication of each of the myriad securities rules under commercial speech review. Given the interrelated structure of the securities regulation framework, such rule-by-rule adjudication would threaten to bring down the entire ship—to the detriment of investors, shareholders, and the public.[172] This reality adds a pragmatic justification to the normative and historical justifications for treating securities-related speech as a category of unprotected speech.

The next Part nevertheless considers the possibility that the Court will treat securities-related speech as a type of commercial speech.

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169 *See* Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 460–68 (2019) (discussing other listener-centered relationships like those between employers and workers, and those between professionals and their clients and patients).

170 *See* Lillian R. BeVier, *A Comment on Professor Wolfson's 'The First Amendment and the SEC*,' 20 CONN. L. REV. 325, 326 (1988) ("The securities market and its associated market for information are in a different institutional setting than are the market for consumer goods and services and its associated market for information; and both markets in turn differ significantly from the institutional setting that characterizes the political market and the market for political information. Therefore, it should not be surprising, and it can hardly be deemed alarming, that the rules that have evolved to govern speech within these different contexts are categorically different from one another."); Dalley, *supra* note 34, at 1090–91 ("[Securities regulation] operates in a singular environment: a highly developed, relatively efficient market with an enormous support structure of both market and informational intermediaries, in a context in which decision-makers often seek professional advice and make great efforts to be as rational as possible. This environment provides a mechanism by which disclosed information can reach its audience, affect behavior, and cause a desired result through its operation on a single variable, the price of a security.").

171 Yet another possibility is that the Court will abandon commercial speech doctrine altogether, and simply apply strict scrutiny to all content-based regulation of speech, regardless of its commercial character. *See infra* notes 192–94 and accompanying text. That possibility's destabilizing consequences, however, lead some to predict that lower courts instructed to apply strict scrutiny to longstanding regulatory frameworks will balk at dismantling those frameworks, and will instead water down strict scrutiny in ways ultimately detrimental to the robust protection of core political speech. *See* Reed v. Town of Gilbert, 576 U.S. 155, 178 (2015) (Breyer, J., concurring in judgment) ("[T]he Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force.").

172 *See* Haan, *supra* note 151, at 10 ("That choice . . . would make nearly every securities regulation a target for First Amendment challenge.").

Here too, securities regulation's listener-centered functions do important work.

III. SECURITIES-RELATED SPEECH AS COMMERCIAL SPEECH

"Listeners first," the Court's commercial speech doctrine has long emphasized. To be sure, First Amendment law often privileges *speakers'* interests. This is the case of political expression and other speech in public discourse, where the Court presumes an environment of equality between speakers and listeners that permits listeners to protect themselves from harmful or unwelcome speech through the traditional remedies of exit or voice.[173] But First Amendment law at times privileges listeners over speakers in some speaker-listener relationships involving asymmetries of information or power: "[W]hen we require *more* of speakers when their listeners lack information or power[,]we improve the quality of the communicative discourse. More specifically, we promote listeners' First Amendment interests when we enable them to receive accurate information that informs, but does not coerce, their decision-making."[174]

The Court's longstanding commercial speech doctrine exemplifies this approach by protecting commercial expression from regulation when that expression serves listeners' interests—but not when that expression frustrates those interests.[175]

A. Commercial Expression's First Amendment Protection Through a Listener-Centered Lens

The Court in 1976 held for the first time that the Free Speech Clause provides *some* protection for commercial speech, where it considered consumers' (that is, listeners') First Amendment challenge to Virginia's law that forbade pharmacists from advertising their prescription drug prices.[176] Ostensibly motivated by fears that such advertising

173 *See* HIRSCHMAN, *supra* note 49, and text accompanying note 49 (discussing exit and voice); *see also* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 21 (2012) ("Within public discourse, the First Amendment protects the autonomy of speakers, not merely the rights of audiences.").

174 Norton, *supra* note 169, at 443.

175 *See* Post, *supra* note 41, at 874 ("Persons do not engage in commercial speech in order to influence the content of public opinion, but to facilitate transactions in the marketplace."); *see also* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1631 (2017) ("The law of consumer protection has long concerned itself with information and power asymmetries among market participants.").

176 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); *see also* Cortez & Sage, *supra* note 6, at 734 ("In the first case to explicitly extend First Amendment coverage to commercial speech, the plaintiffs were *customers* rather than

would drive pharmacists to cut back on quality professional services in a race to reduce costs and thus prices,[177] the law too often harmed consumers: "For forty tetracycline tablets, a patient could pay $1.20 in one pharmacy and $9.00 in another—a difference of almost 650 percent. Without going from pharmacy to pharmacy, patients would never know there was a cheaper alternative."[178] In striking down the law, the Court emphasized the First Amendment value of commercial speech to consumers as often-vulnerable listeners:

> Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.[179]

Soon thereafter the Court announced that its rigor in reviewing the government's regulation of commercial speech would turn on that expression's capacity to further, or instead frustrate, listeners' First Amendment interests. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, a constitutional challenge to a state's ban on utility advertising that promoted electricity use, the Court again described commercial expression's First Amendment value as contingent on its ability to inform consumers' autonomous decisionmaking.[180] Because commercial speech that is false, misleading, or related to illegal activity offers no constitutional value to listeners, the Court explained that the First Amendment does not protect such speech:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.[181]

The Court contrasted accurate speech about legal commercial activity (like accurate speech about prescription drug prices or available

businesses."). The Court had earlier held that the First Amendment provides *no* protection to commercial advertising. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

177 *Va. State Bd.*, 425 U.S. at 767–68.

178 WINKLER, *supra* note 50, at 291.

179 *Va. State Bd.*, 425 U.S. at 763–64 (footnote omitted).

180 *See* 447 U.S. 557 (1980).

181 *Id.* at 563–64 (citations omitted).

electric services) as generally valuable to its listeners, and thus applied a form of intermediate scrutiny to the government's regulation of such speech.[182] Under this test, courts ask whether the government's interest is substantial, whether the regulation directly advances that interest, and whether the regulation is "not more extensive than is necessary to serve that interest."[183] Note here the Court's choice to apply intermediate (rather than strict) scrutiny to the government's restriction of accurate commercial speech, a choice that permits the government greater latitude to regulate speech in commercial settings than in public discourse. Emphasizing "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,"[184] the Court concluded that the "Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[185]

In sum, the Court in *Central Hudson* divided the universe of commercial speech into two types. To one side is commercial actors' speech that is false, misleading, or related to illegal activity, and thus unprotected by the First Amendment because it frustrates listeners' interests. To another side is all other commercial speech, the regulation of which triggers intermediate scrutiny because such expression usually serves listeners' interests.

Shortly thereafter, the Court added a third type: the government's compelled disclosures of accurate information about available goods and services. In *Zauderer v. Office of Disciplinary Counsel*, the Court upheld a state rule requiring lawyers advertising contingent-fee services (in which the client pays attorney's fees only if their suit is successful) to disclose that clients remain responsible for litigation costs even if their suit does not prevail.[186] In so doing, the Court distinguished the government's requirements that commercial actors *disclose* accurate information to consumers from the government's *restrictions* on those actors' speech, applying a more deferential test to the former than to

182 *Id.* at 564–566, 573.

183 *Id.* at 566. Applying this test, the Court struck down the ban on utilities' promotional advertising: although the ban directly advanced the state's substantial interest in energy conservation, the Court found that the state could achieve this interest through more narrowly tailored regulation that, for instance, permitted utilities to promote "electric devices or services that would cause no net increase in total energy use." *Id.* at 570.

184 *Id.* at 562 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

185 *Id.* at 563; *see also Ohralik*, 436 U.S. at 456 ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.").

186 471 U.S. 626, 650 (1985).

the latter.[187] Again emphasizing that commercial expression's First Amendment protection turns on that expression's value to listeners, the Court found that the government generally serves listeners' interests when it requires commercial actors to disclose *more* accurate information about their goods and services.[188] For this reason, the government's required disclosures of "factual and uncontroversial" information need only be "reasonably related" to consumers' interests so long as they are not "unjustified or unduly burdensome."[189] For years, the government's compelled commercial disclosures usually satisfied *Zauderer*'s deferential review.[190]

* * *

The Court has noted that the commercial speech doctrine itself relies on speaker- and content-based distinctions precisely because those distinctions are key to identifying the universe of commercial speech and its attendant potential for value to listeners' decisionmaking.[191] But the contemporary antiregulatory turn in First Amendment law leads many to wonder whether the twenty-first-century Court still understands the commercial speech doctrine as privileging listeners' First Amendment interests, or whether the Court instead now privileges the First Amendment interests of commercial producers and

187 *Id.* at 650–51.

188 *Id.* at 651 ("The State['s] . . . prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." (citation omitted)); *see also* Shanor & Light, *supra* note 163, at 2086 ("[T]he Constitution extends asymmetrical protection to government *restrictions* on commercial speech versus mandated *disclosures* of commercial speech . . . [b]ecause the First Amendment favors more, rather than less, factual-information flow to the public for its decisionmaking in economic and political life.").

189 *Zauderer*, 471 U.S. at 651; *see also* CTIA - The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 842 (9th Cir. 2019) (applying *Zauderer* to disclosures intended to achieve "substantial" government interests like informing consumers about health and safety risks); Am. Meat Inst. v. USDA, 760 F.3d 18, 20 (D.C. Cir. 2014) (applying *Zauderer* to disclosures intended to inform consumers about products' attributes of interest to them); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009) (same).

190 *See* Note, *Repackaging* Zauderer, 130 HARV. L. REV. 972, 973 (2017).

191 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011) ("It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech."); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) (noting that its "decisions have recognized 'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech'" (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978))).

sellers as speakers—including those speakers' interests in *not* disclosing certain accurate information.[192] Indeed, the majority's dictum in *Sorrell v. IMS Health Inc.* suggested the possibility of applying strict scrutiny to the government's regulation of commercial speech (even while holding that the contested regulation in that case—a state law that restricted the sale of information about doctors' prescribing practices for use in pharmaceutical marketing—failed even *Central Hudson* intermediate scrutiny).[193] And Justice Thomas has long argued that courts should apply strict scrutiny to the government's regulation of commercial speech just as they do to the government's regulation of political speech.[194] Nevertheless, lower courts have so far remained largely reluctant to retreat from the Court's longstanding doctrine that treats commercial speech that is false, misleading, or related to illegal activity as entirely unprotected; that applies intermediate scrutiny to the government's regulation of accurate speech about legal commercial activity; and that applies more deferential review to the government's compelled commercial disclosures about factual matters.[195]

B. What This Means for Securities Law

Although the Supreme Court has not precisely defined the universe of "commercial speech," at a minimum the term includes

192 *See* Cortez & Sage, *supra* note 6, at 763–64 (urging a renewed emphasis on listeners' interests when considering the First Amendment claims of corporate speakers); Amy Kapczynski, *Free Speech, Incorporated*, BOS. REV., Summer 2019, at 156, 164 ("In 2011 the commercial speech train jumped the tracks. The legal argument shifted decisively from its earlier focus on citizens' need for information and toward a newfound solicitude for the rights of corporate speakers."); Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 5 (2012) ("*Sorrell* completes what has been a decades-long process of turning the rationale for commercial speech doctrine upside down by putting the speaker, rather than the public interest, at the center of the analysis. It completes what I call has been a 'bait-and-switch' whereby the protection for commercial speech was offered under one justification, but once it was granted, has morphed into something completely different.").

193 *Sorrell*, 564 U.S. 552, 564–65 (2011).

194 *E.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 255 (2010) (Thomas, J., concurring in part and concurring in judgment) (disagreeing with the doctrinal rules that apply less rigorous scrutiny to the government's restriction of accurate commercial speech and to the government's compelled disclosures of factual commercial information); *see also* MARTIN H. REDISH, COMMERCIAL SPEECH AS FREE EXPRESSION: THE CASE FOR FIRST AMENDMENT PROTECTION 99 (2021) ("[A]lthough the Supreme Court arguably continues to adhere to the four-pronged *Central Hudson* test, that test as currently applied offers far more constitutional protection to commercial speech than it did in its early years." (footnote omitted)).

195 *See* William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 BYU L. REV. 875, 912 ("[E]ven relatively recent lower court opinions have continued to resist imposing strict scrutiny on commercial speech regulations, despite *Sorrell*'s implication that they should.").

commercial advertising and other speech that proposes, communicates, or negotiates the terms and conditions of a commercial transaction.[196] The Court itself has never considered whether securities-related speech constitutes commercial speech for First Amendment purposes. But lower courts have occasionally treated securities-related speech as a species within the genus of commercial speech.[197]

Rather than undertake the nigh-impossible task of working through each specific securities regulation, the remainder of this Part instead briefly sketches how commercial speech doctrine maps onto the three major forms of securities regulation: antifraud rules that prohibit certain false and misleading speech; rules that require the disclosure of accurate information to inform listeners' decisionmaking; and gun-jumping rules that tie the timing of certain securities-related offers and marketing to the submission, review, and delivery of those mandatory disclosures. Much of that regulatory framework can satisfy the requisite scrutiny so long as courts continue to tether their understanding of commercial expression's value (and thus its First Amendment protection) to that expression's capacity to inform listeners' autonomous decisionmaking.[198]

1. Antifraud Rules

Securities laws' antifraud rules should remain insulated from First Amendment review under the Court's commercial speech doctrine,

196 *See, e.g.*, Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (characterizing New York law as a regulation of commercial speech because it regulated retailers' communication of the price of their goods and services); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (characterizing product demonstrations in campus dormitory rooms as commercial speech); Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973) (characterizing job advertisements as commercial speech). Amanda Shanor and Sarah Light propose that because the justifications for commercial speech doctrine center on settings involving asymmetries between speakers and listeners, so too should courts define "commercial speech" itself to mean a commercial actor's speech that occurs in a setting of informational dependence. Shanor & Light, *supra* note 163, at 2101.

197 *See* United States v. Wenger, 427 F.3d 840, 847, 849 (10th Cir. 2005) (holding that Section 17(b) of the Securities Act regulated commercial speech, and satisfied *Zauderer* scrutiny, by requiring that persons promoting or publicizing stock for compensation disclose that fact along with the amount of payments received).

198 For a related listener-centered discussion of how a different regulatory regime—food and drug law—could and should satisfy contemporary commercial speech review, see Amy Kapczynski, *supra* note 7, at 202 ("The FDA's substantiation requirements for both pharmaceuticals and tobacco are designed to protect the public by *informing* it . . . . The FDA's regulatory approaches to medicines and tobacco, as described earlier, can be understood as informing consumers, and so are in no real tension with modern commercial speech law." (footnote omitted)).

which treats false and misleading commercial speech as entirely unprotected by the First Amendment because it frustrates listeners' interests.[199] Note that this doctrine does not require the government to prove the commercial speaker's culpable mental state, as its listener-centered focus recognizes that false or misleading commercial expression interferes with listeners' informed decisionmaking regardless of the speaker's scienter. While a listener may find the sting of deception even more painful when accompanied by the speaker's intent to deceive, the deception itself threatens listeners' autonomy, enlightenment, and self-governance interests regardless of the speaker's state of mind.[200]

2. Mandatory Disclosures

The contemporary antiregulatory turn in First Amendment law includes greater judicial skepticism of the government's compelled commercial disclosures, skepticism that takes several doctrinal forms.[201] Whether a specific disclosure rule satisfies this increasingly skeptical review will turn, of course, on the specific disclosure at issue.

a. Deferential or Skeptical Review?

Recall that the Court applies more deferential *Zauderer* review to compelled disclosures of commercial matters deemed "factual and uncontroversial."[202] Increasingly attentive to the First Amendment interests of unwilling speakers, however, the twenty-first-century Court

199 *See* Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1430 (2020) (asserting that areas of traditional government regulation rooted in the private common law of tort and contract—like the antifraud rules—face little First Amendment risk); James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 341, 371–72 (2018) (noting no First Amendment bar to securities laws that prohibit fraudulent statements made to investors).

200 *See* Aaron v. SEC, 446 U.S. 680, 696–702 (1980) (holding that the SEC need not prove the speaker's subjective intent under section 17(a)(3) of the Securities Act of 1933 that prohibits transactions and practices that "*operate*[] or *would operate* as a fraud or deceit" because that provision "quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible," *id.* at 697 (quoting Securities Act of 1933 § 17(a)(3), 15 U.S.C. § 77q(a)(3) (1976)); Shanor & Light, *supra* note 163, at 2094 (emphasizing falsity's harm to listeners in "relationships of reliance and informational dependence").

201 For a sampling of discussion criticizing these contemporary shifts in the First Amendment law of compelled commercial disclosures, see Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881 (2022); David S. Han, *Compelled Speech and Doctrinal Fluidity*, 97 IND. L.J. 841 (2022); Post, *supra* note 41; Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731 (2020); Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L.J. 811 (2022).

202 *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985).

is now quick to characterize a disclosure as instead "controversial." *National Institute of Family and Life Advocates v. Becerra* illustrates the point.[203] In that case, pregnancy service centers (organizations that seek to persuade pregnant women not to have abortions) asserted First Amendment challenges to California's law that required them to disclose that California provided free or low-cost reproductive health care services including prenatal care, contraceptive care, and abortion.[204] A 5–4 Court found that *Zauderer* deference did not apply: even though the disclosure was factually accurate, the majority found it nevertheless "controversial" because it required the speaker to mention "abortion, anything but an 'uncontroversial' topic."[205] (Several thoughtful observers suggest that *NIFLA* is distinguishable from most other compelled-disclosure cases because it dealt with abortion and because it did not arise in a commercial setting since the pregnancy service centers did not charge for their services.)[206]

Along these lines, some lower court*s* are quicker to describe the government's compelled commercial disclosures as involving something other than "factual and uncontroversial" matters, applying *Central Hudson* intermediate scrutiny (which requires the government to show that its regulation of commercial speech "directly advance[s]" its "substantial interest" in a way "not more extensive than is necessary to serve that interest")[207] rather than more deferential *Zauderer* review (under which the government's compelled commercial disclosures will survive so long as they do not unduly burden the commercial actor's speech and are reasonably related to the government's informational objectives).[208] Consider, for example, *National Ass'n of Manufacturers v.*

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203 138 S. Ct. 2361, 2388 (2018). This move too has generated plenty of criticism. *See, e.g.*, REDISH, *supra* note 194, at 131 (proposing instead that "the compelled speech must not include facts or scientific statements with which the compelled speaker reasonably disagrees"); Shiffrin, *supra* note 201, at 731–32 (concluding that "[w]hether factual, informational speech is controversial in any meaningful sense should be irrelevant to a First Amendment inquiry").

204 *NIFLA*, 138 S. Ct. at 2368.

205 *Id.* at 2372. It then found that the notice failed intermediate scrutiny. *Id.* at 2375. Note that the majority distinguished as constitutionally permissible "health and safety warnings long considered permissible" or "purely factual and uncontroversial disclosures about commercial products." *Id.* at 2376.

206 *See, e.g.*, Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 66 (2019) (describing *NIFLA* as "primarily about [the] conservative Justices' hostility to abortion rights"); Haupt & Parmet, *supra* note 8, at 301 ("[T]he most plausible justification for *NIFLA* remains that it is primarily an abortion decision wrapped into a First Amendment claim.").

207 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564, 566 (1980).

208 Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985).

SEC.[209] In hopes of ameliorating the humanitarian crisis created by armed conflict in the Congo funded by the sale of certain minerals, Congress directed the SEC to develop a rule requiring publicly traded companies to disclose whether the minerals used in their products had or had not been found to be "DRC [Democratic Republic of the Congo] conflict free"; the National Association of Manufacturers brought a First Amendment challenge to the resulting "Conflict Minerals Rule."[210] There the D.C. Circuit assumed (without deciding) that the compelled disclosure involved commercial speech,[211] and chose to apply *Central Hudson* skepticism (rather than *Zauderer* deference) to the disclosure in part because it concluded that the disclosure's content was not "factual and uncontroversial"; in the panel's view, requiring a company to disclose that its product was "not conflict free" was no different from "compelling an issuer to confess blood on its hands."[212]

Returning to a listener-centered focus offers a principled understanding of *Zauderer*'s requirement that the government's mandatory disclosures must concern "factual and uncontroversial" matters to deserve deference.[213] When we put listeners first, we can and should

209 800 F.3d 518 (D.C. Cir. 2015).

210 *See id.* at 531 (Srinivasan, J., dissenting) (discussing the rule's history and objectives).

211 *Id.* at 521–22 (majority opinion). For its part, the SEC did not describe the rule's purpose as informing and protecting investors, but instead as "directed at achieving overall social benefits" and thus "quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve." *Id.* at 522 (quoting Conflict Minerals, 77 Fed. Reg. 56274, 56350 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249b)); *see also id.* at 521 n.7. Legal scholar Sarah Haan, however, is among those to contest this characterization, emphasizing that Congress had described its directive to the SEC in terms of investors' informational interests. *See* Haan, *supra* note 151, at 12–14 (criticizing the D.C. Circuit for "fail[ing] to credit Congress's plausible legislative choice that the disclosure would be useful to investors—implicitly holding that its own view about the types of information that should be important to investors mattered more than Congress's," *id.* at 13); *see also* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 147 (2018) ("[The required disclosure] is material in the marketplace, and having the information easily available allows the marketplace to work more smoothly and efficiently.").

212 *Nat'l Ass'n of Mfrs.*, 800 F.3d at 522–24, 530. Acknowledging the instability of current commercial speech doctrine, the court offered an alternative basis for its decision and held that the required disclosures also failed *Zauderer* as both unjustified and unduly burdensome to the commercial actor's speech. *Id.* at 524–28.

213 *See* Norton, *Truth and Lies in the Workplace*, *supra* note 9, at 75 ("An approach more consistent with the protection of listeners' First Amendment interests would thus understand 'factual and uncontroversial' in this context to refer to assertions that are provable (or disprovable) as a factual matter in the same way required of contested assertions in defamation, perjury, and antifraud law. . . . In other words, here 'uncontroversial' should mean factually or empirically uncontroversial rather than politically uncontested.").

understand this doctrinal requirement to describe "the epistemological status of the information that a speaker may be required to communicate."[214] As Robert Post points out, "Plainly a mandated disclosure cannot become controversial merely because a speaker objects to making it. . . . Nor should mandated factual disclosures become constitutionally disfavored because they occur in circumstances of acrimonious political controversy."[215] Think of federal law that requires food manufacturers to disclose caloric and other nutritional information even though certain manufacturers would rather not do so: that the disclosure may not be flattering to the product does not detract from (and in fact may increase) the disclosures' informational value to consumers as listeners. Nor does it interfere with manufacturers' ability to promote their products' positive attributes. So too of mandatory securities disclosures that require companies to disclose accurate information to investors about their performance and potential. Under an appropriately listener-centered focus, the disclosures required by securities law are best understood as "factual and uncontroversial," thus triggering *Zauderer* deference.[216]

But even if courts were instead to apply *Central Hudson*'s more skeptical review, the government's compelled disclosures can satisfy the requisite scrutiny when we attend to asymmetries of information (and sometimes power) between speakers and listeners. In assessing whether the government's regulatory means directly advances its informational ends as required by *Central Hudson*,[217] the Court has permitted the government to rely on "studies[,] anecdotes[,] history, consensus, and 'simple common sense'" to justify its choice.[218] Relatedly, the Court has also refused to insist that the government's regulation be the "least restrictive" alternative,[219] instead requiring "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served'; that employs not necessarily the least

214 Post, *supra* note 41, at 910.

215 *Id.*

216 *See supra* notes 54–64 and accompanying text (describing the sorts of disclosures required by securities law).

217 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564, 566 (1980) (requiring the government to show that its regulation of commercial speech "directly advances" its "substantial interest" in a way "not more extensive than is necessary to serve that interest").

218 Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion)).

219 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001), *superseded in part by statute on other grounds*, Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 203, 123 Stat. 1776, 1846 (2009) (codified at 15 U.S.C. § 1334(c) (2018)).

restrictive means but . . . a means narrowly tailored to achieve the desired objective."[220] In other words, the government's appropriately crafted regulations satisfy such scrutiny so long as we remain attentive to listeners' informational interests.[221]

b. Does the Disclosure Unduly Burden the Commercial Actor's Speech?

The Court's longstanding listener-centered commercial speech doctrine nevertheless at times also considers commercial speakers' interests. Recall that the government's compelled commercial disclosures satisfy *Zauderer* review so long as they do not unduly burden the commercial actor's speech and are reasonably related to the government's informational objectives.[222] And they satisfy *Central Hudson* scrutiny when they directly advance the government's substantial interest through appropriately tailored means.[223]

Courts that have struck down compelled commercial disclosures as unduly burdensome to commercial speakers often focus on whether the required disclosure crowded out the commercial actor's own speech in settings with limited space available for the commercial actor to communicate to its customers.[224] Think of billboards, print advertising, and packaging. Along these lines, the Ninth Circuit invalidated

220 Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (citation omitted) (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982)); *see also id.* at 480–81 ("By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.' Far from eroding the essential protections of the First Amendment, we think this disposition strengthens them." (citation omitted) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))).

221 *See, e.g.*, Greater Phila. Chamber of Com. v. City of Phila., 949 F.3d 116 (3d Cir. 2020) (holding that the city's law prohibiting employers' inquiries about applicants' salary history satisfied *Central Hudson* intermediate scrutiny); King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303, 309 (E.D. Pa. 2012) (holding that Fair Credit Reporting Act requirement that credit reports exclude outdated arrest record information regulates accurate commercial speech and thus triggers *Central Hudson* intermediate scrutiny, and then upholding the provision under that scrutiny).

222 Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985); *see also* Am. Hosp. Ass'n v. Azar, 983 F.3d 528, 541 (D.C. Cir. 2020) (stating that *Zauderer* requires the challenger to "demonstrate a burden on *speech*").

223 *See supra* note 183 and accompanying text.

224 *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018) (finding that California disclosure law that required unlicensed pregnancy service centers to disclose that they were in fact unlicensed because they had no health care professionals on site failed *Zauderer* scrutiny as unduly burdensome because the law required the centers to repeat the state's twenty-nine-word script on billboards and other messages, thus drowning

a city's requirement that health warnings about sugared beverages take up twenty percent of the space available for advertising those products, concluding that it unduly restricted the available space for the advertiser's own message in light of record evidence that in this context a ten percent space allotment would also successfully deliver this warning to consumers.[225]

In contrast, the Ninth Circuit found no undue burden posed by a city's requirement that cell phone retailers make the same disclosures about cell phones' health and safety risks as required of cell phone manufacturers by the Federal Communications Commission.[226] Applying *Zauderer* to what it described as "factual and uncontroversial" disclosures, the court found that the disclosure didn't crowd out the retailers' speech: a retailer could satisfy the requirement with a single posting in its facility or with a small handout accompanying the sale.[227] That the city also permitted retailers to supplement the warning with their own views about cell phones' health and safety attributes further diminished any burden on the retailers' expression.[228]

Courts worried about undue burdens on commercial speakers also increasingly reject disclosures they perceive as requiring the commercial actor to condemn itself. Recall *National Ass'n of Manufacturers v. SEC*, where the D.C. Circuit invalidated the conflict minerals rule that, in the court's view, required companies to convey their moral responsibility for the humanitarian crisis in the Congo.[229] There the court held that the required disclosure failed *Central Hudson* intermediate scrutiny (and failed even *Zauderer* as unduly burdensome) because of the availability of regulatory options less burdensome to the commercial actor's expression—for example, allowing companies to use their own language to describe their products' relationship (if any)

out the centers' own message); Dwyer v. Cappell, 762 F.3d 275, 284 (3d Cir. 2014) (holding that compelled disclosure was unduly burdensome because of its length, where the state required attorney advertisements to present the full text of—rather than excerpts or quotes from—any judicial opinion extolling the attorney's abilities).

225 Am. Beverage Ass'n v. City & Cnty. of S.F., 916 F.3d 749, 757 (9th Cir. 2019).

226 CTIA - The Wireless Ass'n v. City of Berkeley, 928 F.3d 832 (9th Cir. 2019).

227 *Id.* at 845, 849.

228 *Id.* at 849. Along the same lines, the Sixth Circuit found that the size and scale of textual health warnings to be displayed on tobacco packaging and advertising were not unduly burdensome given evidence supporting the proposed warning's effectiveness in communicating the warning to consumers, along with the challengers' failure to show that remaining space was insufficient to display their own expression. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 530–31 (6th Cir. 2012).

229 800 F.3d 518 (D.C. Cir. 2015).

to conflict in the DRC, or requiring instead the SEC to post on its website a list of products that the agency itself had and had not confirmed to be DRC-conflict-free.[230]

Contrast *American Meat Institute v. USDA*, where meat producers brought a First Amendment challenge to the Department of Agriculture's rule requiring them to label their products' country of origin.[231] There the D.C. Circuit found that the rule required the disclosure of factual and uncontroversial information (thus triggering *Zauderer* review) when it permitted producers the choice to use the term "harvested" (rather than insisting on the more value-laden "slaughtered") when labeling their products' county of origin.[232]

Here too securities-related speech differs from speech related to other goods and services in constitutionally relevant ways. The disclosures required by securities law do not crowd out—and thus do not unduly burden—companies' speech because they do not appear on billboards, in newspapers, on packaging, or in other settings where the available space is limited. Instead, securities law requires companies to make disclosures through registration statements to the SEC (which are then made available to the public) and through prospectuses and proxy statements delivered to investors and shareholders.[233] Nor do these disclosures require stigmatizing language of the sort described above,[234] and they leave companies free to provide additional texture and nuance through voluntary disclosures of their own.[235]

c. Has the Government Justified the Disclosure's Value to Listeners?

Courts unimpressed by the evidentiary connection between a required disclosure and the government's informational objectives find those disclosures to fail *Zauderer* deference (as unjustified) or *Central Hudson* scrutiny (as insufficiently justified).[236] From a listener-centered perspective, this evidentiary requirement ensures that a disclosure actually informs listeners about matters relevant to their decisionmaking, and simultaneously screens unnecessary burden on commercial speakers.

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230 *Id.* at 530.

231 760 F.3d 18, 21 (D.C. Cir. 2014).

232 *Id.* at 27.

233 *See supra* notes 54–64 and accompanying text.

234 *See supra* notes 228–32 and accompanying text.

235 *See id.*

236 *See e.g.*, Dwyer v. Cappell, 762 F.3d 275, 282 (3d Cir. 2014) (finding that the government did not explain how requiring an attorney's advertisement to present the full text of—rather than just quotations from—a judicial opinion extolling the attorney's abilities would serve listeners' informational interests).

Some courts are increasingly skeptical of the government's justifications for compelled commercial disclosures.[237] But others credit studies, expert testimony, history, anecdotes, and common sense[238] to find it "self-evident" that the government's compelled disclosures provide information relevant to listeners' decisionmaking.[239] Consider again *American Meat Institute v. USDA*, where meat producers brought a First Amendment challenge to the Agriculture Department's requirement that their packaging disclose their products' country of origin.[240] Applying *Zauderer* scrutiny to those "factual and uncontroversial" disclosures,[241] the court found the disclosures to be justified given consumers' longstanding interest in protecting American enterprise, an interest that explained country-of-origin information's value to consumers distinct from other measures of a product's value like cost or quality.[242] In so doing, the D.C. Circuit recognized that a variety of matters apart from so-called "traditional" measures of quality, cost, and safety can and do inform consumers' decisions.

Here too securities law advances listeners' interests by requiring disclosures that inform investors' decisionmaking. And such disclosures serve those interests when they inform investors about risks both

237 Recall the conflicts mineral rule at issue in *National Ass'n of Manufacturers v. SEC*, with its objective of reducing conflict in the Congo for humanitarian purposes (a departure from securities law's traditional function of informing investors' autonomous choices). *See supra* notes 210–12 and accompanying text. There the D.C. Circuit held that the SEC's rule was unjustified (thus failing even *Zauderer* scrutiny) because the agency had not shown that the disclosure would achieve its objective of greater peace and security in the Congo. *See* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 525 (D.C. Cir. 2015) ("The idea must be that the forced disclosure regime will decrease the revenue of armed groups in the DRC and their loss of revenue will end or at least diminish the humanitarian crisis there. But there is a major problem with this idea—it is entirely unproven and rests on pure speculation.").

238 *E.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995).

239 *E.g.*, Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 652–53 (1985) (finding "self-evident" that a substantial number of laypersons would fail to understand the difference between attorney's fees and litigation costs and would thus benefit from a disclosure making clear that contingent-fee clients would still be liable for litigation costs even if not for attorney's fees); Am. Meat Inst. v. USDA, 760 F.3d 18, 26 (D.C. Cir. 2014) ("The self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades without anyone questioning their constitutionality. In this long-lived group have been not only country-of-origin labels but also many other routine disclosure mandates about product attributes, including, for instance, disclosures of fiber content, care instructions for clothing items, and listing of ingredients." (citations omitted)).

240 760 F.3d at 21.

241 *Id.* at 27.

242 *Id.* at 24–25; *see also id.* at 26 ("[A]s the Court recognized in *Zauderer*, such evidentiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest.").

longstanding and emerging, and when they inform the heterogeneous range of investor methodologies for considering risk and value. Given their design to inform and protect investors as listeners through accurate and comparable disclosures of securities-related information, SEC disclosure requirements can satisfy even increasingly skeptical commercial speech scrutiny when we maintain a listener-centered focus.

3. Gun-Jumping Rules

Closely tied to mandatory disclosure rules are the gun-jumping rules that tie the timing of securities-related offers and marketing statements to the SEC's review of companies' required disclosures and those disclosures' delivery to prospective buyers.[243] That these rules make mandatory disclosures meaningfully effective by ensuring that investors receive them at key decisionmaking junctures supports the application of *Zauderer* deference, which assumes that more accurate information is generally better for listeners. And the gun-jumping rules can satisfy even *Central Hudson* skepticism (in addition to *Zauderer* deference) when courts recall the ways in which they serve investors' interests as listeners in receiving accurate information.[244]

In short, securities law's interlocking regulatory framework can generally satisfy review under commercial speech doctrine so long as courts remain attentive to its listener-centered functions.

CONCLUSION

Securities law's listener-centered functions inform investors' decisions about buying, selling, and holding securities, as well as their decisions about electing directors, approving mergers or acquisitions, and otherwise exercising their corporate governance functions. These listener-centered functions, in turn, also serve public-regarding goals by facilitating stable and efficient markets, encouraging corporate accountability, and ameliorating systemic economic risks.

These functions explain the value—indeed, the necessity—of content- and speaker-specific complexity for securities law, as securities

243 *See supra* notes 65–71 and accompanying text.

244 *See id.* For a recent example of a court engaging in this sort of analysis, see SEC v. AT&T, Inc., 626 F. Supp. 3d 703 (S.D.N.Y. 2022). There the district court rejected a Free Speech Clause challenge to the SEC's Regulation FD, which prohibits public companies from selectively disclosing material nonpublic information to some listeners while withholding that information from the general public. *Id.* at 711. The court declined to apply strict scrutiny to the regulation despite its (and other securities rules') content-based nature. *Id.* at 745. It held instead that the regulation satisfied both rational basis and *Central Hudson* intermediate scrutiny (even though it found the commercial speech doctrine to be "a mismatch for the speech covered by Reg FD"). *Id.* at 748, 750–51.

regulation requires a focus on specific speakers and on specific content to achieve its multiple and interlocking objectives. These listener-centered functions also enable us to identify two pathways for understanding the constitutionality of the securities law framework despite its content-based regulation of speech.

First, these functions explain how we can recognize securities-related speech as a category of unprotected speech by tracing the longstanding regulatory tradition of addressing the information asymmetries unique to the securities market. What binds this regulatory tradition together are the listener-centered functions it has long sought to achieve: informing and protecting investors by prohibiting false and misleading securities-related speech and by requiring companies' accurate disclosures.

Second, even if the Court were instead to treat securities-related speech as a type of commercial speech, much of the securities regulation framework satisfies the requisite scrutiny under commercial speech doctrine so long as courts continue to tether their understanding of commercial expression's value (and thus its First Amendment protection) as turning on that expression's capacity to inform listeners' autonomous decisionmaking.

That courts *could* choose either of these pathways, of course, does not mean that they *will* so choose. Nevertheless, this Article seeks to inform those choices by demonstrating how securities law's longstanding listener-centered framework aligns with the theory and doctrine of free speech law.

Contemporary free speech law now poses new constitutional barriers to longstanding economic regulation. Law professor Julie Cohen describes this antiregulatory turn as reflecting "a broader realignment in free speech jurisprudence, in which the First Amendment's traditional concern with political self-determination plays very little role."[245] Along the same lines, Amy Kapczynski explains that contemporary courts increasingly treat regulatory policy questions "as constitutional questions, answering them through a First Amendment doctrine that treats many forms of regulation as the illegitimate coercion of speech, rather than as the democratic prerogative of a public seeking to protect itself from the risks of deception and harm inherent to market society."[246] Considering the crease between securities law and free speech law, as this Article does, helps illuminate the importance of principled guardrails on that antiregulatory turn.

245 Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1122 (2015).

246 Kapczynski, *supra* note 192, at 157–58.

HUMPHREY'S EX'R v. UNITED STATES. RATHBUN v. SAME.

Supreme Court

295 U.S. 602

55 S.Ct. 869

79 L.Ed. 1611

HUMPHREY'S EX'R
v.
UNITED STATES. RATHBUN v. SAME.

No. 667.

Argued May 1, 1935.

Decided May 27, 1935.

[Argument of Counsel from pages 602-604 intentionally omitted]

Mr. William J. Donovan, of Washington, D.C. (Messrs. Henry H. Bond and Ralstone R. Irvine, both of Washington, D.C., of counsel), for plaintiff.

[Argument of Counsel from pages 604-612 intentionally omitted]

The Attorney General and Mr. Stanley F. Reed, Sol. Gen., of Washington, D.C., for the United States.

[Argument of Counsel from pages 612-618 intentionally omitted]

Mr. Justice SUTHERLAND delivered the opinion of the Court.

1
Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President

undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3(a), c. 229, 43 Stat. 936, 939, 28 U.S.C. § 288 (28 USCA § 288)), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

2

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years, expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground 'that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection,' but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying: 'You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.'

3

The commissioner declined to resign; and on October 7, 1933, the President wrote him: 'Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.'

4

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

5

'1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office', restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

6

'If the foregoing question is answered in the affirmative, then—

7
'2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?'

8
The Federal Trade Commission Act, c. 311, 38 Stat. 717, 718, §§ 1, 2, 15 U.S.C. §§ 41, 42 (15 USCA §§ 41, 42), creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and section 1 provides: 'Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act (September 26, 1914), the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency. neglect of duty, or malfeasance in office. * * *'

9
Section 5 of the act (15 USCA § 45) in part provides that:

10
'Unfair methods of competition in commerce are declared unlawful.

11
'The commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.'

12
In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate Circuit Court

of Appeals for its enforcement. The party subject to the order may seek and obtain a review in the Circuit Court of Appeals in a manner provided by the act.

13

Section 6 (15 USCA § 46), among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

14

Section 7 (15 USCA § 47), provides that: 'In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.'

15

First. The question first to be considered is whether, by the provisions of section 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in Shurtleff v. United States, 189 U.S. 311, 23 S.Ct. 535, 537, 47 L.Ed. 828. That case involved the power of the President to remove a general appraiser of merchandise appointed under the Act of June 10, 1890, 26 Stat. 131. Section 12 of the act provided for the appointment by the President, by and with the advice and consent of the Senate, of nine general appraisers of merchandise, who 'may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.' The President removed Shurtleff without assigning any cause therefor. The Court of Claims dismissed plaintiff's petition to recover salary, upholding the President's power to remove for causes other than those stated. In this court Shurtleff relied upon the maxim expressio unius est exclusio alterius; but this court held that, while the rule expressed in the maxim was a very proper one and founded upon justifiable reasoning in many instances, it 'should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century, and the consequent curtailment

of the powers of the Executive in such an unusual manner.' What the court meant by this expression appears from a reading of the opinion. That opinion, after saying that no term of office was fixed by the act and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government, points out that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

16

'We think it quite inadmissible,' the court said (189 U.S. 311, at pages 316, 318, 23 S.Ct. 535, 537, 47 L.Ed. 828), 'to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. * * * We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt.'

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These circumstances, which led the court to reject the maxim as inapplicable, are exceptional. In the face of the unbroken precedent against life tenure, except in the case of the judiciary, the conclusion that Congress intended that, from among all other civil officers, appraisers alone should be selected to hold office for life was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided. The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

18

The government says the phrase 'continue in office' is of no legal significance and, moreover, applies only to the first Commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a

definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act.

19

The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.' Illinois Cent. &c. R.R. v. Inter. Com. Comm., 206 U.S. 441, 454, 27 S.Ct. 700, 704, 51 L.Ed. 1128; Standard Oil Co. v. United States, 283 U.S. 235, 238, 239, 51 S.Ct. 429, 75 L.Ed. 999.

20

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate (No. 597, 63d Cong., 2d Sess., pp. 10, 11) the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said: 'The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.' The report declares that one advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. The report quotes (p. 22) a statement to the committee by Senator Newlands, who reported the bill, that the tribunal should be of high character and 'independent of any department of the government. * * * a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character.'

21
The debates in both houses demonstrate that the prevailing view was that the Commission was not to be 'subject to anybody in the government but * * * only to the people of the United States'; free from 'political domination or control' or the 'probability or possibility of such a thing'; to be 'separate and apart from any existing department of the government—not subject to the orders of the President.'

22
More to the same effect appears in the debates, which were long and thorough and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 650, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191.

23
Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

24
We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

25
Second. To support its contention that the removal provision of section 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative, and judicial data bearing upon the question, beginning with what is called 'the decision of 1789' in the first Congress and coming down almost to the day when the opinions were

delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of Cohens v. Virginia, 6 Wheat, 264, 399, 5 L.Ed. 257, in respect of certain general expressions in the opinion in Marbury v. Madison, 1 Cranch, 137, 2 L.Ed. 60. Chief Justice Marshall, who delivered the opinion in the Marbury Case, speaking again for the court in the Cohens Case, said: 'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.'

26

And he added that these general expressions in the case of Marbury v. Madison were to be understood with the limitations put upon them by the opinion in the Cohens Case. See, also, Carroll v. Lessee of Carroll et al., 16 How. 275, 286—287, 14 L.Ed. 936; O'Donoghue v. United States, 289 U.S. 516, 550, 53 S.Ct. 740, 77 L.Ed. 1356.

27

The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers Case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers Case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

28

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of 'unfair methods of competition,' that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially. In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency. Under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.[1]

29

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi legislative and quasi judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (Williams v. United States, 289 U.S. 553, 565—567, 53 S.Ct. 751, 77 L.Ed. 1372), continue in office only at the pleasure of the President.

30

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime.

For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

31

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution (4th Ed.) § 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' And see O'Donoghue v. United States, supra, 289 U.S. 516, at pages 530-531, 53 S.Ct. 740, 77 L.Ed. 1356.

32

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

33

In the light of the question now under consideration, we have re-examined the precedents referred to in the Myers Case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called 'decision of 1789' had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was 'to be removable from office by the President of the United States.' This clause was changed to read 'whenever the principal officer shall be removed from office by the President of the United States,' certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the Myers Case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the Myers Case, except to say that the office under consideration

by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612.

34

In Marbury v. Madison, supra, 1 Cranch, 137, at pages 162, 165-166, 2 L.Ed. 60, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that 'their acts are his acts' and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the 'decision of 1789.'

35

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

36

To the extent that, between the decision in the Myers Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

37

In accordance with the foregoing, the questions submitted are answered:

38

Question No. 1, Yes.

39

Question No. 2, Yes.

40

Mr. Justice McREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in Myers v. United States, 272 U.S. 52, at page 178, 47 S.Ct. 21, at page 46, 71 L.Ed. 160, states his views concerning the power of the President to remove appointees.

1

The provision of section 6(d) of the act (15 USCA § 46(d) which authorizes the President to direct an investigation and report by the commission in relation to alleged violations of the anti-trust acts, is so obviously collateral to the main design of the act as not to detract from the force of this general statement as to the character of that body.

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THE SUPREME COURT 2016 TERM

FOREWORD: 1930s REDUX: THE ADMINISTRATIVE STATE UNDER SIEGE

Gillian E. Metzger

INTRODUCTION 2
I. THE CONTEMPORARY ATTACK ON THE ADMINISTRATIVE STATE 8
A. The Political Attack 9
B. The Judicial and Academic Attack 17
1. Separation of Powers 17
2. Subconstitutional Doctrines and the Separation of Powers 24
3. Other Constitutional Claims 28
4. Academic Attacks 31
C. Contemporary Anti-Administrativism's Core Themes 33
1. Rhetorical Anti-Administrativism 34
2. The Judicial Turn 38
3. Constitutionalism and Originalism 42
D. Does Contemporary Anti-Administrativism Matter? 46
II. 1930s REDUX I: TWENTIETH-CENTURY CONSERVATIVE RESISTANCE TO ADMINISTRATIVE GOVERNMENT 51
A. The Liberty League and the ABA Special Committee 52
1. The Liberty League 53
2. The Special Committee 57
3. The Entrenchment of the National Administrative State 59
B. The Contemporary Relevance of the League and the Special Committee 62
III. 1930s REDUX II: THE ADMINISTRATIVE STATE AND EXECUTIVE POWER 71
A. The Brownlow Committee and Presidential Administration 72
B. The Administrative State's Constitutional Functions 77
1. Bureaucratic Supervision and Internal Constraints 78
2. Effective Governance 85
C. The Administrative State as Constitutionally Obligatory 87
1. Delegation and Its Implications 87
2. Delegation and Current Anti-Administrative Challenges 92
CONCLUSION 95

THE SUPREME COURT
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FOREWORD: 1930s REDUX: THE ADMINISTRATIVE STATE UNDER SIEGE

Gillian E. Metzger[*]

INTRODUCTION

Eighty years on, we are seeing a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal. President Trump's administration has proclaimed the "deconstruction of the administrative state" to be one of its main objectives.[1] Early Trump executive actions quickly delivered on this pledge, with a wide array of antiregulatory actions and a budget proposing to slash many agencies' funding.[2] Invoking the long-dormant Congressional Review Act[3] (CRA), the Republican-controlled Congress has eagerly repealed numerous regulations promulgated late in the Obama Administration.[4] Other major legislative and regulatory repeals are pending, and bills that would impose the most significant restrictions on administrative governance since the Administrative Procedure Act (APA) was adopted in

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[1] *See* Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/8KJ3-5TRR]. Although the Trump Administration official who made this proclamation, Steve Bannon, has since been removed from his position as President Trump's Chief Strategist, that removal is unlikely to result in a large-scale change in the Trump Administration's objectives with respect to the administrative state. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 29, 2017, 5:26 AM), https://twitter.com/realDonaldTrump/status/902507855584092160 [https://perma.cc/8LFX-LCGH] (reiterating the need to "reduce [the] size of government"); *see also* Josh Dawsey & Nolan D. McCaskill, *Bannon Out as White House Chief Strategist*, POLITICO (Aug. 18, 2017, 6:16 PM), http://www.politico.com/story/2017/08/18/bannon-out-as-white-house-chief-strategist-241786 [https://perma.cc/DJH2-JJ5D].

[2] *See infra* pp. 9–11.

[3] 5 U.S.C. §§ 801–808 (2012).

[4] *See infra* pp. 10–11.

1946 — like the proposed Regulatory Accountability Act (RAA) — now stand a chance of enactment.[5] This resistance to administrative government reflects antigovernment themes that have been a consistent presence in national politics since President Reagan's election in 1980.[6] But the immediate trigger for the current resurgence of attacks on the administrative state is the national regulatory and administrative expansion that took place under President Obama.[7]

Of particular relevance here, an attack on the national administrative state is also evident at the Supreme Court. The anti-administrative voices are fewer on the Court than in the political sphere and often speak in separate opinions, but they are increasingly prominent.[8] Led by Justice Thomas, with Chief Justice Roberts, Justice Alito, and now Justice Gorsuch sounding similar complaints, they have attacked the modern administrative state as a threat to liberty and democracy and suggested that its central features may be unconstitutional.[9] Conservative legal scholars have joined the fray, issuing a number of academic attacks on the constitutionality of the administrative state that conservative jurists then feature prominently in their opinions.[10] These judicial attacks on administrative governance share several key characteristics: they are strong on rhetorical criticism of administrative government out of proportion to their bottom-line results; they oppose administration and bureaucracy, but not greater presidential power; they advocate a greater role for the courts to defend individual liberty against the ever-expanding national state; and they regularly condemn contemporary national government for being at odds with the constitutional structure the Framers created, though rarely — with the marked exception of Justice Thomas — do they develop this originalist argument with any rigor.[11]

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[5] *See infra* section I.A; *see also* Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017); Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017).

[6] *See infra* p. 14.

[7] *See, e.g.*, THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM 5–10, 31–32, 77–82 (2012) (tying Tea Party mobilization to President Obama's progressive policy agenda); Zeke J. Miller, *President Trump's Lawyers Plan a White House Legal Attack on Federal Agency Power*, TIME (Mar. 13, 2017), http://time.com/4700311/donald-trump-white-house-counsel-steve-bannon [https://perma.cc/M7SP-JFN7] ("But the fight against [the administrative state's] growth became a crusade during the Obama years, particularly in conservative legal circles as they watched the former president rel[y] on regulatory action to circumvent an obstructionist Congress."); *see also* Robert Moffit, Todd Gaziano & Joseph Postell, *How to Limit Government in the Age of Obama*, HERITAGE FOUND. (June 25, 2013), http://www.heritage.org/political-process/report/how-limit-government-the-age-obama [https://perma.cc/XLX6-PB9G] (discussing tactics to fight against President Obama's regulatory policy through Congress and the courts).

[8] Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 42–43.

[9] *See infra* sections I.B.1–3, pp. 17–31.

[10] *See infra* section I.B.4, pp. 31–33.

[11] *See infra* section I.C, pp. 33–46.

These features, particularly the strong rhetorical condemnation of administrative government, typify what I call here contemporary anti-administrativism. The presence of such rhetorical anti-administrativism in the political sphere is not surprising, but its appearance in judicial opinions is more striking. This rhetorical anti-administrativism forms a notable link between the contemporary political and judicial attacks on national administrative government. Further connecting these two is the political flavor of many of the lawsuits underlying the current judicial attacks, as well as a shared network of conservative lawyers, organizations, academics, and funders involved in both.[12]

The 2016 Term saw few cases embodying the judicial attacks on administrative governance and administrative law doctrines that have surfaced in recent years. Nonetheless, anti-administrativism was central to the Term's most important event: the appointment of Justice Gorsuch to the Court. In a concurring opinion issued shortly before his nomination, then-Judge Gorsuch staked out a strongly anti-administrative position. He warned against "permit[ting] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design," and drew a straight line from such institutional expansion to "governmental encroachment on the people's liberties."[13] These anti-administrative views quickly became a centerpiece of Gorsuch's Senate confirmation hearings — surely never before have so many senators spoken at such length about the *Chevron*[14] doctrine of judicial deference to administrative statutory interpretations.[15]

Whether these anti-administrative attacks will ultimately prove successful — and which ones — remains to be seen. The lack of administrative retraction under President Reagan offers reason for doubt that major politically imposed transformations will occur, and President Trump's campaign promises for infrastructure development, an enhanced military, and a crackdown on illegal immigration all entail the

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[12] *See infra* sections I.C, pp. 33–46; II.B, pp. 62–71.

[13] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Gorsuch had signaled such concerns before, though not quite as vociferously. *See* Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015); Neil M. Gorsuch, Lecture, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 911–15 (2016).

[14] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[15] In their brief opening statements, three of the eight Democratic senators expressed their concerns over then-Judge Gorsuch's views on *Chevron*. *See Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States*, S. COMM. ON THE JUDICIARY at 42:33 (Mar. 20, 2017) [hereinafter Gorsuch Confirmation Hearings (Day 1)], https://www.judiciary.senate.gov/hearings/watch?hearingid=DD159112-5056-A066-6024-CF83920A9E17 [https://perma.cc/DKR7-2M9E] (opening statement of Sen. Feinstein); *id.* at 2:06:49 (opening statement of Sen. Klobuchar); *id.* at 2:29:01 (opening statement of Sen. Franken).

administrative state's expansion, not its deconstruction. On the judicial front, the most radical constitutional challenges so far have gained little traction, with majority support limited to claims that tinker with the administrative state at the margin.[16] With Justice Gorsuch on the Court, some constitutionally rooted pullback in deference doctrines appears increasingly likely.[17] But whether these doctrinal tweaks will make much of a difference in practice is a matter of substantial dispute.[18]

Yet dismissing the present anti-administrative moment as a passing craze with little long-term impact would be a mistake. Enactment of measures like the RAA, regulatory rollbacks, and significant cutbacks in agency funding could have a lasting effect on the administrative state's functioning and capacity. Challenges to administrative adjudication on the horizon may portend more dramatic judicial decisions, and some seemingly limited constitutional challenges could yield significant administrative disruption. Even kept to a vocal minority, moreover, constitutional attacks can have an outsized effect by sowing doubts about administrative legitimacy and thereby limiting the progressive potential of — and public support for — administrative government in the future. And the vocal minority on the courts is likely to grow so long as the political branches remain in conservative hands and openly anti-administrative organizations dominate the judicial appointments process.[19] The Trump Administration inherited an extraordinarily large

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[16] *See infra* section I.D, pp. 46–51.

[17] Justice Gorsuch has expressed more open hostility to doctrines such as *Chevron* than his predecessor, Justice Scalia, did. *See* Emily Bazelon & Eric Posner, *The Government Gorsuch Wants to Undo*, N.Y. TIMES (Apr. 1, 2017), https://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html [https://perma.cc/S5E5-A6UR].

[18] *See infra* pp. 48–49. *Compare* Adrian Vermeule, *The Separation of Powers Restoration Act (in the Age of Trump)*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 10, 2016), http://yalejreg.com/nc/the-separation-of-powers-restoration-act-in-the-age-of-trump-by-adrian-vermeule/ [https://perma.cc/3VuC-593L] (noting that even without *Chevron*, courts "might decide that deference just is what the statutory law commands"), *with* Bazelon & Posner, *supra* note 17 (arguing that without *Chevron* ambiguous statutory text may have to be sent back to Congress "to redo or not").

[19] Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 17, 2017), http://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court [https://perma.cc/DW43-NYXF] (describing the role of Leonard Leo, Executive Vice President of the Federalist Society, in the Trump Administration's judicial-selection process); *About Heritage*, HERITAGE FOUND., http://www.heritage.org/about-heritage/impact [http://perma.cc/TC7B-KB4E] ("Since our founding in 1973, The Heritage Foundation has been working to advance the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."). For an example of the Federalist Society's views on administrative government, see generally LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE (Dean Reuter & John Yoo eds., 2016). The national administrative state is the subject of the Federalist Society's annual convention this year. *See 2017 National Lawyers Convention: Administrative Agencies and the Regulatory State*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD., https://www.fed-soc.org/events/detail/2017-national-lawyers-convention [https://perma.cc/9FVD-69TR].

number of judicial vacancies — more than any recent President since Bill Clinton — and will likely have additional Supreme Court vacancies to fill.[20] The potential thus exists for a significant erosion of administrative power, albeit perhaps one achieved more incrementally and more targeted to particular substantive areas than a sudden or broad retraction in the administrative state.

Equally important, the current judicial attack on the administrative state merits attention because of the potential harm it poses for the Court and for constitutional law. Although resistance to strong central government has a long legacy in the United States, the real forebears of today's anti-administrative movement are not the Framers but rather the conservative opponents of an expanding national bureaucracy in the 1930s. Like today, the 1930s attack on "agency government" took on a strongly constitutional and legal cast, laced with rhetorical condemnation of bureaucratic tyranny and administrative absolutism.[21] These efforts were plainly political, fueled by business and legal interests deeply opposed to pro-labor regulation and economic planning. The Supreme Court's constitutional opposition to early New Deal measures carried heavy political salience as well, triggering President Franklin Delano Roosevelt's contentious plan to pack the Court.[22] A similar political aspect is inseparable from the contemporary administrative attack, as the nomination process for Justice Gorsuch demonstrated.[23]

To acknowledge the political cast of contemporary anti-administrativism is not to question that genuine constitutional concerns animate it. Such close intertwining of the political and constitutional is characteristic of efforts to construct a new institutional order — and was as true of progressive efforts to build out the New Deal administrative state in the 1930s as it is of contemporary anti-administrativism's effort to reign in that state today. But recognizing this political cast, and the parallels to the 1930s conservative attacks on the New Deal, demonstrates anti-administrativism's radical potential. It also underscores the extent to which judicial opinions that decry the dangers of the ever-expanding administrative state risk reinforcing the intense politicization of the

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[20] *See* Jonathan H. Adler, *How President Trump Will Shape the Federal Courts*, WASH. POST: VOLOKH CONSPIRACY (Jan. 20, 2017), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/20/how-president-trump-will-shape-the-federal-courts/ [https://perma.cc/PAD4-2D4P]; Ryan Lovelace, *Trump Adviser Leonard Leo Details Plans to Overhaul Judiciary*, WASH. EXAMINER (May 12, 2017, 2:00 PM), http://www.washingtonexaminer.com/trump-adviser-leonard-leo-details-plans-to-overhaul-judiciary/article/2622956 [https://perma.cc/UPT3-6HAW] (noting that Trump already has 134 judicial openings to fill and may eventually have as many as 200, as well as three Supreme Court vacancies).

[21] *See infra* section II.A, pp. 52–62.

[22] *See id.*; *see also* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 132–62 (1995) (discussing President Roosevelt's "court-packing" plan and the controversy surrounding it).

[23] *See infra* section II.B, pp. 62–71.

Court — a result particularly hard to justify when (at least so far) these opinions' bottom-line impact does not match their polarizing rhetoric.

Perhaps most problematic, anti-administrativism misdiagnoses the administrative state's constitutional status. Anti-administrativists paint the administrative state as fundamentally at odds with the Constitution's separation of powers system, combining together in agencies the legislative, executive, and judicial authorities that the Constitution vests in different branches and producing unaccountable and aggrandized power in the process. In fact, however, the administrative state is essential for actualizing constitutional separation of powers today, serving both to constrain executive power and to mitigate the dangers of presidential unilateralism while also enabling effective governance. Far from being constitutionally suspect, the administrative state thus yields important constitutional benefits. Anti-administrativists fail to recognize that the key administrative state features that they condemn, such as bureaucracy with its internal oversight mechanisms and expert civil service, are essential for the accountable, constrained, and effective exercise of executive power.

Even further, the administrative state today is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government. Those delegations are necessary given the economic, social, scientific, and technological realities of our day. Not surprisingly, therefore, very few anti-administrativists are willing to call such delegation of power into serious constitutional question. But they fail to realize that delegation comes with substantial constitutional strings attached. In particular, many of the administrative state's features that anti-administrativists decry follow as necessary consequences of delegation.

By refusing to recognize the administrative state's essential place in our constitutional order, contemporary anti-administrativism forestalls development of a separation of powers analysis better tailored to the reality of current government. Rather than laying siege to the administrative state, such an analysis would seek to maximize the constitutional benefits that the administrative state has to offer. And it would reorient constitutional analysis to considering not just constitutional constraints on government but also constitutional obligations to govern.

Part I of what follows describes the current attacks on the administrative state and assesses their central analytic moves, focusing in particular on judicial anti-administrativism. It then takes up the question of whether the current attack is likely to make a difference, arguing that this attack holds greater significance for national administrative governance than might at first appear. Part II adopts a historical lens, identifying contemporary anti-administrativism as the latest episode in a conservative campaign against administrative governance that stretches back to the early twentieth century, in particular to battles over the New

Deal in the 1930s. After highlighting parallels between the contemporary attacks and 1930s efforts to hamstring New Deal administrative agencies, Part II draws out cautionary historical lessons for the Court. Part III turns to analyzing the constitutional functions of the administrative state. Here, too, the 1930s hold important lessons, underscoring the administrative state's constitutional role in both enabling and constraining executive power. Recognizing these constitutional functions opens the door to a very different account of the administrative state's constitutional status from what the anti-administrativists offer. This Part then takes the constitutional argument a step further, contending that the contemporary reality of delegation makes core features of the administrative state constitutionally obligatory.

A word on terminology at the outset: The term "administrative state" is frequently bandied about, but often carries very different meanings. In promising to deconstruct the administrative state, for instance, the Trump Administration presumably does not mean to include the mechanisms of bureaucratic power that allow the President to oversee agency actions. As used here, the administrative state includes those oversight mechanisms, as well as other core features of national administrative governance: agencies wielding broad discretion through a combination of rulemaking, adjudication, enforcement, and managerial functions; the personnel who perform these activities, from the civil service and professional staff through to political appointees, agency heads, and White House overseers; and the institutional arrangements and issuances that help structure these activities. In short, it includes all the actors and activities involved in fashioning and implementing national regulation and administration — including that which occurs in hybrid forms and spans traditional public-private and nation-state boundaries.[24] An unfortunate implication of invoking the administrative state writ large is that it conveys the idea of a single monolithic entity, whereas in reality national administrative government contains within it tremendous variety, cooperation, and rivalry — a pluralistic dynamic that obtains within individual agencies as well. The administrative state writ large is nonetheless a helpful analytic conceit here as a stand-in for the archetypal characteristics of national administrative government now under attack.

I. THE CONTEMPORARY ATTACK ON THE ADMINISTRATIVE STATE

Across a range of public arenas — political, judicial, and academic in particular — conservative and libertarian challenges to administrative governance currently claim center stage. Sustained resistance to

[24] *See* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 855–63 (2014).

national administrative power is no stranger to American public life. It has been a feature of national politics for decades, going back to the Reagan revolution of the 1980s and Barry Goldwater's 1964 presidential campaign that preceded it.[25] The striking feature of the current challenges, however, is the extent to which they are surfacing in court and being framed in terms of constitutional doctrine. The problems these attacks identify with the administrative state are not simply the policies it advances, its role as the engine for social regulation, or its domination by progressive bureaucrats. More than this, the national administrative state is attacked as fundamentally unconstitutional. While still a minority position, this view is gaining more judicial and academic traction than at any point since the 1930s.

The first step in assessing the significance of the current attack is understanding its full contours. This Part takes on that descriptive task, detailing the current attacks on administrative governance. It focuses in greatest detail on the attack in the courts, where a variety of legal challenges, some constitutional and some not, are surfacing. This Part then identifies and examines several central features that these attacks on the administrative state share and assesses their likely impact.

A. The Political Attack

The political attack on the national administrative state is hard to miss. Even separate from the Trump Administration's promise to "deconstruct[] the administrative state" or its identification of a dangerous "deep state" opposed to the President, the Administration's initial actions have been aggressively antiregulatory.[26] These actions include specific area rollbacks, such as instructions that agencies repeal, waive, or delay implementation of major Obama Administration regulatory initiatives in the environmental, financial regulation, and health care arenas.[27] But they also encompass dramatic transsubstantive measures, in particular requirements that agencies establish task forces focused on

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[25] Leading accounts of contemporary American conservatism date its birth to the 1950s, but it only appeared in contemporary national political life with the Goldwater campaign and did not gain significant popular traction until Reagan. *See* LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT 111–46, 187–216 (2001).

[26] *See* Rucker & Costa, *supra* note 1; Matthew Nussbaum et al., *Trump's Obsession over Russia Probe Deepens*, POLITICO (May 28, 2017, 10:10 PM), http://www.politico.com/story/2017/05/28/trump-russia-advice-238911 [https://perma.cc/94U8-3PAJ].

[27] Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (Promoting Energy Independence and Economic Growth); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 8, 2017) (Core Principles for Regulating the United States Financial System); Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 24, 2017) (Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal); *see also* Fiduciary Duty Rule, Memorandum for the Secretary of Labor, 82 Fed. Reg. 9675 (Feb. 7, 2017).

regulatory repeal,[28] repeal two regulations for each new regulation they propose, and keep additional regulatory costs at zero.[29] President Trump's cabinet is composed of individuals who have long opposed the agencies and programs they now lead[30] and his budget proposes to dramatically slash funding for a large swath of nonmilitary agencies.[31] Business interests are enjoying a regulatory retraction of unprecedented proportions, with the combination of executive branch actions and Congress's disapproval of late Obama Administration rules under the CRA.[32] By the time the window for disapproval closed, Congress had overturned fourteen Obama regulations — which was thirteen more regulatory disapprovals than had previously occurred in the CRA's

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[28] *See* Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017) (Enforcing the Regulatory Reform Agenda); Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES (July 11, 2017), https://www.nytimes.com/2017/07/11/business/the-deep-industry-ties-of-trumps-deregulation-teams.html [https://perma.cc/7XRZ-3ZYJ].

[29] *See* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (Reducing Regulation and Controlling Regulatory Costs); Memorandum from Dominic J. Mancini, Acting Adm'r, Office of Info. & Regulatory Affairs, to Regulatory Policy Officers at Exec. Dep'ts & Agencies & Managing & Exec. Dirs. of Certain Agencies and Comm'ns (Feb. 2, 2017), https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017 [https://perma.cc/2NBH-LW56]. For early assessments of President Trump's administrative agenda, see Daniel A. Farber, *Presidential Administration Under Trump* 16–21 (Univ. of Cal. Berkeley Pub. Law Research Paper, 2017), https://ssrn.com/abstract=3015591 [https://perma.cc/B782-MCA9]; and Peter L. Strauss, The Trump Transition and American Administrative Law (May 2017) (unpublished manuscript) (on file with the Harvard Law School Library).

[30] *See, e.g.*, Juliet Eilperin & Steven Mufson, *Trump Taps Former Texas Gov. Rick Perry to Head Energy Department He Once Vowed to Abolish*, WASH. POST (Dec. 14, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/13/trump-taps-former-texas-gov-rick-perry-to-head-energy-department-he-once-vowed-to-abolish/ [https://perma.cc/JLH5-CHBR]; Eric Lipton & Coral Davenport, *Scott Pruitt, Trump's E.P.A. Pick, Backed Industry Donors over Regulators*, N.Y. TIMES (Jan. 14, 2017), https://www.nytimes.com/2017/01/14/us/scott-pruitt-trump-epa-pick.html [https://perma.cc/DP3W-CJW2]; *see also* Kate Zernike, *Betsy DeVos, Trump's Education Pick, Has Steered Money from Public Schools*, N.Y. TIMES (Nov. 23, 2016), https://www.nytimes.com/2016/11/23/us/politics/betsy-devos-trumps-education-pick-has-steered-money-from-public-schools.html [https://perma.cc/X96D-29UK] (describing Secretary DeVos's prior efforts to shift funding away from public schools).

[31] Gregor Aisch & Alicia Parlapiano, *How Trump's Budget Would Affect Every Part of Government*, N.Y. TIMES (May 23, 2017), https://www.nytimes.com/interactive/2017/05/23/us/politics/trump-budget-details.html [https://perma.cc/U5H5-JHCX]; Kim Soffen & Denise Lu, *What Trump Cut in His Agency Budgets*, WASH. POST (May 23, 2017), https://www.washingtonpost.com/graphics/politics/trump-presidential-budget-2018-proposal/ [https://perma.cc/RHC7-BXTY].

[32] Per a count by the *New York Times*, over ninety Obama-era regulations were delayed, suspended, or reversed in President Trump's first month and a half in office alone. Eric Lipton & Binyamin Appelbaum, *Leashes Come off Wall Street, Gun Sellers, Polluters and More*, N.Y. TIMES (Mar. 5, 2017), https://www.nytimes.com/2017/03/05/us/politics/trump-deregulation-guns-wall-st-climate.html [https://perma.cc/HF7E-WS5Y]; *see also* Barry Meier & Danielle Ivory, *Under Trump, Worker Protections Are Viewed with New Skepticism*, N.Y. TIMES (June 5, 2017), https://www.nytimes.com/2017/06/05/business/under-trump-worker-protections-are-viewed-with-new-skepticism.html [https://perma.cc/TY3H-XRZJ]; Hiroko Tabuchi & Eric Lipton, *How Rollbacks at Scott Pruitt's E.P.A. Are a Boon to Oil and Gas*, N.Y. TIMES (May 20, 2017), https://www.nytimes.com/2017/05/20/business/energy-environment/devon-energy.html [https://perma.cc/Z9NU-SKZB].

twenty-one year life.[33] Agency teams — often with business ties — have sought to delay numerous rules immediately, although such efforts have already faced resistance from courts.[34] Importantly, the Trump Administration has also proposed some measures that would expand the administrative state — for example, by adding over 15,000 more immigration employees.[35] And some ostensibly deregulatory measures, such as congressional Republicans' efforts to repeal the Affordable Care Act, may well entail substantial grants of new administrative authority.[36] But the overall thrust since the Trump Administration came into office has been in a strongly deregulatory direction.

Even more significant for the administrative state would be enactment of congressional measures like the proposed RAA. The Senate's version of the RAA would require agencies, upon request, to hold oral evidentiary hearings on any "specific scientific, technical, economic, or other complex factual issues that are genuinely disputed" in high-impact rulemakings (those with an expected annual economic impact of $1 billion or more) and in some major rulemakings (those with an expected annual economic impact of $100 million or more).[37] It would also limit the use of interim final rulemaking, require high-impact rules to meet a higher evidentiary standard, and limit judicial deference to an agency's

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[33] *See* Alex Guillén, *GOP Onslaught on Obama's "Midnight Rules" Comes to an End*, POLITICO (May 7, 2017, 7:10 AM), http://www.politico.com/story/2017/05/07/obama-regulations-gop-midnight-rules-238051 [https://perma.cc/Y29R-MM8B]. Conservative leaders within and outside Congress are trying to expand the CRA's reach further, arguing that it should apply to guidance and to rules never properly submitted for congressional review in the past. PHILIP A. WALLACH & NICHOLAS W. ZEPPOS, BROOKINGS INST., HOW POWERFUL IS THE CONGRESSIONAL REVIEW ACT? (2017), https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/ [https://perma.cc/P3NJ-K2U8]; Arianna Skibell, *GAO to Review Guidance Docs as Republicans Test CRA's Reach*, E&E NEWS: GREENWIRE (May 25, 2017), https://www.eenews.net/greenwire/stories/1060055171 [https://perma.cc/3CCC-J9B2].

[34] *See, e.g.*, Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017) (invalidating the EPA's stay of methane rule); Juliet Eilperin & Damian Paletta, *Trump Administration Cancels Hundreds of Obama-Era Regulations*, WASH. POST (July 20, 2017), https://www.washingtonpost.com/business/economy/trump-administration-cancels-hundres-of-obama-era-regulations/2017/07/20/55f501cc-6d68-11e7-96ab-5f38140b38cc_story.html [https://perma.cc/5QPL-AMU5].

[35] Eric Katz, *Trump's Orders Calling for 15,000 New Federal Employees Could Face Setbacks*, GOV'T EXECUTIVE (Jan. 26, 2017), http://www.govexec.com/management/2017/01/trumps-orders-calling-15000-new-employees-could-face-setbacks/134929 [https://perma.cc/P6VG-VYCG]. Most recently, President Trump proposed and then signed into law a multibillion dollar expansion in federal disaster relief. *See* Mike DeBonis & Kelsey Snell, *Trump Signs $15 Billion Harvey Aid Package After Republicans Booed Top White House Officials*, WASH. POST: POWERPOST (Sept. 8, 2017), https://www.washingtonpost.com/powerpost/house-set-to-vote-today-on-harvey-aid-package-that-would-also-raise-debt-ceiling/2017/09/08/728ddce8-9494-11e7-8754-d478688d23b4_story.html [https://perma.cc/8478-36ZZ].

[36] Stan Dorn & Sara Rosenbaum, *Senate Health Care Legislation Would Grant HHS Unprecedented Power over States*, HEALTH AFF. BLOG (July 24, 2017), http://healthaffairs.org/blog/2017/07/24/senate-health-care-legislation-would-grant-hhs-unprecedented-power-over-states [https://perma.cc/SXA6-QQM2].

[37] S. 951, 115th Cong. §§ 2–3 (2017).

interpretations of its own rules.[38] The House version is more extreme, requiring an agency to hold formal trial-like hearings when proposing a high-impact rule and, for all rulemakings, often to hold an initial hearing at which interested parties can challenge the information on which the agency plans to rely.[39] Both bills would also impose additional evaluation requirements on agencies and expand the availability of judicial review of agency actions;[40] and the House version forbids agencies from implementing rules until all legal challenges to them are resolved.[41] Additionally, the House incorporated the proposed Separation of Powers Restoration Act in its version, which would require courts to "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies."[42] Although some question how burdensome the Senate version would be,[43] past experience with oral hearing and trial-type procedures under the APA's formal rulemaking provisions and other statutes strongly suggests that both measures would be significantly onerous and resource consuming for agencies.[44] A separate proposed measure, the Regulations from the Executive in Need of Scrutiny (REINS) Act, would not impose additional procedures on agencies but instead require Congress enact a joint resolution of approval before any major rule could go into effect.[45] Given the notorious difficulty Congress has had recently in

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[38] *Id.* §§ 3–4.

[39] H.R. 5, 115th Cong. § 103 (2017).

[40] *See id.*; S. 951 §§ 3–4.

[41] H.R. 5 § 402 (Require Evaluation Before Implementing Executive Wishlists Act).

[42] *Id.* §§ 201–202; *see also* H.R. 76, 115th Cong. (2017) (as a standalone bill).

[43] *Compare* Kent Barnett, Opinion, *Looking More Closely at the Platypus of Formal Rulemaking*, REG. REV. (May 11, 2017), https://www.theregreview.org/2017/05/11/Barnett-platypus-formal-rulemaking [https://perma.cc/D7DX-Y7DP], *and* Cass R. Sunstein, Opinion, *A Regulatory Reform Bill that Everyone Should Like*, BLOOMBERG VIEW (June 22, 2017, 8:30 AM), https://www.bloomberg.com/view/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like [https://perma.cc/6HHT-D8V5] (largely supporting the RAA), *with* William W. Buzbee, Opinion, *Regulatory "Reform" that Is Anything But*, N.Y. TIMES (June 15, 2017), https://www.nytimes.com/2017/06/15/opinion/regulatory-reform-bills-congress-trump.html [https://perma.cc/K3QW-5ED6] (arguing against the RAA), *and* William Funk, Opinion, *Requiring Formal Rulemaking is a Thinly Veiled Attempt to Halt Regulation*, REG. REV. (May 18, 2017), https://www.theregreview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/ [https://perma.cc/2Y88-WDBS].

[44] *See* Funk, *supra* note 43; *see also* Martha Roberts, Opinion, *The Misguided Regulatory Accountability Act*, REG. REV. (Mar. 29, 2017), https://www.theregreview.org/2017/03/29/roberts-misguided-regulatory-accountability-act/ [https://perma.cc/386L-RVKW] (arguing that the RAA would impose cost assessment and formal rulemaking requirements that hobbled the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2697 (2012), prior to that Act's reform). *But see* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 240–42 (2014) (arguing that the lengthy delays of prior formal rulemakings could have been averted and that the benefits of formal rulemaking may justify such cost in some circumstances).

[45] *See* H.R. 26 § 3, 115th Cong. (2017).

passing legislation, the REINS Act would even more clearly stop regulation in its tracks.[46]

Much advocacy for these legislative and regulatory measures describes administrative government in harsh terms, for example invoking the need to rein in an "out-of-control bureaucracy"[47] intent on imposing costly, "job-crushing" regulations.[48] An equally frequent refrain is condemnation of rampant "Obama administration overreach."[49] Yet in 2017 the RAA's backers adopted a more constitutional register, arguing that "[i]n recent years . . . we have seen th[e] separation of powers undermined by an overzealous bureaucracy that creates laws, then executes those laws, and then acts as their own appeal authority."[50] No doubt this constitutional turn reflects in part the separation of powers concerns now expressly in the bill. But such constitutional rhetoric also surfaces in the REINS Act, which emphasizes that the Constitution vests the legislative power in Congress.[51] It was also strongly present in the 2016 Republican national platform, which repeatedly portrayed the growth in the national administrative state as a constitutional crisis.[52] And it echoes the heavily constitutional discourse of the Tea Party, whose 2010 protests against the financial bailouts and the Affordable Care Act in the name of limited government and fiscal constraint marked the advent of the current anti-administrative moment.[53]

Trump is hardly the first or even the most anti-administrative modern President. President Richard Nixon also repeatedly attacked the

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[46] Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1458–60 (2015).

[47] 163 CONG. REC. H900 (daily ed. Feb. 2, 2017) (statement of Rep. Walorski on H.R.J. Res. 40, 115th Cong. (2017)).

[48] President Donald J. Trump, Remarks in Joint Address to Congress (Feb. 28, 2017), https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress [https://perma.cc/HQT4-L88A]; *see also* 161 CONG. REC. H249 (daily ed. Jan. 13, 2015) (statement of Rep. Goodlatte) ("What is killing the American Dream . . . is the endless drain of resources that takes working people's hard-earned wages to Washington . . . ."); 157 CONG. REC. 18,685 (2011) (statement of Rep. Smith) (noting the "job-killing cost of regulations"); *id.* at 18,687 (statement of Rep. Coble) (stating the "regulatory process is out of control").

[49] 163 CONG. REC. H900 (daily ed. Feb. 2, 2017) (statement of Rep. Walorski on H.R.J. Res. 40, 115th Cong. (2017)); 163 CONG. REC. H761 (daily ed. Jan. 31, 2017) (statement of Rep. Newhouse on H.R.J. Res. 38, 115th Cong. (2017)); *see* 163 CONG. REC. H903 (daily ed. Feb. 2, 2017) (statement of Rep. Arrington on H.R.J. Res. 40, 115th Cong. (2017)).

[50] 163 CONG. REC. H253 (daily ed. Jan. 10, 2017) (statement of Rep. Bacon); *see also* 163 CONG. REC. H328–29 (daily ed. Jan. 11, 2017) (statement of Rep. McCarthy).

[51] *See* H.R. 26, 115th Cong. § 2 (2017).

[52] *See* 2016 REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016, at 9–10 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf [https://perma.cc/YFJ4-VB75].

[53] SKOCPOL & WILLIAMSON, *supra* note 7, at 7–10, 31–32, 160; Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193 (2011) (discussing the Tea Party as a form of popular constitutionalism).

federal bureaucracy,[54] and President George W. Bush was famous for centralizing and politicizing the executive branch to bring administrative government more under his control.[55] Democratic Presidents have done their share of bureaucracy bashing as well, with President Bill Clinton proclaiming that the "era of big Government is over"[56] and Vice President Al Gore spearheading the New Performance Review, an effort "to change the culture of our national bureaucracy away from complacency and entitlement" and to provide the "honest and efficient" government that the "American people deserve . . . [but] for too long . . . haven't gotten."[57] The closest parallel to President Trump, however, is President Ronald Reagan, who campaigned on similar promises of dramatically cutting back the national government and made regulatory relief "one of the four 'cornerstones'" of his program for economic recovery.[58] Reagan is credited with prominently injecting antigovernmental rhetoric back into national political discourse; he famously proclaimed in his first inaugural address that "government is not the solution to our problem; government is the problem."[59] Reagan, too, appointed outsiders committed to rolling back the agencies they led, slashed agency budgets, and pushed for repeal of statutes requiring extensive regulatory regimes as well as abolition of some agencies.[60]

The promises of regulatory reduction and downsizing of government, however, largely went unfulfilled. Much of the deregulation achieved under Reagan resulted from controlling implementation and administration of existing statutes, not from legislative repeals.[61] More to the point,

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54 RICHARD P. NATHAN, THE ADMINISTRATIVE PRESIDENCY 8–9 (1983).

55 *See, e.g.*, David J. Barron, Foreword, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1128 (2008); Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 719–38 (2007).

56 Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 79 (Jan. 23, 1996).

57 Remarks Announcing the National Performance Review, 1 PUB. PAPERS 233–34 (Mar. 3, 1993).

58 Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 261 (1986) (quoting Press Release, Office of the White House Press Sec'y, Statement of the President on Regulatory Relief (June 5, 1981), *reprinted in* MATERIALS ON PRESIDENT REAGAN'S PROGRAM OF REGULATORY RELIEF 1 (1981), https://reaganlibrary.gov/digitallibrary/smof/cos/cicconi/Box-12/40-94-6914308-012-007-2016.pdf [https://perma.cc/856R-MABF]).

59 Inaugural Address, 1 PUB. PAPERS 1 (Jan. 20, 1981); *see also* ALLAN J. LICHTMAN, WHITE PROTESTANT NATION: THE RISE OF THE AMERICAN CONSERVATIVE MOVEMENT 350 (2008); SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974–2008, at 127–28, 136 (2008).

60 WILENTZ, *supra* note 59, at 140–41, 169; Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan's First Term*, 2 YALE J. ON REG. 293, 297–303 (1985); McGarity, *supra* note 58, at 262–68.

61 LICHTMAN, *supra* note 59, at 354; MEG JACOBS & JULIAN E. ZELIZER, CONSERVATIVES IN POWER: THE REAGAN YEARS, 1981–1989, at 38–39 (2011).

the Reagan Administration's efforts at deregulation and curtailing administrative government are largely considered a failure.[62] Governmental spending increased, no major domestic programs were terminated, and by the start of Reagan's second term regulatory relief was firmly off the agenda.[63] If anything, the Reagan era sowed the seeds for what conservatives today view as executive overreach. It was the Reagan Administration's deregulatory efforts that produced the *Chevron* doctrine and deference to an agency's reasonable interpretation of ambiguous statutes that it implements.[64] It was also the Reagan Administration that developed centralized regulatory review and pushed for recognition of constitutionally protected presidential control of administration.[65] Over subsequent decades both Republican and Democratic Presidents developed these tools of presidential control even further. In particular, President Obama used his powers of administrative direction and oversight to push progressive policies stymied in Congress.[66] Once Republican mainstays, *Chevron* deference and presidential administrative control quickly became the *bêtes noires* of conservatives.[67]

Thus, if past experience is any guide, the current political attack seems unlikely to dramatically transform the administrative state. Administrative government's endurance reflects basic political as well as economic, social, and technological realities. An administrative state is

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[62] WILENTZ, *supra* note 59, at 194–96.

[63] JACOBS & ZELIZER, *supra* note 61, at 28–33, 40–41; Fix & Eads, *supra* note 60, at 293, 304; McGarity, *supra* note 58, at 268–70. Similar antiregulatory promises from Presidents Nixon and Bush were equally unfulfilled. In fact, national administrative government dramatically expanded under Nixon's watch with the enactment of the major environmental, labor, and health statutes that ushered in a new era of national social regulation. JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT 15, 20–22 (2016).

[64] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[65] *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 374–83 (2008); *see also* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 383 (2003) ("Reagan sought not only to advance his vision of [limited national] government through policy choices and political discourse, but also to enshrine it in constitutional doctrine.").

[66] Gillian E. Metzger, Essay, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1741, 1752–57, 1774–77 (2015) [hereinafter Metzger, *Agencies, Polarization, and the States*].

[67] *See, e.g.*, *Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States (Day 3)*, S. COMM. ON THE JUDICIARY at 1:46:08 (Mar. 22, 2017), https://www.judiciary.senate.gov/hearings/watch?hearingid=8325DA5C-5056-A066-6059-5FD8D312A9BB [https://perma.cc/L74Q-GK5M] (statement of Sen. Hatch) ("I am troubled by the suggestion that skepticism of *Chevron* . . . means that one is somehow reflexively opposed to regulation. . . . After all, it's important to remember that *Chevron* deference first flourished as a reaction against liberal judges overturning the . . . actions of the Reagan Administration."); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1091 (2016) (noting that conservative *Chevron* skepticism may be attributable to "conservative frustration with eight years of a Democratic administration, contrasted with enthusiasm for the doctrine at its outset in the Reagan years").

unavoidable today for the country to function; the question is not whether an administrative state will exist, but rather what will be the scope and focus of its activities.[68] Many government programs are popular or lobbied for by well-connected interest groups;[69] even those clamoring vociferously for a rollback of national government, such as the Tea Party, are strongly committed to some features of modern administrative governance.[70] Moreover, Presidents need the administrative state to achieve their policy goals. This is as true of President Trump as of his predecessors: Trump's campaign promises of significant infrastructure development, growing the military, and a crackdown on immigration all entail administrative expansions.[71] Further, enactment of burdensome procedural constraints or legislation retracting deference would only serve to make the Trump Administration's efforts to repeal regulations significantly harder.[72] Instead, a more likely move — again following in the footsteps of Reagan and subsequent Presidents — would be for the Trump Administration to seek to achieve deregulation from within the executive branch, as it already has started to do.

But past experience in fact may not be a good guide, because the national political situation today differs in important ways from that of the 1980s. Most salient here is the alarming increase in political polarization, with the two parties significantly more ideologically divided from each other and more internally ideologically consistent than they were when Reagan was President.[73] Moreover, the divergence between the

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[68] Pojanowski, *supra* note 67, at 1075.

[69] *See* Paul Pierson, *The New Politics of the Welfare State*, 48 WORLD POL. 143, 143–44 (1996); Lauren Etter & Greg Hitt, *Farm Lobby Beats Back Assault on Subsidies*, WALL ST. J. (Mar. 27, 2008, 11:59 PM), https://www.wsj.com/articles/SB120657645419967077 [https://perma.cc/5FU2-6Z3G]; Robert Y. Shapiro & Greg M. Shaw, *Why Can't the Senate Repeal Obamacare? Because Its Policies Are Actually Popular*, WASH. POST: MONKEY CAGE (July 19, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/19/why-cant-the-senate-repeal-obamacare-because-its-actual-policies-are-popular/ [https://perma.cc/ZLR6-TRUG].

[70] SKOCPOL & WILLIAMSON, *supra* note 7, at 59–60 (noting that "Tea Party people know that Social Security, Medicare, and veterans' programs are government-managed, expensive, and funded with taxes," but support the programs because they feel the recipients have "earned" it).

[71] David Lewis, *Why Donald Trump Needs the "Administrative State" that Steve Bannon Wants to Destroy*, WASH. POST: MONKEY CAGE (Mar. 2, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/02/why-donald-trump-needs-the-administrative-state-that-steve-bannon-wants-to-destroy/ [https://perma.cc/M32V-PKYM]; Brian Naylor, *Trump's Plan to Hire 15,000 Border Patrol and ICE Agents Won't Be Easy*, NPR (Feb. 23, 2017, 5:12 AM), http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15–000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill [https://perma.cc/SP5P-GNNZ].

[72] *See* Vermeule, *supra* note 18.

[73] *See* Cynthia R. Farina, Essay, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1701–05 (2015) (noting increases in congressional polarization since the 1980s with current levels of polarization being the highest since the Civil War). Although some debate the extent of polarization, there is general agreement that polarization is strongly present at the level of party elites and party activists. *See, e.g.*, *id.* at 1705–17 (describing debate and concluding that evidence shows polarization among party activists and members of Congress); Gary

parties is particularly stark when it comes to the role of government, with recent surveys indicating that Republicans and Republican-leaning independents strongly prefer a smaller government providing fewer services (74%), whereas Democrats and Democratic-leaning independents strongly prefer a bigger government with more services (65%).[74] This divide is plainly evident in Congress, where the barrier to the RAA's enactment is near-solid Democratic opposition in the closely split Senate, making it difficult for the RAA's backers to secure the necessary supermajority of sixty votes to overcome a Democratic filibuster. Were the makeup of the Senate to turn more Republican, or were the Senate to do away with the filibuster, the RAA might well be enacted — particularly if Republicans conclude (as Democrats did in 1946 with respect to the APA) that their control of the executive branch is likely to be limited and enactment of the RAA is thus in their long-term interests.[75]

B. The Judicial and Academic Attack

The current judicial challenges to national administrative government fall into three general categories: separation of powers challenges; subconstitutional challenges with a separation of powers background; and other constitutional challenges. Academic scholarship sounds similar themes, albeit with more of an individual rights flavor.

1. Separation of Powers. — The separation of powers challenges can further be subdivided by subject matter, again into three groupings: presidential power, in particular presidential appointment and removal authority; administrative adjudication; and delegation of authority to the executive branch.

(a) Presidential Power. — So far, presidential power challenges have been the most successful, in part reflecting longstanding doctrinal uncertainty about the scope of the President's removal powers. In the 2010 case of *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[76] a 5–4 Court invalidated for-cause removal protections for members of the Public Company Accounting Oversight Board (PCAOB), an entity that oversees the accounting industry and whose members are appointed by the Securities and Exchange Commission (SEC). According to Chief Justice Roberts's majority opinion, because the members of the SEC also enjoyed for-cause removal protection, the

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C. Jacobson, *Partisan Polarization in American Politics: A Background Paper*, 43 PRESIDENTIAL STUD. Q. 688, 690–700 (2013) (describing polarization in Congress and arguing that it reflects increased polarization in party bases).

[74] *With Budget Debate Looming, Growing Share of Public Prefers Bigger Government*, PEW RES. CTR. (Apr. 24, 2017), http://www.people-press.org/2017/04/24/with-budget-debate-looming-growing-share-of-public-prefers-bigger-government/3/ [https://perma.cc/84JW-2JZX].

[75] McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 180–83 (1999).

[76] 561 U.S. 477 (2010).

result was a double for-cause protection that eviscerated the President's control over the PCAOB and thereby impaired his ability to ensure that the laws be faithfully executed.[77] *Free Enterprise* has sparked a cottage industry of separation of powers challenges, including *PHH Corp. v. Consumer Financial Protection Bureau*,[78] in which a 2–1 panel of the D.C. Circuit invalidated the removal protections for the Director of the Consumer Financial Protection Bureau (CFPB), an agency newly created by the Dodd-Frank Wall Street Reform and Consumer Fairness Act (Dodd-Frank).[79] According to the panel decision, now vacated pending en banc review, the concentration of CFPB's significant powers in a single director, rather than a multimember commission such as other independent agencies, removed important checks on accumulated power and rendered the arrangement unconstitutional.[80]

Both *Free Enterprise*'s prohibition on double for-cause removal protection and *PHH Corp.*'s requirement that independent agencies be headed by multimember commissions represent new constitutional limits on Congress's power to fashion administrative arrangements. Both decisions in turn justified their results in part on the novelty of the administrative structures they confronted.[81] In *Free Enterprise*, Chief Justice Roberts's majority opinion maintained that "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress's action,[82] a principle on which the D.C. Circuit panel heavily relied in *PHH Corp.*[83] The constitutionally suspect character of administrative novelty was also emphasized by the Court in *NLRB v. Noel Canning*,[84] which provided the Supreme Court with its first occasion to interpret the meaning of the Recess Appointments Clause.[85] President Obama's actions underlying *Noel Canning* were novel; no President had previously made recess appointments during a pro forma session — nor, indeed, had pro forma sessions been used to stymie recess appointments before 2007.[86] In *Noel Canning*, Justice

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[77] *Id.* at 495–99.

[78] 839 F.3d 1 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, No. 15-1177, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017).

[79] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

[80] *PHH Corp.*, 839 F.3d at 16.

[81] Antinovelty has surfaced in a number of structural constitutional challenges of late. *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1415–21 (2017).

[82] 561 U.S. at 505 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

[83] 839 F.3d at 22.

[84] 134 S. Ct. 2550 (2014).

[85] *Id.* at 2560; *see* U.S. CONST. art. II, § 2, cl. 3.

[86] Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1609, 1619–20 (2015); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 46 (2014).

Breyer's majority opinion underscored the importance of historical practice in holding that President Obama's unprecedented action fell outside the scope of the recess appointments power.[87] But on the same basis, the majority ruled that recess appointments can be used during intrasession recesses and to fill vacancies that already exist when the recess occurs, concluding these practices were by now long established and accorded with the purpose of the clause.[88] Here Justice Scalia, writing also for Chief Justice Roberts and Justices Thomas and Alito, disagreed that longstanding historical practice was clear and also challenged the majority's reliance on twentieth-century historical practice as an abandonment of the Court's constitutional responsibilities.[89]

Hence, in addition to rejecting administratively novel arrangements, at least three current members of the Court would appear to give little weight to the tenure of administrative arrangements in assessing their constitutionality.[90] This asymmetry — novelty can condemn an administrative arrangement, but lack of novelty can't save it — displays a skepticism toward administrative government on the part of a sizeable group on the Court. Although no constitutional separation of powers challenges came before the Court in the 2016 Term, the question of historical practice surfaced in *NLRB v. SW General, Inc.*,[91] a case on the scope of the President's power to fill vacancies under the Federal Vacancies Reform Act[92] (FVRA). Chief Justice Roberts wrote for the Court that the Act barred those who were nominated to a vacant office requiring Senate confirmation from serving in the same office in an acting capacity (with an exception for nominees who had previously served a set period as first assistants to the office at issue).[93] Ever since 1998, when the FVRA was enacted, both the Office of Legal Counsel and the General Accountability Office had read the Act's prohibition as applying more narrowly.[94] Concluding "[h]istorical practice is too grand a

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[87] 134 S. Ct. at 2567, 2574.

[88] *Id.* at 2566–68. This approach to novelty marked a change from Justice Breyer's approach in *Free Enterprise*. Dissenting there, Justice Breyer thought this novelty of no moment, emphasizing the variety of administrative structures and the importance of "flexibility needed to adapt statutory law to changing circumstances." 561 U.S. 477, 520 (2010) (Breyer, J., dissenting); *see id.* at 514–20.

[89] *Noel Canning*, 134 S. Ct. at 2592 (Scalia, J., concurring in the judgment).

[90] It seems quite likely that Justice Gorsuch would be of a similar view, given his approach to related separation of powers challenges. *See supra* notes 13–17 and accompanying text.

[91] 137 S. Ct. 929 (2017).

[92] 5 U.S.C. §§ 3345–3349 (2012).

[93] *SW General*, 137 S. Ct. at 932.

[94] *See id.* at 943; Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (1999) (interpreting the FVRA's ban as applying only when a first assistant became an acting officer before serving the requisite ninety-day period, but not applying to other officers the FVRA made eligible to serve in an acting capacity).

title for [this] evidence," Roberts rejected the relevance of these past interpretations without calling *Noel Canning* into question.[95] The most extreme claim in *SW General* was made by Justice Thomas, who argued in a concurrence that the Constitution likely prohibited any non-Senate-confirmed appointment to a principal officer position, even in an acting capacity.[96]

(b) Administrative Adjudication. — Free Enterprise has also surfaced in the administrative adjudication context, with a number of cases challenging the appointment and removal processes for administrative law judges (ALJs) at the SEC. Defendants facing administrative enforcement proceedings as a result of Dodd-Frank's expansion of the SEC's adjudication authority have argued that the ALJs presiding over their proceedings are inferior officers.[97] Under governing statutes, ALJs are competitively selected by the Office of Personnel Management (OPM), with agencies choosing an ALJ to hire from the three highest-scoring names on a list that OPM compiles.[98] By SEC rule, the agency's chief ALJ selects which of these three candidates to hire — an arrangement that all concede would be unconstitutional if ALJs were indeed inferior officers, given the requirement that inferior officers be selected by the President (with or without Senate confirmation), heads of department, or courts of law.[99] Moreover, ALJs enjoy elaborate independence protections. Those protections include not only strong salary and for-cause removal protection for themselves, but also removal only after a formal on-the-record hearing by the Merit Systems Protection Board, the members of which also enjoy for-cause removal protection.[100] These

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[95] *SW General*, 137 S. Ct. at 943 (internal quotation marks omitted).

[96] *Id.* at 948–49 (Thomas, J., concurring).

[97] *See, e.g.*, Bandimere v. SEC, 844 F.3d 1168, 1171 (10th Cir. 2016); Raymond J. Lucia Cos. v. SEC, 832 F.3d 277, 289 (D.C. Cir. 2016), *aff'd by an equally divided en banc court*, No. 15-1345, 2017 WL 2727019 (D.C. Cir. June 26, 2017) (per curiam); Hill v. SEC, 825 F.3d 1236, 1239 (11th Cir. 2016); Duka v. SEC, 103 F. Supp. 3d 382, 393 (S.D.N.Y. 2015).

[98] *See* 5 U.S.C. §§ 3317–3318 (2012); Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 804–05 (2013).

[99] *See* 17 C.F.R. § 200.30-10(a)(2) (delegating to the Chief ALJ the power "[t]o designate administrative law judges"); *see also* Barnett, *supra* note 98, at 800 ("If . . . ALJs are 'inferior Officers' (not mere employees), the manner in which some are currently selected is likely unconstitutional."). Appointment Clause problems may exist even in other agencies where the agency head does select the ALJs, given OPM's role in limiting the pool of ALJ candidates and the fact that some agency heads may not qualify as department heads for constitutional purposes because their agencies are nested within bigger administrative entities. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 511 (2010) ("[A] freestanding component of the Executive Branch, not subordinate to or contained within any other such component, . . . constitutes a 'Departmen[t]' for the purposes of the Appointments Clause." (second alteration in original)); Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. (forthcoming 2018) (Mar. 2017 draft at 64–68) (on file with the Harvard Law School Library).

[100] *See, e.g.*, 5 U.S.C. § 5335 (setting pay schedule for permanent employees, including ALJs); *id.* § 5362 (protecting permanent employees from pay decreases); *id.* § 7521 (establishing procedures to be followed before adverse action can be taken against an ALJ); *see also id.* § 1202(d) (providing

protections are a core feature of the current system for administrative adjudication under the APA, which combines initial adjudication by an ALJ with de novo review at the agency head level.[101] As a result, if ALJs are inferior officers, not only would the current systems many agencies use to appoint them be at odds with the Appointments Clause,[102] but also these removal protections might well run afoul of *Free Enterprise*'s double for-cause bar.[103]

Whether or not this challenge to ALJ appointment ultimately proves successful in court, the mere fact that such a long-established feature of the national administrative state is under question is striking. This point is only more true with respect to the other constitutional attacks on administrative adjudication now being raised, such as the claim that such adjudication violates the Seventh Amendment jury trial right and claims that the combination of adjudicatory, prosecutorial, and enforcement powers in an agency violates due process.[104] The Roberts Court's position on these challenges is hard to read. In other contexts, the Chief Justice has worried about agencies wielding a combination of de facto legislative, executive, and adjudicatory power.[105] In addition, a majority of the Court has indicated some resistance to non–Article III jurisdiction, invalidating bankruptcy court jurisdiction over state law private right counterclaims in *Stern v. Marshall*.[106] Subsequently, in *Wellness International Network, Ltd. v. Sharif*,[107] the Chief Justice, writing for himself and two other Justices, strongly dissented over what he perceived as a rollback from *Stern*. He insisted that "[w]ith narrow exceptions, Congress may not confer power to decide federal cases and

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that any member of the Merit Systems Protection Board "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office").

101 *See id.* § 556(b)(3) (providing that an ALJ may preside over the taking of evidence); *id.* § 557(b) (providing that the presiding employee shall make an initial decision, binding on the agency unless appealed).

102 U.S. CONST. art. II, § 2, cl. 2.

103 However, *Free Enterprise*'s express reservation of its import for ALJs, 561 U.S. at 507 n.10, suggests that the Court may be unwilling to invalidate double for-cause removal in the adjudicatory context, and precedent going back to *Myers v. United States*, 272 U.S. 52 (1926), suggests that constitutional requirements of presidential control are different when adjudication is at issue, *id.* at 135.

104 *See, e.g.*, Complaint at 12–13, Chau v. SEC, 72 F. Supp. 3d 417 (S.D.N.Y. 2014) (No. 14-cv-1903); Complaint at 7–8, Jarkesy v. SEC, 48 F. Supp. 3d 32 (D.D.C. 2014) (No. 14-114); Complaint at 13–23, Bebo v. SEC, 2015 WL 905349 (E.D. Wis. Mar. 3, 2015) (No. 15-C-3). The influx of litigation challenging the administrative adjudicatory practices at the SEC has been attributed in part to the increase in power of SEC ALJs brought on by Dodd-Frank. *See* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1190–210 (2016) (discussing possible infirmities of SEC ALJ adjudication).

105 *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting).

106 564 U.S. 462 (2011).

107 135 S. Ct. 1932 (2015).

controversies upon judges who do not comply with the structural safeguards of Article III."[108] On the other hand, the *Stern* majority expressly stated it was not reaching broader questions of administrative adjudication, acknowledged that public rights do not require Article III adjudication, and appeared to sanction a broad definition of public rights as rights that are "integrally related to particular Federal Government action."[109] In addition, the Court's return to a more flexible approach to Article III's requirements in *Wellness International Network* perhaps signals some hesitancy to disrupt existing arrangements that significantly.[110]

The 2017 Term may well shed light on how far the Roberts Court is willing to pull back on administrative adjudication. A circuit split now exists on the question of whether SEC ALJs are inferior officers or employees, and thus also on the constitutionality of SEC adjudications.[111] And the Court has already granted certiorari in a case challenging whether the Patent and Trademark Office's inter partes review of the validity of existing patents violates Article III and the Seventh Amendment.[112]

(c) Delegation. — In *Department of Transportation v. Ass'n of American Railroads*,[113] the D.C. Circuit invalidated a statutory scheme for improving passenger rail service on the grounds that it contained a delegation of regulatory power to private hands that violated due process and the separation of powers.[114] Given that the ostensibly private hands at issue were those of Amtrak, a statutorily denominated private corporation that the Supreme Court had previously found to be a governmental actor for constitutional purposes — as well as the Supreme Court's consistent unwillingness to invalidate delegations as unconstitutional — the Court's subsequent rejection of the D.C. Circuit's private delegation holding was predictable.[115] Far less expected, however, were

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[108] *Id.* at 1951 (Roberts, C.J., dissenting).

[109] 564 U.S. at 490–91.

[110] *See* 135 S. Ct. at 1944–46.

[111] *Compare* Raymond J. Lucia Cos. v. SEC, 832 F.3d 277 (D.C. Cir. 2016) (holding SEC ALJs to be constitutionally hired employees), *aff'd by an equally divided en banc court*, No. 15-1345, 2017 WL 2727019 (D.C. Cir. June 26, 2017) (per curiam), *and* Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000), *with* Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016) (holding SEC ALJs to be unconstitutionally appointed inferior officers), *and* Burgess v. FDIC, No. 17-60579, 2017 WL 3928326 (5th Cir. Sept. 7, 2017).

[112] Oil States Energy Servs., LLC v. Greene's Energy Grp., 639 F. App'x 639 (Fed. Cir. 2016) (mem.) (per curiam), *cert. granted*, 137 S. Ct. 2239 (2017) (mem.).

[113] 721 F.3d 666 (D.C. Cir. 2013), *vacated and remanded*, 135 S. Ct. 1225 (2015), *aff'd on reh'g*, 821 F.3d 19 (D.C. Cir. 2016).

[114] *Id.* at 677.

[115] *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1232–35; *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 492 (2001) (rejecting unconstitutional delegation holding below).

the "concurrences" of Justices Alito and Thomas. Both Justices expressed concern that delegations make lawmaking too easy and threaten individual liberty.[116] Justice Alito mainly targeted the possibility that required performance standards for Amtrak might be set by binding arbitration using an arbitrator appointed by the federal Surface Transportation Board.[117] In his view, this possibility likely rendered the scheme unconstitutional: if a private arbitrator were used, the scheme would violate what he posited as a categorical constitutional ban on private delegations; and if the arbitrator were public, the fact that her decisions would be binding meant that she was a principal officer who had to be appointed by the President.[118] Meanwhile Justice Thomas, concurring only in the judgment, offered a broad-ranging disquisition on the original understanding of separation of powers and the unconstitutionality of modern-day delegations of regulatory authority. Condemning the reigning intelligible principle test as failing to prevent delegation of legislative power, Justice Thomas advocated "return[ing] to the original understanding of the federal legislative power," which would "require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process" and deny the executive "*any* degree of policy judgment" in establishing such rules.[119] Concurring this Term in an otherwise-unanimous case on preemption, Justice Thomas reiterated his attack on delegation, stating that a "statute that confers on an executive agency the power to enter into contracts that pre-empt state law . . . might unlawfully delegate legislative power to the President insofar as the statute fails sufficiently to constrain the President's contracting discretion."[120]

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[116] *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints." (citing INS v. Chadha, 462 U.S. 919, 959 (1983))); *id.* at 1245 (Thomas, J., concurring in the judgment) ("At the heart of this liberty were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free.").

[117] Justice Alito also attacked the method for appointing Amtrak's president; he argued that the president was a principal officer requiring presidential appointment, and further contended that, even if Amtrak's president were an inferior officer, Amtrak was likely not a department, so the president's selection by the Amtrak board was still unconstitutional. *See id.* at 1239–40 (Alito, J., concurring).

[118] *Id.* at 1235–39.

[119] *Id.* at 1246, 1251 (Thomas, J., concurring in the judgment).

[120] Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1199 (2017) (Thomas, J., concurring). While Justice Gorsuch took no part in the consideration or decision of *Coventry Health Care*, he previously expressed a similar view. *See* Gorsuch, *supra* note 13, at 914–15 (criticizing the blend of executive power with delegated legislative and judicial power that characterized the *De Niz Nobles* case); *see also* Bazelon & Posner, *supra* note 17 ("Judge Gorsuch is skeptical that Congress can use broadly written laws to delegate authority to agencies in the first place.").

Broad delegations of policymaking power represent the backbone of the modern administrative state, and reliance on private actors for governmental functions is also a major trend.[121] Hence, a centrally important feature of the Court's *American Railroads* decision is the fact that both Justices wrote singly; all the other Justices did was overturn the D.C. Circuit's private delegation holding and remand the appointments and due process claims for that court to consider in the first instance.[122] This fact did not lead the D.C. Circuit to change its tune, however. On remand the same panel of the D.C. Circuit essentially reinstated the logic of its earlier decision by holding that Amtrak was an economically self-interested entity, even if governmental, and allowing such an entity to exercise regulatory power over its competitors for track time violated due process.[123]

2. Subconstitutional Doctrines and the Separation of Powers. — More members on the Court have signaled some support for Justice Thomas's concerns about delegation when advanced indirectly — as a basis for pulling back on judicial deference to agencies — rather than as a frontal constitutional assault.[124] So far, only two Justices have concluded that *Chevron* deference to agency statutory interpretations is unconstitutional,[125] though several more are willing to limit *Chevron*'s scope.[126] Even more have signaled their willingness to dispense with judicial deference to agency interpretations of their own regulations — deference which is reflected in the line of cases from *Bowles v. Seminole*

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121 Gillian E. Metzger, *Delegation, Accommodation, and the Permeability of Constitutional and Ordinary Law*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 409, 410 (Mark Tushnet et al. eds., 2015).

122 *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233–34.

123 Ass'n of Am. R.Rs. v. U.S. Dep't. of Transp., 821 F.3d 19, 27 (D.C. Cir. 2016). The panel also agreed with Justice Alito that the arbitrator was an unconstitutionally appointed principal officer. *Id.* at 38–39. The D.C. Circuit denied the government's petition for en banc review, and the government opted to not seek certiorari. *Ass'n of Am. R.Rs.*, No. 12-5204 (D.C. Cir. Sept. 9, 2016) (mem.) (per curiam).

124 *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211 (Scalia, J., concurring in the judgment); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring) (Justice Alito joined Chief Justice Roberts's opinion); *id.* at 616 (Scalia, J., concurring in part and dissenting in part); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

125 *See* Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) ("These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference."); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring) ("But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); *see also Perez*, 135 S. Ct. at 1211–13 (Scalia, J., concurring in the judgment) (noting *Chevron*'s problematic basis but justifying it as "in conformity with the long history of judicial review of executive action").

126 *See supra* note 124 and accompanying text.

Rock & Sand Co.[127] through *Auer v. Robbins*.[128] Although such retraction in deference is justified in part by reference to the language of the APA, separation of powers concerns are also frequently invoked. Hence, for example, Justice Scalia maintained that deferring to agency interpretations of their own rules "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."[129]

These attacks on deference are of very recent vintage. It was just twenty years ago, in 1997, when Justice Scalia penned *Auer* for a unanimous Court and reaffirmed that courts defer to agency interpretations of their own regulations "unless 'plainly erroneous or inconsistent with the regulation.'"[130] In the 2016 Term, the Court came close to deciding a case that raised questions about the scope of *Auer* deference. In *G.G. ex rel. Grimm v. Gloucester County School Board*,[131] the Fourth Circuit deferred to guidance from the Departments of Education and Justice interpreting Title IX and a Department of Education (DOE) regulation as requiring the Gloucester County School Board to allow G.G. access to the boys' bathroom at his school.[132] Although declining the School Board's request to reconsider *Auer* deference writ large, the Court granted certiorari on the question of whether deference to the specific guidance at issue was appropriate.[133] When the Trump Administration

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[127] 325 U.S. 410 (1945).

[128] 519 U.S. 452 (1997). Justices Thomas and Alito have indicated that they believe *Auer* may well be incorrect and should be reconsidered, which was also Justice Scalia's view. *See Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring in the judgment); *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment); *see also id.* at 1212–13 (Scalia, J., concurring in the judgment). Justice Gorsuch's view that *Chevron* deference is unconstitutional and violates the APA strongly suggests he would take a similar stance on *Auer* deference. *See Gutierrez-Brizuela*, 834 F.3d at 1152–55 (Gorsuch, J., concurring). In addition, Chief Justice Roberts signaled his willingness to revisit *Auer* in an appropriate case, *see Decker*, 568 U.S. at 615–16 (Roberts, C.J., concurring), but also joined the majority opinion in *Perez*, which treated *Auer* as good law — albeit emphasizing the limited scope of *Auer* deference as it did so, 135 S. Ct. at 1208 n.4.

[129] *Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part); *see also Perez*, 135 S. Ct. at 1216–21 (Thomas, J., concurring in the judgment); City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting).

[130] *Auer*, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

[131] 822 F.3d 709 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017).

[132] *Id.* at 715. The Department of Education letter at issue provided that, in situations where sex segregation is allowed in schools, such as in bathrooms under 34 C.F.R. § 106.33 (2016), "transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice 3 (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/K6K9-Q3NL].

[133] Petition for a Writ of Certiorari at i, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (2016) (No. 16-273) (presenting the questions: (1) should the Court retain *Auer* deference, (2) is *Auer* deference appropriate for the guidance document at issue, and (3) is the DOE guidance appropriate); *Gloucester County*, 137 S. Ct. at 369 (granting certiorari on questions (2) and (3)).

rescinded the guidance, however, the Court simply remanded the case back to the Fourth Circuit to reconsider the issue without reaching the merits.[134] Despite the Court's failure this Term to act on *Gloucester County* or other cases raising *Auer* deference,[135] continuing controversy suggests that the Court will likely address *Auer*'s scope and propriety in coming Terms.

Even more striking than the attacks on *Auer* are judicial efforts to overturn the longstanding deference to agency statutory interpretations provided under the *Chevron* framework. Newly minted Justice Gorsuch emerged this year as a pointed critic of *Chevron*. In a series of opinions on the Tenth Circuit, then-Judge Gorsuch attacked *Chevron* deference as at odds with the separation of powers:

> *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. . . . *Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty. . . . When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct. . . . Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more.[136]

Although *Chevron* has certainly sparked its share of criticism over the years, such a frontal constitutional assault on *Chevron* in a judicial opinion is a relative novelty. Indeed, in 2005 Justice Thomas — who now agrees *Chevron* is unconstitutional — wrote a majority opinion for the Court holding that under *Chevron* a lower court must defer to agency interpretations of ambiguous statutes, even if the court had already interpreted the statute differently in another context.[137]

Other Justices have pursued a more modest attack on *Chevron*. For example, in *King v. Burwell*[138] a majority signed on to Chief Justice Roberts's opinion summarily rejecting the *Chevron* framework in interpreting an admittedly ambiguous statute, on the grounds that at issue

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[134] *Gloucester County*, 137 S. Ct. at 1239.

[135] *See, e.g.*, Bible v. United Student Aid Funds, Inc., 807 F.3d 839 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari); Flytenow, Inc. v. FAA, 808 F.3d 882 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 618 (2017); Diamond Sawblades Mfrs. Coal. v. Hyosung D & P Co., 809 F.3d 626 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 1325 (2017); Noble Energy, Inc. v. Jewell, 650 F. App'x 9 (D.C. Cir. 2016) (per curiam), *cert. denied sub nom.* Noble Energy, Inc. v. Haugrud, 137 S. Ct. 1327 (2017).

[136] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149, 1152, 1155 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015).

[137] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

[138] 135 S. Ct. 2480 (2015).

was "a question of deep 'economic and political significance' that [was] central to th[e] statutory scheme."[139] Strongly dissenting in *City of Arlington v. FCC*,[140] the Chief Justice, joined by Justices Kennedy and Alito, argued that courts failed to perform their constitutional and statutory duties if they deferred to agency jurisdictional determinations.[141] In addition, several decisions have read statutes aggressively to discern a plain meaning at odds with the agencies' interpretations,[142] displayed increasing skepticism about changed agency interpretations,[143] and read procedural restrictions on agencies expansively.[144] Justice Gorsuch has also offered cabining principles, holding for the Tenth Circuit that *Chevron* does not apply when an agency issues a new rule in an adjudication[145] and similarly that agency interpretations of ambiguous provisions apply prospectively, at least when the agency's interpretations are at odds with existing judicial interpretations.[146]

Far too many judicial decisions sustain administrative actions on deferential review to identify a clear move toward rejecting *Chevron*.[147] The Supreme Court has also rebuffed lower court efforts to impose procedural requirements on agencies' ability to promulgate new statutory interpretations beyond those mandated by Congress.[148] But combined with the various lines of constitutional attack on administrative action

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139 *Id.* at 2489 (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)).

140 569 U.S. 290 (2013).

141 *Id.* at 314–16 (Roberts, C.J., dissenting).

142 *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2706–07 (2015) (rejecting agency interpretation as unreasonable under *Chevron*'s deferential second step); Texas v. United States, 809 F.3d 134, 179–87 (5th Cir. 2015) (concluding from express statutory authorization of certain immigration relief that plain text of statute prohibited agency's interpretation of statute as allowing additional relief), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam); *see also* Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) (underscoring importance of *Chevron*'s first step).

143 *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–26 (2016) (finding a change in agency interpretation arbitrary and capricious because the agency inadequately explained why the interpretation was changed); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1209 (2015) (noting that it is arbitrary and capricious to change an interpretation that has been relied upon without explaining why). *But see* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) (holding that not all changes in agency interpretation need be justified by reasons more substantial than those required to adopt an interpretation in the first instance).

144 *See* Texas v. United States, 809 F.3d at 170–78 (finding that promulgation of an alleged guidance document was procedurally defective because it was not submitted for notice and comment).

145 De Niz Robles v. Lynch, 803 F.3d 1165, 1171–72 (10th Cir. 2015).

146 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1144–49 (10th Cir. 2016).

147 Indeed, Professor Adrian Vermeule recently argued that courts are moving toward greater deference. ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 157–58 (2016).

148 *See Perez*, 135 S. Ct. at 1206 (rejecting additional procedural requirements for changed agency interpretations); *see also* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782–84 (2016) (rejecting the D.C. Circuit's contention that FERC did not adequately engage with reasonable arguments against the adopted rule).

and the Court's at times strong anti-administrative rhetoric, these statements questioning deference contribute to the sense of a growing judicial resistance to administrative governance and judicial concern over the constitutional legitimacy of the administrative state.

3. Other Constitutional Claims. — Finally, the Supreme Court and lower courts have also cut back on administrative governance by constitutional means other than separation of powers. In recent years, the Roberts Court has expanded First Amendment protections in ways that pose challenges to major regulatory schemes.[149] This antiregulatory tilt is particularly evident with respect to corporate speech and speech in economic contexts, including most prominently the First Amendment invalidation of bans on direct corporate election spending in *Citizens United v. FEC*.[150] It is also demonstrated by the D.C. Circuit's protection of employers' refusals to post statements of workers' statutory rights to organize[151] and the Supreme Court's protections for corporate access to information for drug marketing.[152] A similar phenomenon has occurred in relation to religion, with regulatory requirements being significantly pared back in the name of religious free exercise.[153]

Both of these trends were on display in the 2016 Term. *Expressions Hair Design v. Schneiderman*[154] involved a challenge by merchants to a New York statute that precluded them from imposing a surcharge on consumers who pay by credit card; the merchants claimed that the statute violated their First Amendment rights by regulating how they communicate their prices.[155] The Court did not reach the question of whether the statute actually violated the First Amendment; instead it simply found that the statute regulated speech and remanded for the

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149 *See* Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. no. 4, 2014, at 195, 198–203. *See generally* Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 178–82. As Professor Jeremy Kessler has described, these First Amendment challenges to economic regulation have a long history over the twentieth century. *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1941–76 (2016).

150 558 U.S. 310 (2010).

151 *See* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C. Cir. 2013); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015).

152 Sorrell v. IMS Health Inc., 564 U.S. 552, 571–80 (2011).

153 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–85 (2014) (invalidating on religious freedom grounds regulations requiring employers to provide health insurance with coverage for contraceptive drugs); *see also* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1466–71 (2015). Although constitutionally infused, these decisions are often based on the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012), rather than direct constitutional free exercise claims. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2759.

154 137 S. Ct. 1144 (2017).

155 *Id.* at 1146–48.

Second Circuit to assess its constitutionality in the first instance.[156] The Court was somewhat more forthcoming in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[157] where by a 7–2 vote it ruled that Missouri's refusal to allow a church to participate in a government-subsidized playground resurfacing program violated the Free Exercise Clause.[158] But the majority limited its holding to express discrimination in the context of playground resurfacing — an oddly specific limit, but one that avoided reaching questions of more religious uses or other types of government funding, and also served to secure Justice Breyer's vote.[159]

In other individual rights contexts, however, the Roberts Court's willingness to overturn regulatory schemes has been more muted. Of particular note, other than protection of commercial and corporate speech, the Roberts Court has not indicated much interest in revitalizing individual economic rights doctrines in a way that would force a significant curtailment in government regulation. For example, the Court has shown little interest in reviving direct economic due process protection of the *Lochner*[160] variety. It has also proceeded cautiously on the takings front, invalidating a longstanding agricultural marketing arrangement, but on grounds that accord with well-established doctrine and yielded broad support among the Justices.[161] This Term's decision in *Murr v. Wisconsin*[162] continued this restrained stance, with Justice Kennedy's 5–3 opinion insisting that regulatory takings analysis must be flexible to balance individual property rights with the government's power to regulate, and therefore rejecting a categorical rule that property lot boundaries must define the extent of property for takings purposes.[163] Although *Murr* provoked a dissent by Chief Justice Roberts that Justices Thomas and Alito joined, the dissent expressly limited its objections to the majority's methodology, stating that the majority's finding of no taking was not troubling and that the type of zoning ordinance at issue "is

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[156] *Id.* at 1147; *see also* Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (invalidating statutory prohibition on registration of trademarks that disparage persons or bring them into contempt or disrepute as violating the First Amendment).

[157] 137 S. Ct. 2012 (2017).

[158] *Id.* at 2024–25.

[159] *Id.* at 2024 n.3; *see also id.* at 2026–27 (Breyer, J., concurring in the judgment). The Court will confront a Free Exercise challenge next Term that lacks express discrimination against religion and also involves government regulation rather than government benefits. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276–77 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 127 S. Ct. 2290 (2017) (mem.).

[160] Lochner v. New York, 198 U.S. 45 (1905).

[161] *See* Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015); *see also* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010) (upholding Florida's Beach and Shore Preservation Act against takings challenge).

[162] 137 S. Ct. 1933 (2017).

[163] *Id.* at 1944–47.

a commonplace tool to preserve scenic areas . . . for the benefit of landowners and the public alike."[164]

Instead of developing economic rights directly, the Court has turned to constitutional surrogates to limit economic regulation — the First Amendment claims identified above[165] and also federalism limits to the scope of national authority. The prime example of the latter move is *NFIB v. Sebelius*,[166] where the Court ruled that Congress's commerce power did not extend to requiring individuals to buy health insurance, although it ultimately upheld the Affordable Care Act's individual mandate as a tax.[167] A prohibition on congressional regulation of inaction is unlikely to have much import in practice, given the rarity of such regulatory regimes and the ease with which inaction usually can be reformulated as action — not to mention a majority's willingness to allow Congress to rely on its taxing power to similar effect. Thus, *NFIB* suggests the Roberts Court's hesitancy to pull back significantly on national regulatory power.[168] Yet the fact that the Court came close to invalidating the most significant national social welfare program in a generation, and asserted constraints on the spending power for the first time, again indicates the extent to which judicial views on national power may be changing.

Moreover, several lower court judges have given voice to strong off-the-court libertarian attacks on administrative government,[169] as well as occasional on-the-court diatribes. Perhaps the most dramatic of the latter was Judge Brown's concurrence in *Hettinga v. United States*,[170] joined by Judge Sentelle, invoking "the gap between the rhetoric of free markets and the reality of ubiquitous regulation" and characterizing regulation of a dairy farmer as "impermissibl[e] collectiviz[ation]," despite concluding the statute at issue was sanctioned by a long line of constitutional adjudication.[171] Similar sharp libertarian statements appear at other levels of government, with Texas Supreme Court Justice Willett

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164 *Id.* at 1950 (Roberts, C.J., dissenting).

165 *See supra* notes 149–59 and accompanying text.

166 567 U.S. 519 (2012).

167 *Id.* at 574–75; *see also* Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 277–84 (2012) (arguing that the NFIB challengers relied on federalism arguments as a proxy for debunked Lochnerian substantive due process).

168 *See* Gillian E. Metzger, *The Supreme Court, 2011 Term — Comment: To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 112–16 (2012) ("[I]t is not at all clear that there is substantial sentiment on the Court for curbing the national government in favor of the states.").

169 *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 403–06 (2015) (describing speeches from Judges Ginsburg and Brown on the D.C. Circuit).

170 677 F.3d 471 (D.C. Cir. 2012).

171 *Id.* at 480 (Brown, J., concurring); *see also* Ass'n of Am. R.Rs. v. Dep't of Transp., 821 F.3d 19, 39 (D.C. Cir. 2016) ("The Constitution's drafters may not have foreseen the formidable prerogatives of the administrative state . . . .").

describing a state constitutional challenge to a hair braider licensing requirement as being "about whether government can connive with rent-seeking factions to ration liberty unrestrained."[172]

4. Academic Attacks. — This growing judicial resistance to administrative government is supported by increasing academic attacks on the constitutional legitimacy of administrative government. To be sure, academic complaints about the current scope of national regulatory power are well established,[173] and some scholars have long alleged that the modern national administrative state is fundamentally at odds with the Constitution.[174] But these administrative challenges have expanded in scope and become more prominent in academic debates over the separation of powers.[175] The most extreme example of this trend is perhaps Professor Philip Hamburger's *Is Administrative Law Unlawful?*.[176] In Hamburger's portrayal, administrative government is the modern incarnation of the royal prerogative overturned in Britain at the end of the seventeenth century: Agencies unlawfully engage in legislation and adjudication, and the combination of these functions in agencies yields consolidated and absolute power.[177] The "Constitution in Exile" movement, with its attacks on contemporary delegation and commerce power doctrine as deviating from the original constitutional plan, was an early manifestation of the current academic anti-administrative trend.[178]

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[172] Patel v. Texas Dep't of Licensing & Regulation, 469 S.W.3d 69, 93 (Tex. 2015) (Willett, J , concurring). In September 2017, President Trump nominated Justice Willett to serve as a circuit judge on the U.S. Court of Appeals for the Fifth Circuit. Kyle Swenson, *Trump Wants Texas's "Tweeter Laureate" Judge on Federal Appeals Court*, WASH. POST (Sept. 29, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/09/29/trump-wants-texass-twitter-laureate-judge-on-federal-appeals-court/ [https://perma.cc/R6M5-WRS].

[173] *See, e.g.*, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

[174] For a particularly effective statement of these arguments, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–49 (1994).

[175] *See* Sunstein & Vermeule, *supra* note 8, at 46–47.

[176] Hamburger answers this question with a resounding "Yes." *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014). For a critique and an equally resounding "No," see Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra*). *See also* Paul P. Craig, *The Legitimacy of U.S. Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 2–4 (Univ. of Oxford Legal Research Series, Paper No. 44, 2016), https://ssrn.com/abstract=2802784 [https://perma.cc/M8UY-VAJ5].

[177] HAMBURGER, *supra* note 176, at 26–29.

[178] Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995, at 83, 84 (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)) ("So for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses.").

Like the judicial attacks, scholars also target specific features of administrative governance as unconstitutional, such as delegation[179] and administrative adjudication.[180] Interestingly, although Reagan-era attacks on administrative governance challenged restrictions on presidential authority as unconstitutional,[181] some anti-administrative scholars are now sounding alarms about burgeoning presidential power.[182]

Academic attacks on administrative governance additionally parallel judicial attacks in combining full-bore constitutional assaults with more moderate interventions. Surrounding these constitutional attacks is a growing body of legal academic work pushing back at administrative governance more incrementally, often through administrative law.[183] A particular area of focus is *Chevron* deference, which conservative scholars condemn as unconstitutionally biased in the government's favor and violating Article III as well as the APA.[184] A notable difference between judicial and academic anti-administrativism, however, is the strong libertarian edge to anti-administrative scholarship. Professors Randy Barnett, David Bernstein, and Richard Epstein, in particular, have prominently critiqued national regulation for exceeding constitutional bounds and violating individual rights, as part of a broader effort to revive *Lochner* and libertarian constitutionalism.[185]

The recent spurt of anti-administrative scholarship is in part a response to the Obama Administration's expansive use of executive power

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[179] *See, e.g.*, Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 491–93 (2016); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 353–77 (2002).

[180] *See* Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023 (2016).

[181] *See* Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 628–29 (1989).

[182] *See* Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. (forthcoming) (manuscript at 3–5) (on file with the Harvard Law School Library); *see also* F.H. BUCKLEY, THE ONCE AND FUTURE KING 12–15 (2014). On the compatibility of these two views, see John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J.F. 374 (2017).

[183] *See, e.g.*, Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 178–83 (2016) (advocating adoption of the REINS Act, cost-benefit analyses in rulemaking, and a fifteen-year sunset on major rules); Ginsburg & Menashi, *supra* note 179, at 477 ("[O]ur administrative law doctrines have drifted . . . far from the liberal tradition."); Nielson, *supra* note 44 (arguing for expanded use of formal rulemaking procedures); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1575–76 (2013) (arguing for stricter judicial policing of agency reasoning and determinations when agencies adjudicate private rights); Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106 (2017) (arguing against more restrictive remedial rules).

[184] *See* Ginsburg & Menashi, *supra* note 179, at 497–507; Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016); *see also* CHARLES MURRAY, BY THE PEOPLE 69–71 (2015).

[185] *See* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION (2016); DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* (2011); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014).

in a progressive and proregulatory direction.[186] But these academic moves reflect a longer-term and more lasting development. They are part of a wider and decades-old effort to reset constitutional law in a conservative and libertarian direction, reflected in the work of conservative legal groups like the Federalist Society and the Institute for Justice.[187] As that suggests, there is a mutually reinforcing relationship between judicial and academic attacks on the administrative state. Hamburger's volume gained prominence when it was repeatedly cited by Justice Thomas in his *American Railroads* concurrence,[188] while Barnett and other scholars have sought to advance their scholarly views through litigation, such as the constitutional challenge to the Affordable Care Act.[189] This parallel academic push thus makes the judicial anti-administrative turn seem more likely to intensify, particularly with appointments of judges with deep roots in the conservative legal movement.[190]

C. Contemporary Anti-Administrativism's Core Themes

These attacks on the administrative state may seem on the surface a diverse lot. They encompass a range of measures and challenges, and even similar claims are advocated with varying degrees of moderation and extremity. Nor does support for these challenges necessarily signal antipathy to administrative government. One can favor greater presidential power over the administrative state while also supporting more active administration, for example.[191] Scholars committed to the administrative project have criticized executive branch excesses,[192] identified agency failures,[193] and long raised concerns about *Chevron*

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[186] *See, e.g.*, DAVID E. BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW (2015); BUCKLEY, *supra* note 182.

[187] *See* DECKER, *supra* note 63, at 39–50; Brian Beutler, *The Rehabilitationists*, NEW REPUBLIC (Aug. 30, 2015), https://newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal [https://perma.cc/ZB2P-9777] (describing increased influence of libertarian scholars in conservative legal circles). *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008).

[188] 135 S. Ct. 1225, 1242–44 (2015) (Thomas, J., concurring in the judgment).

[189] *See, e.g.*, BARNETT, *supra* note 185, at 1–18.

[190] *See supra* notes 19–20 and accompanying text.

[191] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248–49, 2251–52 (2001).

[192] *See, e.g.*, PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 3–5 (2009); William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 773–80.

[193] *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990) (detailing regulatory deficiencies at the National Highway Traffic Safety Administration); *see also* JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT

deference.[194] Some proposed anti-administrative measures find favor across the political spectrum,[195] and many progressives are now turning to the courts to counter the Trump Administration's regulatory rollbacks, just as conservatives used litigation to resist the Obama Administration's proregulatory initiatives.[196]

Nonetheless, these current attacks evidence commonalities that justify their linkage as part of a distinct and emerging phenomenon. In particular, three key themes run throughout: a rhetorical and almost visceral resistance to an administrative government perceived to be running amok; a strong turn to the courts as the means to curb administrative power; and a heavy constitutional overlay, wherein the contemporary administrative state is portrayed as at odds with the basic constitutional structure and the original understanding of separation of powers.[197] These underlying logics offer the conceptual frame that drives contemporary anti-administrativism, but they lack merit on examination.

1. Rhetorical Anti-Administrativism. — These political, judicial, and academic attacks stand out for their rhetorical antipathy to administrative government.[198] Such strident rhetoric is unsurprising in the political sphere, where bureaucracy bashing is nothing new. And although Hamburger's repeated insistence that administrative government is "unlawful," "extralegal," and "supralegal," and represents the "exercise of power outside and above the law"[199] is striking for academic

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(1960) (analysis for newly elected President Kennedy of regulatory problems and failures, written by a central defender of the administrative state in the 1930s).

194 *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010) (arguing that *Chevron* deference is at odds with governing statutes, lacks a theoretical foundation, is inconsistently applied, and creates uncertainty); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 497–98, 520 (1989).

195 As an example, Professor Cass Sunstein, the former head of the Office of Information and Regulatory Affairs (OIRA) under President Obama, has indicated his support for aspects of the RAA. *See* Sunstein, *supra* note 43.

196 *See, e.g.*, Complaint for Declaratory and Injunctive Relief, Pub. Citizen, Inc. v. Trump, No. 1:17-cv-00253 (D.D.C. Feb. 8, 2017); Eli Savit, *The New Front in the Clean Air Wars: Fossil-Fuel Influence over State Attorneys General — And How It Might Be Checked*, 115 MICH. L. REV. 839, 855–57 (2017) (book review).

197 Two other important connections are the shared network of lawyers, scholars, advocates, and funders that lies behind the current spate of attacks and the parallels to claims raised against administrative government in the 1930s, discussed below in Part II.

198 Professor Edward Rubin has characterized this phenomenon as an "anti-administrative impulse," a "preanalytic hostility to the modern administrative state," and "an anti-bureaucratic pastoralism that feeds on nostalgia for simpler, more integrated times." Edward Rubin, Essay, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073–74 (2005).

199 HAMBURGER, *supra* note 176, at 6–7. Similarly in this vein is Hamburger's recent short book titled *The Administrative Threat*. *See* PHILIP HAMBURGER, THE ADMINISTRATIVE THREAT 4 (2017) ("Administrative power is thus all about the evasion of governance through law,

commentary, diatribes against administrative government are no strangers to legal scholarship.[200]

Similar rhetorical excesses appear frequently in the Supreme Court's recent separation of powers and administrative law jurisprudence. Agency officials are overregulating "bureaucrats"[201] who seek to expand their authority by exploiting judicial deference[202] and who wield their broad delegated powers arbitrarily[203] or with the intent of advancing their own interests at the expense of the regulated public.[204] National administrative government consists of "hundreds of federal agencies poking into every nook and cranny of daily life"[205] as part of a "titanic administrative state."[206] This harsh condemnation of the federal government is unusual in Supreme Court jurisprudence and also appears to be a relatively recent development, largely dating back to Chief Justice Roberts's *Free Enterprise* opinion.[207] Often these judicial castigations of administrative government are unnecessary to the case at hand. A prime exemplar is Justice Gorsuch's broadside against agencies in *Gutierrez-Brizuela v. Lynch*[208] when he was still on the Tenth Circuit, which came in a concurrence to an opinion he himself had written.[209] But Justice Thomas is undoubtedly the king of the anti-administrative concurrence, having used the form to issue long discursions on the unconstitutionality of administrative governance on several occasions in recent years.[210]

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including an evasion of constitutional processes and procedural rights. These legal problems are forceful reasons to reject all administrative power and, indeed, to consider it the civil liberties issue of our time.").

200 *See supra* section I.B.4, pp. 31–33.

201 City of Arlington v. FCC, 569 U.S. 290, 305 (2013) ("These lines will be drawn . . . by unelected federal bureaucrats . . . .").

202 Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) (arguing that courts sanctioned unconstitutional agency aggrandizement in stating: "[W]hen an agency interprets its own rules[,] . . . [t]hen the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly . . . ." (emphasis omitted)).

203 *See* Michigan v. EPA, 135 S. Ct. 2699, 2706–07 (2015).

204 *See City of Arlington*, 569 U.S. at 313–15 (Roberts, C.J., dissenting); *see also* Ass'n of Am. R.Rs. v. Dep't of Transp., 821 F.3d 19, 27 (D.C. Cir. 2016) ("The specific fairness question we face here is whether an economically self-interested entity may exercise regulatory authority over its rivals.").

205 *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting).

206 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

207 Although anti-administrative rhetoric certainly surfaced before *Free Enterprise*, many of the recent manifestations cite back to that decision. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1241, 1246, 1254 (2015) (Thomas, J., concurring in the judgment); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1218, 1221 (2015) (Thomas, J., concurring in the judgment); *City of Arlington*, 569 U.S. at 313–14 (Roberts, C.J., dissenting).

208 834 F.3d 1142.

209 *See id.* at 1149 (Gorsuch, J., concurring).

210 *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring); Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1240

The rhetorical character of judicial anti-administrativism is reinforced by the sharp disconnect that often exists between the constitutional concerns invoked and the legal result reached. Take, for example, Chief Justice Roberts's statement in *City of Arlington* that "[t]he accumulation of . . . powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government. . . . [T]he danger posed by the growing power of the administrative state cannot be dismissed."[211] The logical inference from such language is that modern administrative government is systematically unconstitutional, yet all the Chief Justice sought was an exclusion of jurisdictional determinations from the ambit of *Chevron* deference.[212] Similarly, with the exception of Justice Thomas, anti-administrative Justices have largely kept to corralling administrative government at the edges, unwilling to significantly curtail key administrative phenomena such as delegations of power or administrative adjudication.[213]

As Professors Cass Sunstein and Adrian Vermeule have argued, these judicial attacks on administrative government "[a]t bottom . . . rest[] on the overriding fear that the executive will abuse its power."[214] This anti-administrative rhetoric interestingly reveals two related yet distinct concerns about executive power. One is that it is unaccountable, best captured by Chief Justice Roberts's plaintive complaint against administrative government as undemocratic in *Free Enterprise*:

> One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.[215]

The other concern is that executive power is aggrandized, evident in comments singling out administrative government's "vast and varied"[216]

(Thomas, J., concurring in the judgment); *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

211 569 U.S. at 313–15 (Roberts, C.J., dissenting).

212 *Id.* at 312.

213 *See supra* pp. 21–22.

214 Sunstein & Vermeule, *supra* note 8, at 44.

215 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010). Dissenting, Justice Breyer attacked the majority for adopting an unduly formalistic analysis, arguing that the SEC had multiple mechanisms for overseeing the PCAOB other than removal and that the presence or lack of for-cause removal protection for PCAOB members did not affect presidential control in practice. *Id.* at 519–30 (Breyer, J., dissenting).

216 *Id.* at 499 (majority opinion).

scope and "arrogation of power."[217] Core to this concern with "aggrandizement of the power of administrative agencies" is the claim that Congress has "effective[ly] delegat[ed] . . . huge swaths of lawmaking authority" to agencies,[218] so that "agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power."[219]

The distinction between these two concerns about executive power — that it is politically unaccountable and that it is aggrandized — matters because their respective remedies may stand in some tension. More specifically, those fearing unaccountable power often advocate greater presidential control over government administration.[220] But from an aggrandized power perspective, such a response may simply worsen the problem, adding the President's popular authority and political leadership to the mix of executive, legislative, and adjudicatory powers agencies wield on their own.[221] These judicial concerns about executive power also appear particularly targeted at domestic and administrative contexts. When it comes to foreign relations, the Roberts Court's record is mixed, sustaining some strong claims of executive power while rejecting others.[222] But similar rhetorical concerns about executive power spinning out of control or being exercised at odds with the constitutional structure are largely — if not completely[223] — lacking. Anti-administrative Justices also appear more sanguine about executive power in the national security arena.[224] Moreover, on issues of

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[217] Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part); *see also City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

[218] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment).

[219] *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting).

[220] *See Free Enterprise*, 561 U.S. at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." (quoting U.S. CONST. art. II, § 3)); PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 5 (D.C. Cir. 2016) ("To carry out the executive power and be accountable for the exercise of that power, the President must be able to control subordinate officers in executive agencies."). *See generally* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

[221] *See infra* section III.A, pp. 72–77; *see also* Sunstein & Vermeule, *supra* note 8, at 47.

[222] *Compare* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (holding that the President has exclusive power to recognize foreign nations and governments), *with* Boumediene v. Bush, 553 U.S. 723 (2008) (holding that restrictions on judicial review of executive determinations of enemy-combatant status violated habeas corpus). *See also* Medellín v. Texas, 552 U.S. 491 (2008) (holding that an international treaty agreed to by the President is not domestic law unless it is self-executing or Congress passes implementing legislation).

[223] *See Zivotofsky*, 135 S. Ct. at 2116 (Scalia, J., dissenting) (arguing that the majority's decision to recognize an exclusive presidential power was an unconstitutional return to the royal prerogative in foreign affairs).

[224] *See, e.g.*, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2089–90 (2017) (Thomas, J., concurring in part and dissenting in part) (arguing for complete lifting of stay on travel and refugee ban issued by President Trump on national security grounds); *Boumediene*, 553 U.S. at 802–

specifically presidential power, anti-administrative Justices are often all over the map, sometimes upholding strong claims of presidential power and sometimes rejecting them.[225] Congress's response to presidential assertions of power, on the other hand, is largely driven by partisanship rather than institutional concerns, with congressional leaders supporting Presidents of their party even at the cost of congressional prerogatives.[226]

Hence, although overlapping at times with more established constitutional critiques of the administrative state such as the unitary executive theory, contemporary anti-administrativism stands as a distinct phenomenon. Further evidence of this comes from the fact that the judicial anti-administrativists' preferred remedy frequently is not greater presidential control. True, the Court in *Free Enterprise* opted for the remedial route of invalidating limits on the President's removal authority. But even *Free Enterprise* sanctioned limits on presidential control by upholding the PCAOB's constitutionality once its structure was reduced to a single level of for-cause removal protection.[227]

2. The Judicial Turn. — Instead, the most common response to these fears of unaccountable and aggrandized executive power is an assertion of a greater role for the Article III courts. This judicial turn is particularly evident in the efforts to replace interpretive deference with independent judicial judgment, as well as the growing challenges to administrative adjudication.

Pulling back on deference is often justified as mandated by the APA's instruction that "the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions."[228] Yet a number of administrative law doctrines represent substantial judicial elaboration in tension with the APA's text.[229] The Court overturned one

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13 (Roberts, C.J., dissenting) (emphasizing administrative procedures available to challenge executive detention as well as limited judicial review in concluding detainees' habeas corpus rights were not violated).

225 *Compare Boumediene*, 553 U.S. at 801 (Roberts, C.J., dissenting), *and id.* at 826 (Scalia, J , dissenting), *with Zivotofsky*, 135 S. Ct. at 2113 (Roberts, C.J., dissenting), *and id.* at 2116 (Scalia, J., dissenting).

226 Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2323–25 (2006).

227 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508–10 (2010). *PHH Corp.* similarly accepts such protection for independent regulatory commissions, but frames it more as mandated by governing precedent than a broader principle. 839 F.3d 1, 5–6, 8–9 (D.C. Cir. 2016).

228 5 U.S.C. § 706 (2012). In *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), Justice Scalia advanced an additional APA argument, contending that judicial deference to agency regulatory interpretations is at odds with § 553(b)(A), which excluded interpretive rules from notice-and-comment rulemaking procedures because they lacked the force of law. *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment).

229 Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–1300, 1305 (2012) [hereinafter Metzger, *Embracing Administrative Common Law*];

such elaboration recently in *Perez v. Mortgage Bankers Ass'n*,[230] rejecting the D.C. Circuit's one-bite rule allowing agencies only one chance to issue a definitive interpretation of a regulation without having to go through notice-and-comment rulemaking, a restriction that the Court held was "contrary to the clear text of the APA's rulemaking provisions."[231] For the most part, however, there are few judicial calls to pull back on these doctrines as nontextually supported incursions into agencies' rightful discretion.[232] Perhaps the biggest weakness with the APA argument is that taking it seriously would entail dispensing with *Chevron* altogether, but as of now only Justices Thomas and Gorsuch are willing to go so far.[233]

The underlying impetus thus seems less about respecting the APA and more about reasserting judicial power over the executive branch. Further evidence of this comes from the repeated invocations of *Marbury*'s famous statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[234] in justifying denial of deference. To be clear, the suggestion that the courts must independently police agency authority at some level is hardly novel; that proposition is embodied in *Chevron*'s step one, in which courts exercise independent judgment in determining whether Congress has spoken plainly to the question at hand.[235] These new invocations go further, however, and use *Marbury* to argue against granting deference even

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see also Am. Radio Relay League v. FCC, 524 F.3d 227, 245–48 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting the extent to which current doctrine is at odds with the APA's text on notice-and-comment rulemaking). *But see* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016) (arguing that true hard look review is rare).

230 135 S. Ct. 1199.

231 *Id.* at 1206.

232 If anything, the Supreme Court may be strengthening these doctrines, for example by holding that an agency acted arbitrarily by failing to consider cost at the very outset (as opposed to later in a rulemaking) when the governing statute simply instructed the agency to consider "appropriate" factors in deciding whether to regulate. *See* Michigan v. EPA, 135 S. Ct. 2699, 2706–12 (2015). *But see* FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782–84 (2016) (emphasizing the limited scope of judicial review of agency reasoning in overturning lower court determination that agency had acted arbitrarily).

233 *See supra* notes 136–37 and accompanying text; *see also Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (noting that the Court had developed deference doctrines at odds with "the original design of the APA" and urging that *Auer* deference be overturned but signaling reluctance to take such a step with respect to *Chevron* deference). Several scholars also advocate dispensing with *Chevron*. *See, e.g.*, HAMBURGER, *supra* note 176, at 315–17; Ginsburg & Menashi, *supra* note 179, at 497–500.

234 5 U.S. (1 Cranch) 137, 177 (1803).

235 Peter L. Strauss, *Overseers or "The Deciders" — The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 817 (2008). *See generally* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

when statutory ambiguity exists.[236] A similar concern that agencies are trenching on the Article III courts' purview links the deference pullback to the attacks on administrative adjudication.[237] An emphasis on reasserting judicial power also comes from the political sphere, with prohibitions on judicial deference to any agency statutory or regulatory interpretations, as well as provisions for expanded judicial review of agency rulemaking in the proposed RAA and Separation of Powers Restoration Act.[238]

The judicial power arguments against deference come in two varieties, one far more radical than the other. The radical attack maintains that deference is constitutionally prohibited in a twofold sense: first, because deference allows agencies to unconstitutionally exercise judicial power by promulgating binding interpretations of statutes, and second, because independently interpreting statutes is necessary for courts to perform their *Marbury* function and serve as a check on executive power.[239] Both claims rely on a classical understanding of law as having a fixed meaning and interpretation as distinct from policymaking, so that determining "the best policy choice" is different from determining "what the [statute or] regulation means."[240] This argument challenges *Chevron* and *Auer* head-on, particularly *Chevron*'s express elision of interpretation and policymaking in many contexts and corresponding acceptance that a statute's or regulation's interpretation can change.[241] But its radical import is even greater: This argument would also preclude Congress from expressly delegating binding interpretative authority to agencies,[242] and its insistence on a firm divide between interpretation and policymaking conflicts with broadly accepted legal realist insights about the frequency of legal indeterminacy, and thus of policymaking, in judicial decisionmaking.[243]

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[236] *See, e.g.*, *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring); King v. Burwell, 135 S. Ct. 2480, 2496 (2015); Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring).

[237] *See supra* notes 106–08, 180 and accompanying text.

[238] *See supra* notes 48–53 and accompanying text.

[239] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment); *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring); *see also Gutierrez-Brizuela*, 834 F.3d at 1149–52 (Gorsuch, J., concurring).

[240] *Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment); Pojanowski, *supra* note 67, at 1089–90.

[241] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005).

[242] Sunstein & Vermeule, *supra* note 8, at 79.

[243] Cass R. Sunstein, Essay, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2591–94, 2598 (2006); *see also* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395–400 (1950).

Further, the argument that Article III compels independent judicial judgment for all questions of statutory interpretation runs into substantial arguments to the contrary. Article III may in fact militate in favor of deference to expert elucidation of statutory standards if the questions at issue require specialized expertise or experience that the federal courts lack. In such contexts, preserving the federal courts' ability to perform their constitutional function and reach accurate, coherent, and consistent determinations may mandate deference to agency determinations.[244] Nor does the historical record support an independent judgment requirement. Until the early decades of the twentieth century, direct review of executive decisionmaking was rare, and the direct challenges often took the form of mandamus actions that limited the scope of judicial review. Moreover, a number of decisions invoked the propriety of judicial deference to executive statutory interpretations.[245] Legal academics dispute the extent of this deference, but there is substantial support for the view that independent judicial judgment was not thought required for a vast array of executive action, often including questions of statutory interpretation.[246] Longstanding jurisprudence also holds that Article III courts need not be involved at all in adjudications of matters of public right, without regard to whether statutory interpretation was involved.[247] Although the Court's understanding of what counts as public right has varied over time, historically the category included some coercive governmental action, such as forced payment of customs duties, as well as grants of privileges and licenses, such as public land grants.[248] Today, as *Stern* indicated, the Court considers a right to be public when it is "integrally related to particular Federal

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[244] *See* Peter L. Strauss, Essay, *"Deference" Is Too Confusing — Let's Call Them "*Chevron *Space" And "*Skidmore *Weight*," 112 COLUM. L. REV. 1143, 1144–48 (2012); *see also* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130 (1944).

[245] JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 65–78 (2012); *see also* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912–13, 912 n.5 (2017) (describing sources asserting historical support for such deference).

[246] *Compare* United States v. Mead Corp., 533 U.S. 218, 260 (2001) (Scalia, J., dissenting) (identifying "a tradition of great deference to the opinions of the agency head"), *and* Bamzai, *supra* note 245, at 916–19 (identifying a tradition of deference to longstanding and contemporaneous interpretations by executive actors and others), *with* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 951–53 (2011) (explaining that when it occurred, nineteenth-century judicial review was largely de novo).

[247] *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

[248] Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 952, 954 (1988) (detailing coercive actions classified as public right); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566–90 (2007) (defining public right as including rights and privileges in individual hands).

Government action."[249] Either the historical or the contemporary definition could bring much contemporary regulation within the public right category, and thus into the category of actions for which no Article III involvement traditionally was thought constitutionally necessary — let alone de novo judicial review.[250]

The radical argument against deference and in favor of independent judicial judgment thus is implausible. That leaves the more restrained approach, which invokes judicial independent judgment instead of *Chevron* deference in only certain situations, such as jurisdictional questions or big-ticket economic and political issues. But little principled basis exists for singling out these situations; the driver instead appears to be judicial intuitions about which statutory questions Congress would want a court to decide.[251] As Justice Scalia wrote for the Court in *City of Arlington*, rejecting a jurisdictional exception to *Chevron*:

> The [jurisdictional] label is an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction. . . . The federal judge as haruspex, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as "jurisdictional," is not engaged in reasoned decisionmaking.[252]

Moreover, insofar as the underlying logic of this approach is that courts are a necessary check on an ever-growing and out-of-control executive branch, the number of situations when Justices will conclude Congress would want independent judicial judgment seems likely only to grow. This approach thus can quickly become less restrained and not much different from wholesale revocation of *Chevron*, except in its lack of transparency about its aims.

3. Constitutionalism and Originalism. — A third theme, evident from the preceding discussion, is anti-administrativism's heavy consti-

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[249] 564 U.S. 462, 490–91 (2011).

[250] *See* Fallon, *supra* note 248, at 951–63 (analyzing the tensions that traditional public rights ideas pose to viewing Article III appellate review of administrative determinations as constitutionally necessary). Although the Court has deviated from its traditional exclusion of matters of public right from *any* need for judicial review, it has emphasized that "Article III does not confer . . . an absolute right to the plenary consideration of every nature of claim by an Article III court" and upheld deferential review such as a "weight of the evidence" standard as sufficient to preserve the "essential attributes of judicial power" in the Article III courts. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848, 852–53 (1986).

[251] *See* Michael Herz, Essay, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1872–79 (2015) (arguing that *Chevron* is fundamentally a doctrine of judicial self-regulation, resting on the courts' views of when a judicial check on the executive (or judicial turf-protection) is warranted).

[252] 569 U.S. 290, 300–01 (2013).

tutional flavor, particularly in its judicial and academic varieties. Often — though not always[253] — this constitutional dimension is marked by originalism. According to anti-administrative accounts, the core of the Framers' structural design was limiting government so as to protect individual liberty.[254] But on their view the administrative state does the opposite: where the Framers sought to make it hard for the national government to bind individuals, administrative government makes it easy;[255] where the Framers sought to limit the fields of national action, administrative government expands them; and where the Framers sought to separate out legislative, judicial, and executive power into separate hands and ensure checks among the branches, administrative government combines them into one and dramatically aggrandizes the executive branch.[256] The net result is that the "'vast and varied federal bureaucracy' . . . now hold[s] [authority] over our economic, social, and political activities" to a degree "[t]he Framers could hardly have envisioned."[257]

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[253] Hamburger's account, for example, trains most of its attention on seventeenth-century Britain rather than the Framing. HAMBURGER, *supra* note 176; JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 6 (2017).

[254] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1245 (2015) (Thomas, J., concurring) ("At the center of the Framers' dedication to the separation of powers was individual liberty." (citing THE FEDERALIST NO. 47, at 299 (James Madison) (Clinton Rossiter ed., 2003))); *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting) ("The Framers did divide governmental power in the manner the Court describes, for the purpose of safeguarding liberty."); *Stern*, 564 U.S. at 483 ("As Hamilton put it, quoting Montesquieu, 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003))); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("Even more importantly, the founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties, including all those later enumerated in the Bill of Rights.").

[255] *See, e.g.*, *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring) (arguing that "bicameralism and presentment make lawmaking difficult *by design*" and that the Constitution's "deliberative process" is "not something to be lamented and evaded" (alteration omitted) (quoting John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 202 (2007))); *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring) (criticizing *Brand X* for allowing regulatory overriding of judicial decisions "without the inconvenience of having to engage the legislative processes the Constitution prescribes," leading to "[a] form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people").

[256] *See, e.g.*, *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1254–55 (Thomas, J., concurring) ("We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure."); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part) ("When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." (alteration in original) (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS 151–52 (Oskar Piest ed., Thomas Nugent trans., 1949) (1748))).

[257] *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).

Separation of powers concerns have long animated administrative law and judicial review of executive action, albeit usually remaining tacit.[258] What is new is thus not their presence but the extent to which constitutional concerns are now openly invoked in administrative law opinions. Yet this express invocation is rarely accompanied by sustained constitutional analysis — perhaps because, as noted above, few Justices seem willing to embrace the rollback in national administrative government that the posited antimony of separation of powers and contemporary national administrative government would seem to entail.[259] The problem for anti-administrativists, however, is that background separation of powers concerns can be addressed in a variety of ways, including approaches that embrace the administrative state rather than cabin it. Concerns about amalgamated powers, for example, could be met by separation of functions requirements within agencies and other internal administrative checks.[260] Posited at a general level, separation of powers principles say little about the constitutionality of the administrative state.

A similar weakness undercuts anti-administrativists' invocations of originalism. As others have noted, there is an unfortunate selectivity to anti-administrativist originalism.[261] Part of the problem with seeking contemporary constitutional conclusions from the original debates on constitutional structure is that the Framers pursued multiple goals.[262] Limiting government — limiting the national government's scope, limiting the ease by which it could enact legislation, and to some extent

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[258] *See generally* Gillian E. Metzger, Essay, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010).

[259] *See supra* pp. 21–22, 36.

[260] *See, e.g.*, Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) [hereinafter Metzger, *The Constitutional Duty to Supervise*] (arguing for strengthening internal administrative supervision to meet constitutional structural demands); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 622–25 (1984) (emphasizing separation of functions requirements as satisfying separation of powers concerns); *see also* JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 62–70 (2016) (identifying that separation of powers imposes an articulated governance requirement that can be satisfied by internal executive branch separation of powers functions). For a discussion of the multitude of internal checks within agencies and the constitutional functions that they play, see *infra* pp. 80–85.

[261] Sunstein & Vermeule, *supra* note 8, at 85–87.

[262] For an eloquent statement of this point and careful exegesis of variations in views of the Framers on separation of powers, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996). For a description of the normative plurality underlying the separation of powers and an identification of liberty, effective administration, democratic accountability, and the rule of law as central commitments, see also Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 382–88 (2016).

limiting state governments — was a concern of the Framers.[263] But so were nation-state building and effective government. Indeed, further empowering the national government was the central impetus behind the constitutional convention.[264] While the Federalists were forced to compromise on several features of their nationalist agenda, they succeeded in obtaining a number of powers viewed as essential to the project of creating a viable national government.[265] The decision to create an executive branch headed by a single President — despite the fears of a return to monarchy that it aroused — embodied the Framers' commitment to ensuring the "energy" and capacity for efficient, coordinated, and effective action that the Articles of Confederation system had lacked.[266] Moreover, some scholars resist the suggested antinomy between these goals of limiting and empowering national government — for instance, arguing that supporters of the Constitution believed that creating "an energetic government" with the "strength to deal with foreign powers and quash interstate rivalries was the surest path to personal liberty."[267]

Of course, the general proposition that the Framers sought to empower as well as constrain says little about whether particular administrative arrangements are constitutional.[268] But, like anti-administrativism's invocation of separation of powers, most political and judicial anti-administrativist originalism stays at a general and abstract level. Rather than identifying how a specific administrative arrangement is at odds with original understandings, the claim is that the whole thrust and purpose of modern administrative government deviates from the

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[263] *See* BARNETT, *supra* note 185, at 52–61; MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 5 (2003). However, historical accounts documenting myriad forms of regulation in the name of collective interests, with enforcement by executive officials, suggest that this concern with limiting government in the name of individual liberty is easily exaggerated. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 2–3, 10–11, 32–35 (1996).

[264] *See* EDLING, *supra* note 263, at 4, 7; Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 47–49 (2016).

[265] U.S. CONST. art. I, § 8, cls. 1–5; EDLING, *supra* note 263, at 7–8 (discussing the nation-state building import of Congress's tax, army, and commerce powers); *see also* ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 171–76, 185–87 (1993).

[266] THE FEDERALIST NOS. 70, 72, at 421–29, 434–39 (Alexander Hamilton) (Clinton Rossiter ed., 2003); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 34 (Tulane Studies in Political Sci., Vol. IX, 1965); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 75 (2014).

[267] BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA 54, 56 (2009); *see also* RAKOVE, *supra* note 262, at 244–56.

[268] *Cf.* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1826 (1996) ("[T]he Founding commitment to energy cannot be discussed in a relative vacuum . . . .").

Framers' separation of powers design.[269] Justice Thomas's detailed originalist assessments of the unconstitutionality of administrative arrangements are an exception, but they are universally solo undertakings.[270] These assessments are also difficult to square with the nation's practice since the Founding. As recent scholarship by Professor Jerry Mashaw and others has established, the national administrative state has a long lineage, with some administrative structures in place even at the Constitution's adoption and national administrative officials playing important governance roles from the Washington Administration onward.[271] But perhaps the strongest count against Justice Thomas's originalist opinions is that they would entail a profound disruption in the nature of contemporary government, as he acknowledges.[272] Other Justices' unwillingness to sign onto his full-bore originalist account may reflect the belief that adopting constitutional understandings that would overturn governance relationships on which the nation has by now long relied cannot be justified.[273]

D. Does Contemporary Anti-Administrativism Matter?

A movement against national administrative government is thus afoot in the political arena, the courts, and legal academe. Its

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[269] *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). The opinions in *Noel Canning* and *Stern* engage more extensively with original understandings, but both have limited direct import for administrative government. Some anti-administrative scholars engage originalism in more detail. *See, e.g.*, BARNETT, *supra* note 185, at 203–21; EPSTEIN, *supra* note 185, at 267–84.

[270] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1245–46 (2015) (Thomas, J., concurring in the judgment) (arguing that any exercise of policymaking authority by the Executive is at odds with original understandings); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215–17 (2015) (Thomas, J., concurring in the judgment) (arguing that *Seminole Rock* deference runs afoul of original checks and balances principles); *see also* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 948–49 (2017) (Thomas, J., concurring) (explaining the original understanding of the Appointments Clause).

[271] *See* BALOGH, *supra* note 267, at 2–5, 10–11, 19, 97–105, 117–19, 138–40, 154; RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 1–24 (1995); MASHAW, *supra* note 245, at 5, 34–38, 46, 49, 98–104, 119–43. *But see* POSTELL, *supra* note 253, at 59–102, 127–29 (accepting state and local regulation but disputing suggestions of a significant national administrative state in the early Republic and the nineteenth century). *See generally* NOVAK, *supra* note 263, at 51–233 (detailing state regulatory efforts). Most of these early administrative institutions were primarily developmental and redistributive rather than regulatory, but not exclusively so. *See* SAMUEL DECANIO, DEMOCRACY AND THE ORIGINS OF THE AMERICAN REGULATORY STATE 21–22 (2015); MASHAW, *supra* note 245, at 193–200.

[272] *See SW General*, 137 S. Ct. at 948–49 (Thomas, J., concurring); *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1252 (Thomas, J., concurring in the judgment).

[273] *Cf.* Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008) (Roberts, C.J., concurring) ("Justice Thomas's analysis of the present issue is compelling, but . . . [a] sufficient case has not been made for revisiting [two controlling] precedents."); United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) ("[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.").

significance, however, is unclear. In particular, is the national administrative state really under siege, or are we simply witnessing an anti-administrative phase likely to have little lasting effect?

Some anti-administrative moves could prove quite significant. The RAA, for example, would be a substantial impediment to major and high-impact rulemakings if enacted, the REINS Act even more so.[274] Scholarship documenting the deregulatory effect of OIRA review even absent a 2–1 repeal requirement suggests that the regulatory initiatives of the Trump Administration could be momentous as well,[275] and regulatory repeals have already undone rules years in the making. The Court's First Amendment decisions, particularly *Citizens United*, have had a profound effect on certain regulatory regimes.[276] If a majority of the Court were to reject the constitutionality of broad delegations or the combination of functions in a single agency, much of the national administrative state would be in immediate jeopardy. Similarly, invalidation of administrative adjudication as violating Article III or as unconstitutionally biased by virtue of agencies' additional rulemaking and enforcement roles would have a dramatic effect, calling into question basic and longstanding features of our national administrative landscape.[277]

But as noted above, good reasons exist to conclude that few of these more radical political moves will come to pass. So far the judicial bark has been fiercer than its bite, and when the Roberts Court has invalidated an administrative arrangement on constitutional grounds, it has often done so narrowly (as in *Free Enterprise* and *Noel Canning*), or in ways that could minimize the impact on administrative governance (as in *Stern* and *NFIB*).[278] For all their success of late, First Amendment challenges are unlikely to render broad swaths of the national administrative state unconstitutional. Support is growing on the Court for some

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[274] *See supra* notes 37–46 and accompanying text.

[275] *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263–82 (2006) (arguing that OIRA has an inherently deregulatory bias because (1) it focuses on cost-benefit analysis, (2) it is not rigorous regarding decisions to deregulate, (3) it does not regulate agency inaction, and (4) it is structured procedurally to support deregulation).

[276] *See* Purdy, *supra* note 149, at 195 ("Constitutional neoliberalism is *broad* in that it touches many areas of legal regulation, from state controls on pharmaceutical marketing to the federal individual-insurance mandate to corporate campaign contributions."); *see also* Shanor, *supra* note 149, at 134 ("[T]he First Amendment has emerged as a powerful deregulatory engine.").

[277] *See* FTC v. Cement Inst., 333 U.S. 683, 701 (1948) (remarking that finding the FTC biased in its adjudication of antitrust claims "would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act"); *see also* 5 U.S.C. §§ 554, 556–57 (2012) (providing for de novo review of ALJ determinations by the head of the relevant agency).

[278] On *NFIB*'s limited import, see, for example, Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 898–902 (2013), which argues that the use of the "anti-leveraging principle" did a reasonably good job accommodating constitutional values without threatening the constitutionality of too many Spending Clause laws.

pullback on judicial deference to agency interpretations, yet several scholars argue that such a pullback would have little impact in practice. The reasons given — first, that courts deferred before *Chevron* and *Auer* and would continue to do so regardless, and second, that *Chevron* and *Auer* do little work because they are riddled with exceptions — are somewhat contradictory, but lead to the same conclusion.[279]

All of this might suggest that the current attack on the national administrative state is of little lasting significance.[280] This view strikes me as too sanguine a stance for supporters of national administrative governance to take. Deep cutbacks in resources and personnel can undercut administrative capacity in ways that are not immediately reversible by changing legislative and executive branch political control.[281] Some seemingly moderate administrative limitations could prove quite disruptive, moreover. For example, Justice Alito's view that public arbitrators are principal officers in *American Railroads*[282] would invalidate numerous regulatory arrangements in which officials not appointed by the President exercise some degree of unreviewable discretion, and dramatically expand the pool of positions for which presidential nomination and Senate confirmation are required.[283] Similarly, if ALJs are deemed inferior officers, there would be an immediate impact on government operations. Moreover, that conclusion might call into question a massive number of past administrative adjudications in agencies like the SEC where ALJs are not selected by the agency head — particularly given the Court's reluctance to uphold decisions in similar circumstances on a de facto officer doctrine basis.[284] Such a holding would

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[279] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring) ("We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change — except perhaps the most important things."); VERMEULE, *supra* note 147, at 31, 74–76; Beermann, *supra* note 194, at 809–35, 845–50 (discussing the problems that have developed in employing *Chevron* and the possibility of retaining deference toward agencies even if *Chevron* were overruled).

[280] Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2465 (2017) ("[T]he administrative state has never been more secure.").

[281] *See* RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC 5, 65–70 (2010) (describing the impact of funding shortfalls on agencies and the political difficulty involved in expanding funding).

[282] 135 S. Ct. 1225, 1235–39 (2015) (Alito, J., concurring). Justice Alito's view was adopted by the D.C. Circuit. Ass'n of Am. R.Rs. v. Dep't of Transp., 821 F.3d 19, 37–38 (D.C. Cir. 2016).

[283] Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–94 (2003) (describing a number of modern private delegations potentially compromised by the revival of private nondelegation doctrine); *see also* Mascott, *supra* note 99, at 62–69 (describing the vast array of federal agents who could be considered "officers" subject to constitutional appointment procedures); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013) (describing the past, present, and future of private delegation).

[284] Ryder v. United States, 515 U.S. 177, 182–84 (1995); *cf.* New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010) (failing to consider the possibility of sustaining agency decisions decided when agency erroneously thought it was authorized to act, even though the effect was to call into question

also create serious constitutional problems with how ALJs are appointed and removed — perhaps curable by having agency heads pick ALJs and ending the removal protection for members of the Merit Systems Protection Board, but at the cost of making administrative adjudication less politically insulated and undermining key features of the APA regime.[285]

Assessing the impact of a pullback in subconstitutional deference is difficult, given selection bias and the dynamic effects such a pullback might have. *Chevron* likely deters regulated parties from bringing certain challenges and also encourages agencies to push their interpretative powers in creative ways.[286] A retraction in deference thus might have a substantially greater impact than suggested by simply considering the number of cases today in which *Chevron* or *Auer* deference is actually determinative. Further, at the lower court level, where the bulk of challenges to agency actions are resolved, scholars have suggested that *Chevron* deference is in fact more determinative than many believe.[287] As important, to the extent such a pullback in deference rests on an account of interpretation as distinguishable from policymaking, the pullback could extend to situations in which interpretation occurs through agency application of a statutory standard to different factual contexts — a vast range of agency action not often thought of as falling under the *Chevron* aegis.[288]

More broadly, contemporary anti-administrativism may serve to undercut the legitimacy of national administrative governance. Professor Richard Fallon helpfully distinguishes among three forms of legitimacy: legal, meaning conforming with legal norms; sociological, meaning publicly accepted; and moral, meaning normatively justified.[289] The frequent suggestion that the national administrative state is at odds with the constitutional framework most directly challenges that state's legal legitimacy. It is such legal doubts that led Professor James Freedman to famously describe national administrative governance as subject to a

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"more than 500 cases [the agency had] addressed during those 26 months," *id.* at 689 (Kennedy, J., dissenting)).

285 Barnett, *supra* note 98, at 827–61 (discussing a variety of possible remedies to "the ALJ quandary" and positing that appointment by the D.C. Circuit would resolve constitutional problems without elevating due process concerns related to presidential control).

286 Sunstein, *supra* note 243, at 2598–600.

287 *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017) (manuscript at 67), https://ssrn.com/abstract=2808848 [https://perma.cc/J8U9-LCEC].

288 *See, e.g.*, Pojanowski, *supra* note 67, at 1085–90 (discussing the effect eliminating *Chevron* would have on the disaggregation of policymaking and statutory interpretation).

289 Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–96 (2005); *see also* Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006) (discussing different psychological theories of legitimacy).

"recurrent sense of crisis" over its legitimacy.[290] But the constant repetition of this motif, combined with the Court's rhetorical invocations of liberty-threatening bureaucrats, undermines the administrative state's sociological and moral legitimacy as well. Of course, to someone who believes that the national administrative state actually is unconstitutional and should be cast aside, such a lack of legitimacy is entirely appropriate. But few Justices, politicians, or academics appear willing to go that far, despite their frequent rhetorical jabs at bureaucracy and invocations of current administrative arrangements as at odds with the Framers' plan.

Adrian Vermeule disputes this legitimacy concern, terming constitutional anxiety about the administrative state "a largely elite discourse . . . . It is a conceptual mistake to think that complaints about the administrative state, even on constitutional grounds, are necessarily sociological evidence of the illegitimacy of the regime."[291] The 1930s support his point to some extent; as Part II describes, the constitutional battle that elite lawyers waged failed to undermine massive popular support for the New Deal administrative state. And current political attacks on administrative governance come in conjunction with broad popular support for many government programs. As Vermeule notes, "[a] nation that twice elected Barack Obama by clear margins is a nation comfortable with technocratic governance."[292]

Yet rhetoric can take on a life of its own, as recent constitutional challenges to the Affordable Care Act showed, all the more when constitutional discourse is employed to political ends.[293] Moreover, anxiety over the administrative state's constitutionality can operate to limit its potential for further development and innovation.[294] That may be a good part of the anti-administrativists' goal, particularly in the judicial sphere. Decisions like *Free Enterprise* have a "this far but no further" feel, which connects to the Court's resistance to innovative administrative structures and regulatory regimes. Indeed, absent an anti-administrative orientation, this resistance to innovation is hard to explain.

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[290] JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 11 (1978).

[291] Vermeule, *supra* note 280, at 2465.

[292] Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND (May 9, 2016), https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis [https://perma.cc/FVD7-DT77].

[293] Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012) [hereinafter Balkin, *From Off the Wall to On the Wall*], https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/ [https://perma.cc/HUG8-4ABX]; *see also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011).

[294] Jeremy K. Kessler, *The Struggles for Administrative Legitimacy*, 129 HARV. L. REV. 718, 771 (2016) (reviewing DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014)).

Given Congress's broad power to structure the executive branch and design regulatory schemes, one would expect the presumption to run in favor of constitutionality, at least when the innovation is embodied in legislation.[295] Even further, such anxiety may have a corrosive effect over time, leading to greater scrutiny of agency decisionmaking and erosion of established administrative mechanisms.[296] In short, rhetorical anti-administrativism can have real practical bite, even if one that emerges gradually and indirectly.

The current attack on the administrative state has two further effects that are explored in the Parts that follow. The first relates to the close intertwining of contemporary political and constitutional anti-administrativism. Anti-administrativism's deeply rooted conservative character means that constitutional attacks on administrative governance risk injecting the Court even further into national politics, at a time when the Court is increasingly viewed as a partisan institution. The second centers on anti-administrativism's impact on constitutional law. By framing the debate as one of administrative government's unconstitutionality, anti-administrativism obscures the possibility that the national administrative state may actually serve important constitutional functions, such as controlling executive power. Furthermore, this framing renders incoherent the suggestion that far from being constitutionally questionable, today's national administrative state is constitutionally obligatory. Returning to the 1930s elucidates the first of these effects and sets the stage for reconceiving the administrative state's constitutional role.

II. 1930S REDUX I: TWENTIETH-CENTURY CONSERVATIVE RESISTANCE TO ADMINISTRATIVE GOVERNMENT

Building out the national state was a constant and contested process from the Founding through the nineteenth century.[297] The period of

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[295] *See* NFIB v. Sebelius, 567 U.S. 519, 537–38 (2012) (describing reach of congressional authority); Metzger, *supra* note 86, at 1639 ("The ability to design innovative governmental structures or regulatory measures is a flexibility the Constitution's Necessary and Proper Clause gives to Congress."). For a thorough analysis of the flaws with the Court's opposition to innovation, see Litman, *supra* note 81.

[296] *See* Francis Fukuyama, *The Ties that Used to Bind: The Decay of American Political Institutions*, AM. INTEREST (Dec. 8, 2013), https://www.the-american-interest.com/2013/12/08/the-decay-of-american-political-institutions/ [https://perma.cc/Z5AH-VY8T] ("Distrust of executive agencies leads [to] demands for more legal checks on administration, which further reduces the quality and effectiveness of government by reducing bureaucratic autonomy.").

[297] *See, e.g.*, BALOGH, *supra* note 267, at 12–17, 379–82 (describing patterns of nation-state development over the nineteenth century); MASHAW, *supra* note 245, at 5–17 (arguing that the national administrative state existed and developed throughout the first one hundred years of U.S. history); THEODORE SKY, TO PROVIDE FOR THE GENERAL WELFARE: A HISTORY OF THE FEDERAL SPENDING POWER 111–247 (2003) (detailing debates over the national government's power to undertake internal improvements that were waged throughout the first half of the nineteenth century).

greatest relevance to contemporary anti-administrativism, however, is the 1930s. It was in the Progressive Era at the end of the nineteenth century and the early decades of the twentieth that national administrative government truly blossomed. And it was in the 1930s, in business and legal resistance to the New Deal and FDR, that an existential battle over the national administrative state was last fought. In the years since, the national government has expanded and gained significant new powers and responsibilities. Nonetheless, that 1930s battle bears striking parallels to the current attack and represents an important backdrop against which to assess contemporary anti-administrativism.

A. The Liberty League and the ABA Special Committee

Anti-administrativists often identify the Progressive Era, from the late nineteenth century through the early decades of the twentieth, as the time when the national government went off the constitutional rails and over to the dark side of administrative government.[298] Transformations in manufacturing, technology, and economic relations in this era sparked expansions in both national and state regulatory authority. The national administrative state continued to grow over the first four decades of the twentieth century.[299] FDR's election and enactment of the broad regulatory statutes of the New Deal thus was not a sudden move to administrative government, but it did represent a significant intensification.[300]

Many businesses were initially quite supportive of national intervention to address the economic crisis of the Depression. Big businesses particularly favored the National Industrial Recovery Act's[301] (NIRA) suspension of antitrust laws and reliance on industry-developed business codes, which they controlled.[302] *Harper's Magazine* went so far as to

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[298] *See, e.g.*, BARNETT, *supra* note 185, at 123–53; MURRAY, *supra* note 184, at 11–29.

[299] William J. Novak, *The Legal Origins of the Modern American State*, *in* LOOKING BACK AT LAW'S CENTURY 249, 262–65 (Austin Sarat et al. eds., 2002) (identifying the formative period of growth of the American state occurring between 1877 and 1937).

[300] LICHTMAN, *supra* note 59, at 58–59.

[301] Pub. L. No. 73-67, 48 Stat. 195 (1933) (repealed 1966).

[302] *See* LICHTMAN, *supra* note 59, at 68–69; *see also* ROBERT F. BURK, THE CORPORATE STATE AND THE BROKER STATE: THE DU PONTS AND AMERICAN NATIONAL POLITICS, 1925–1940, at 112–21 (1990) (detailing Pierre du Pont's involvement in the NIRA). Business interests sometimes supported earlier progressive regulatory measures as well, such as the maximum hours for bakers law at issue in *Lochner v. New York*, 198 U.S. 45 (1905), which established bakeries supported as a means to push their smaller-scale competitors out of business and ease their relationship with the bakers' union. *See* BERNSTEIN, *supra* note 185, at 23; *see also* Barton J. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, *in* TOWARDS A NEW PAST 263, 263–82 (Barton J. Bernstein ed., 1968) (arguing that the New Deal represented conservative reform).

dub the NIRA the "child" of big business.[303] But this support soon began to sour, largely in response to growing protections for labor, expanding governmental economic regulation, and higher taxes.[304] The growing business resistance surfaced in litigation and legislative reform efforts. Such litigation was at first spectacularly successful, with *A.L.A. Schechter Poultry Corp. v. United States*,[305] *United States v. Butler*,[306] and *Carter v. Carter Coal Co.*[307] invalidating major legislation from FDR's first one hundred days as exceeding the constitutional scope of Congress's authority and representing unconstitutional delegations of legislative power.[308] Two organizations central to business efforts challenging the New Deal were the American Liberty League (the League) and the American Bar Association's (ABA) Special Committee on Administrative Law.[309]

1. The Liberty League. — The Liberty League, termed the "most articulate spokesman of . . . political conservatism"[310] in the 1930s, was the more overtly political of the two organizations. It was also overtly tied to big business, being founded in 1934 by several major industrialists, in particular the brothers Pierre, Irénée, and Lammot du Pont of the E.I. du Pont de Nemours company and their associates.[311] The League contained a number of well-known Republicans and Democrats; what linked the members of the League, in addition to their economic

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303 John T. Flynn, *Whose Child Is the NRA?*, HARPER'S MAG., Sept. 1934, at 385, 394.

304 *See* BURK, *supra* note 302, at 122–42; KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL 3–6 (2010).

305 295 U.S. 495 (1935) (invalidating section 3 of the NIRA).

306 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act).

307 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935).

308 *See also, e.g.*, R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1934); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935) (invalidating a portion of the NIRA).

309 These were not the only organizations active against the New Deal and FDR's initiatives. Other groups with business and corporate ties included the American Newspaper Publishers Association, the Chamber of Commerce, the Crusaders, the National Association of Manufacturers, and the Sentinels of the Republic. In addition, there were groups organized to oppose the court-packing plan, like the Committee to Uphold Constitutional Government, as well as popular leaders viewed as quasi-fascist, such as Senator Huey Long of Louisiana and the "radio priest" Father Charles Coughlin. *See* ALAN BRINKLEY, VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, AND THE GREAT DEPRESSION xi–xii (1982); LICHTMAN, *supra* note 59, at 62–76, 88, 94, 114; Kessler, *supra* note 149, at 1923, 1930–34, 1943–48.

310 GEORGE WOLFSKILL, THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE 1934–1940, at viii (1962); *see also* LICHTMAN, *supra* note 59, at 70 ("The Liberty League . . . commence[d] the most ambitious marketing of conservative ideas in American history.").

311 *See* BURK, *supra* note 302, at 134–41; Frederick Rudolph, *The American Liberty League, 1934–1940*, 56 AM. HIST. REV. 19, 21–22 (1950). The League was in many ways a successor to the Association Against the Prohibition Amendment (AAPA), an organization largely controlled by the Du Ponts that led the national campaign to adopt a constitutional amendment repealing Prohibition. For an account of the AAPA and the Du Ponts' involvement, see BURK, *supra* note 302, at 16–121.

interests, was not party but conservatism.[312] Despite insisting that it was nonpartisan, the League was rabidly anti–New Deal and opposed to FDR. League pamphlets with titles like "The President Wants More Power" and "Will It Be Ave Caesar?," not to mention statements by League leaders that "Roosevelt desires to pass laws utterly destructive of liberty," hardly suggested political neutrality.[313] Thus, not surprisingly, the League was strongly attacked by FDR's backers, and FDR himself used the League as a punching bag during the 1936 election.[314] After Roosevelt won by a landslide, the League quickly became dormant until it dissolved in 1940.[315]

A striking feature of the League was its insistence on attacking the New Deal on constitutional grounds[316] — a strategic choice, as critiquing the New Deal for burdening elite economic interests would not have been a popular move.[317] The League was much more concerned with some constitutional provisions than others, however. Its focus was on resisting economic regulation and opposing the national administrative state, with frequent invocations of property rights and the right to work, combined with attacks on the national government's incursion into the proper realm of the states, profligate taxing and spending, and use of broad legislative delegations.[318] Thus, for example, in its platform the

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312 WOLFSKILL, *supra* note 310, at 36; Arthur Krock, *American Liberty League Soon to Begin Activities*, N.Y. TIMES, Nov. 10, 1934, at 14.

313 James A. Reed, Shall We Have Constitutional Liberty or Dictatorship?, Address Before the Lawyers' Association of Kansas City (Apr. 14, 1936), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 120, at 1, 14 (1936); *see* AM. LIBERTY LEAGUE, LEAFLET NO. 1, THE PRESIDENT WANTS MORE POWER: IS A SCRAPPED CONSTITUTION TOO HIGH A PRICE TO PAY FOR IT? (1936); AM. LIBERTY LEAGUE, LEAFLET NO. 6, WILL IT BE AVE CAESAR? (1936) (reprinted from WASH. HERALD, June 24, 1935); *see also* WOLFSKILL, *supra* note 310, at 108.

314 *See, e.g.*, PHILLIPS-FEIN, *supra* note 304, at 20 (noting FDR's "relentless assault on the American Liberty League"); Kessler, *supra* note 149, at 1930 (quoting FDR as saying that the "tenets" of the American Liberty League "appear[] to be to love thy God but forget thy neighbor . . . only God, in this case, appear[s] to be property" (alterations in original) (internal quotation marks omitted)); Rudolph, *supra* note 311, at 29–30; George S. Silzer, Letter to the Editor, *A Partisan Organization: American Liberty League Viewed as Anti-Roosevelt*, N.Y. TIMES, Aug. 28, 1934, at 20.

315 Rudolph, *supra* note 311, at 32–33.

316 *See* AM. LIBERTY LEAGUE, A STATEMENT OF ITS PRINCIPLES AND PURPOSES (1934). *See generally* Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 TEMP. L. REV. 287 (2014) (discussing the League's constitutional focus).

317 LICHTMAN, *supra* note 59, at 61 (quoting League founder and General Motors executive Donaldson Brown as saying that "[a]ny organization which was known to be directly interested primarily in the defense of established property rights" would lack public support); WOLFSKILL, *supra* note 310, at 111.

318 WOLFSKILL, *supra* note 310, at 116, 138; AM. LIBERTY LEAGUE, DOCUMENT NO. 26, YESTERDAY, TODAY AND TOMORROW: A REVIEW OF FACTUAL ANALYSES ISSUED BY THE AMERICAN LIBERTY LEAGUE AND SOME DISCUSSION OF THE PRESENT LEGISLATIVE SITUATION (1935) [hereinafter AM. LIBERTY LEAGUE, DOCUMENT NO. 26]; Raoul E. Desvernine, Chairman, Nat'l Lawyers Comm. of the Am. Liberty League, Speech at the Institute of Public Affairs (July 11, 1935), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 52, THE PRINCIPLES OF CONSTITUTIONAL DEMOCRACY AND THE NEW DEAL 10–12 (1935).

League committed to "maintain the right of an equal opportunity for all to work, earn, save and acquire property"[319] and to "uphold the American principle that laws be made only by the direct representatives of the people in Congress, and that the laws be interpreted only by the Courts, and to oppose the delegation of either of these functions to executive departments, commissions, or bureau heads."[320] Profligate congressional delegations to the executive were a common theme of League attacks, with calls for "an immediate cessation of attempts to subvert basic constitutional principles through . . . delegation" and warnings that such delegations represented "an abdication by the Congress of its proper responsibilities and . . . a step toward the European type of dictatorship."[321]

The League repeatedly warned of unlawful administrative assertions of power and expanding bureaucracy. Its leaders frequently invoked the Framers, declaring that "[o]ur forefathers were suspicious of government . . . [and] erected barriers in the Constitution to prevent government from ever placing the deadening hand of bureaucracy upon the initiative, enterprise, energy and self-reliance of the private citizen."[322] The League sometimes put the point more floridly, insisting that "[t]he Federal bureaucracy has become a vast organism spreading its tentacles over the business and private life of the citizens of the country."[323] Similarly, sounding a note eerily relevant today, the League condemned the

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[319] AM. LIBERTY LEAGUE, ITS PLATFORM 3 (1935).

[320] *Id.* at 4; *see also* Jouett Shouse, President, Am. Liberty League, Speech at the Young Men's Hebrew Association of St. Louis, Missouri (Feb. 12, 1935), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 16, THE CONSTITUTION STILL STANDS 10 (1935) (decrying "the establishment of a centralized Federal Government such as was never contemplated" and "the dangerous relinquishment of legislative powers to the Executive" present in New Deal legislation); WOLFSKILL, *supra* note 310, at 116.

[321] AM. LIBERTY LEAGUE, DOCUMENT NO. 26, *supra* note 318, at 4, 8; *see, e.g.*, AM. LIBERTY LEAGUE, DOCUMENT NO. 19, THE PENDING BANKING BILL: AN ANALYSIS OF A PROPOSAL TO SUBJECT THE NATION'S MONETARY AND BANKING STRUCTURE TO THE EXIGENCIES OF POLITICS (1935) (arguing that the proposed Banking Act of 1935 represented congressional abdication and further expansion of executive power); R.E. Desvernine, Member, Nat'l Advisory Council, Am. Liberty League, Speech over the Blue Network of the National Broadcasting Company (May 16, 1935), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 35, HUMAN RIGHTS AND THE CONSTITUTION 7 (1935) ("[I]nnumerable commissions have been created with the most far-reaching delegated legislative powers and with absolute discretion to interpret, administer and enforce . . . .").

[322] Borden Burr, Member, Nat'l Advisory Council, Am. Liberty League, Speech Before the Kiwanis Club at Columbus, Mississippi (Sept. 19, 1935), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 70, THE CONSTITUTION AND THE SUPREME COURT 9 (1935); *see also* Jouett Shouse, President, Am. Liberty League, Speech Before the Philadelphia County League of Women Voters (Feb. 4, 1935), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 14, DEMOCRACY OR BUREAUCRACY (1935).

[323] AM. LIBERTY LEAGUE, DOCUMENT NO. 133, FEDERAL BUREAUCRACY IN THE FOURTH YEAR OF THE NEW DEAL 4 (1936); *see also* AM. LIBERTY LEAGUE, DOCUMENT NO. 57, EXPANDING BUREAUCRACY 2 (1935) ("The mushroom growth of the Federal bureaucracy

increased use of executive orders, arguing that "[l]aws enacted since March, 1933, delegating broad power to the Executive, have . . . [countenanced] lawmaking by executive order . . . to a degree unprecedented and almost unbelievable."[324]

The League regularly turned to lawyers to make its constitutional arguments. Soon after its founding, the League assembled a National Lawyers Committee (NLC) composed of many eminent business lawyers of the day.[325] The NLC undertook to assess the constitutionality of several major pieces of New Deal legislation, all of which it deemed to violate constitutional limits on the commerce power, economic due process, and (in some cases) the jury trial right or prohibitions on delegation of legislative power to the executive.[326] Its first report, condemning the National Labor Relations Act (NLRA) as unconstitutional on Commerce Clause and due process grounds,[327] sparked a public outcry, with the NLC lawyers attacked for serving their business clients' anti-labor interests.[328] The NLC provided ammunition for these claims, describing the report not just as providing a detailed brief for why the statute was unconstitutional but also as justifying noncompliance by regulated companies. In the words of the NLC lawyer who led the NLRA report: "When a lawyer tells a client that a law is unconstitutional, . . . it is then a nullity and he need no longer obey that law."[329]

Several of the League's lawyers also argued constitutional challenges in court. NLC lawyers filed briefs in many of the early challenges to New Deal legislation at the Supreme Court, including *Butler*, *Carter Coal*, *NLRB v. Jones & Laughlin Steel Corp.*,[330] *Jones v. SEC*,[331] and *Ashwander v. Tennessee Valley Authority*.[332] Lawyers who were fellow

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during the past two years represents . . . a menace to the liberties, rights and welfare of individual citizens and business enterprises.").

[324] AM. LIBERTY LEAGUE, DOCUMENT NO. 60, LAWMAKING BY EXECUTIVE ORDER 3 (1935); *see also id.* at 21 ("By no stretch of the imagination can many of these orders be regarded merely as ministerial acts in execution of laws enacted by the Congress.").

[325] *See* RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 81, 89–92 (1995). Professor Daniel Ernst notes that lawyers were divided on the New Deal and growing administrative state, with corporate lawyers often being more favorably disposed to administrative adjudication subject to limited judicial review (provided such adjudication was subject to procedural constraints) than trial lawyers. ERNST, *supra* note 294, at 5–6.

[326] WOLFSKILL, *supra* note 310, at 72–78.

[327] *See* NAT'L LAWYERS COMM. OF THE AM. LIBERTY LEAGUE, REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT (1935).

[328] *See* WOLFSKILL, *supra* note 310, at 73 (quoting attacks on the NLC report in *The Nation* and *The New Republic*).

[329] *Id.* at 72 (quoting the chairman of the subcommittee that drafted the report).

[330] 301 U.S. 1 (1937).

[331] 298 U.S. 1 (1936).

[332] 297 U.S. 288 (1936); Memorandum from Eve A. Levin on The NLC, ABA, and Anti–New Deal Litigation to Gillian Metzger 4–10 (June 10, 2017) [hereinafter Levin] (on file with the Harvard Law School Library) (detailing the NLC's participation in legal challenges to the New Deal).

travelers, if not actual NLC members, played a major role in many more — including most prominently Frederick H. Wood, a litigation partner at Cravath who led the constitutional challenges in the *Schechter Poultry*, *Carter Coal*, and *Morgan v. United States*[333] cases, among others.[334] After its early success, this full-bore constitutional attack on the New Deal famously hit a judicial wall in 1937, with *Jones & Laughlin* sustaining the NLRA as within congressional power and *West Coast Hotel Co. v. Parrish*[335] sustaining minimum wage legislation against a due process challenge.[336] Scholars debate whether this represented a sudden switch to stave off FDR's court-packing threat or a more gradual doctrinal evolution, but all agree that within a few years — and after FDR had appointed seven new Justices — constitutional limits to economic regulation and national administration had largely disappeared.[337]

2. The Special Committee. — The ABA Special Committee was formed in 1933 to address perceived deficiencies in administrative law and administrative procedures raised by lawyers representing clients before administrative agencies. Many of these concerns predated FDR's election, but with the advent of the New Deal the Special Committee's ambit became more ambitious and more politically charged.[338]

Although the memberships of the League's NLC and the Special Committee were different, there was extensive overlap between the NLC and the ABA, with NLC members often in leadership positions at the ABA and involved in other ABA committees targeting the New Deal.[339] Indeed, this overlap became a liability for the ABA, subjecting it to the same criticisms of serving the interests of economic privilege.[340] One particularly fitting connection between the NLC and the Special Committee was the claim by Ollie Roscoe McGuire, the many-year

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[333] 298 U.S. 468 (1936).

[334] *See* SHAMIR, *supra* note 325, at 81–92 (detailing an elite network of lawyers that fought the New Deal); Levin, *supra* note 332, at 4–8 (describing the connections among lawyers involved in these challenges). Although Wood is not included on lists of NLC members, Professor Peter Irons reports that Wood was an NLC member and that the League helped subsidize Wood's representation in *Schechter Poultry*. PETER H. IRONS, THE NEW DEAL LAWYERS 98 (1982).

[335] 300 U.S. 379 (1937).

[336] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31–32 (1937); *West Coast Hotel Co.*, 300 U.S. at 379–99.

[337] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 229–35 (2009). *Compare* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 5–7 (1998), *with* LEUCHTENBURG, *supra* note 22, at 213–36.

[338] ERNST, *supra* note 294, at 119; JOANNA GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 20–22 (2014); Dan Ernst, *The Special Committee on Administrative Law*, LEGAL HIST. BLOG (Sept. 27, 2008, 12:38 PM), http://legalhistoryblog.blogspot.com/2008/09/special-committee-on-administrative-law.html [https://perma.cc/3M5D-ALMT].

[339] *See* SHAMIR, *supra* note 325, at 88–92; Levin, *supra* note 332, at 1–4.

[340] *See* SHAMIR, *supra* note 325, at 30–31, 68–70, 92; Levin, *supra* note 332, at 4.

Chair of the Special Committee, to have written much of prominent NLC member (and former Solicitor General) James Montgomery Beck's tirade against administrative government, *Our Wonderland of Bureaucracy*.[341] Moreover, like the League, the Special Committee claimed neutrality on the New Deal policies but repeatedly expressed concern about the spreading expanse of national power and national administration. Its initial report described the legislation of FDR's first one hundred days as "represent[ing] an advance of federal administrative machinery, on a scale and to an extent never before attempted, into fields not heretofore brought under federal regulation."[342]

Early on, the Committee flagged separation of powers and due process concerns with the delegation of legislative and judicial powers to the executive branch as well as these powers' combination in a single agency's hands, often without provision for judicial review.[343] Yet, unlike the League, identifying constitutional infirmities with expanding administrative government was not the Special Committee's focus. Instead, the Committee devoted itself to recommending legislative reforms that would tame "administrative absolutism" and abuse, advocating for greater and more uniform procedural requirements, independence for administrative adjudication, and broad judicial review.[344] For several years the Committee urged the creation of a single administrative court in which all administrative adjudication would occur, but repeatedly ran into opposition from lawyers who practiced before existing administrative tribunals and did not want consolidation.[345] After failing in that effort, the Special Committee switched gears and began to push

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341 JAMES M. BECK, OUR WONDERLAND OF BUREAUCRACY: A STUDY OF THE GROWTH OF BUREAUCRACY IN THE FEDERAL GOVERNMENT, AND ITS DESTRUCTIVE EFFECT UPON THE CONSTITUTION (1932); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1573–74 (1996).

342 *Report of the Special Committee on Administrative Law*, 56 ANN. REP. A.B.A. 407, 408 (1933); *see also id.* at 415; Shepherd, *supra* note 341, at 1569–75 (discussing the 1933 Committee's objections and solutions to perceived problems with agency authority).

343 *Report of the Special Committee on Administrative Law*, *supra* note 342, at 409–11, 414, 424–25; *see also Proceedings of the Fifty-Eighth Annual Meeting of the American Bar Association*, 56 ANN. REP. A.B.A. 57, 141 (1935) ("[T]he citizen's right to engage in an honorable calling is subject to revocation for violation of some regulation which a commission has made, and the same commission prosecutes for violation of the regulation and sits as judge in its own case . . . ." (statement of Louis G. Caldwell, Chair of the Special Committee)).

344 *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 342–46 (1938).

345 *Report of the Special Committee on Administrative Law*, 57 ANN. REP. A.B.A. 539, 539–40 (1934); Louis G. Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966 (1936) (describing the proposal). The question of whether to push for a single administrative court proved internally contentious in the ABA, as lawyers with established practices before existing tribunals wanted those tribunals preserved. Shepherd, *supra* note 341, at 1577–78.

for broad procedural limits on agencies' use of rulemaking and adjudication.[346]

The League may have provided some political cover for the Special Committee, making the Committee's efforts to rein in the New Deal state seem more moderate than the League's all-out constitutional attack. At any rate, it was after the League had faded from public view, and constitutional challenges to the New Deal had failed, that the Special Committee took over responsibility for curbing administrative government. Chaired during 1937–1938 by Roscoe Pound, who had just stepped down as Dean of Harvard Law School, the Committee issued a proposed administrative reform bill in 1938.[347] In 1939, the Committee's proposed legislation was introduced in Congress essentially unchanged as the Walter-Logan Act and passed both houses.[348] The bill would have imposed broad hearing and judicial review requirements and other limitations on agency action.[349] Ultimately, FDR's veto and creation of an Attorney General's Committee that would undertake further study of national administration prevented Walter-Logan's adoption.[350] The Special Committee's influence continued to be felt, however. The Attorney General's Committee produced majority and minority bills; the minority bill, which called for more procedural constraints, stronger judicial review, and a comprehensive administrative code, was proposed by the three dissenters including the former head of the ABA and the future Chair of the Special Committee.[351] Ultimately, in 1946 — after the intervention of World War II — the minority, ABA-friendly bill was largely adopted as the Administrative Procedure Act.[352]

3. The Entrenchment of the National Administrative State. — By the end of World War II and the 1940s, the basic legal postulates of the

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[346] *Report of the Special Committee on Administrative Law*, 62 ANN. REP. A.B.A. 789 (1937); *Report of the Special Committee on Administrative Law*, 64 ANN. REP. A.B.A. 281 (1939).

[347] ERNST, *supra* note 294, at 121–23; Mark Tushnet, Lecture, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1630–31 (2011). For a detailed discussion of Pound's view, arguing that he did not support the proposed legislation, see ERNST, *supra* note 294, at 121–32. *But see* Kessler, *supra* note 294, at 754–57 (noting that Pound endorsed the Walter-Logan Act and disputing Ernst's account of Pound as more moderate).

[348] S. 915, 76th Cong. (1939); H.R. 6324, 76th Cong. (1939).

[349] *See* GRISINGER, *supra* note 338, at 62–64; Shepherd, *supra* note 341, at 1599–600 (discussing SEC General Counsel Chester Lane's objections to the bill). The bill was watered down somewhat during the legislative process, exempting some agencies and targeting its restrictions more on those most at odds with business. ERNST, *supra* note 294, at 137.

[350] GRISINGER, *supra* note 338, at 64–67; *see also* Shepherd, *supra* note 341, at 1614–21, 1625–28.

[351] For more information on the views of the minority report drafters Carl McFarland, E. Blythe Stason, and Arthur T. Vanderbilt, see ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT 203–16 (1941).

[352] *See* Shepherd, *supra* note 341, at 1649; *see also* Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

modern national administrative state were firmly in place. In *Wickard v. Filburn*[353] in 1942, the Court had outlined the scope of national authority with breadth that still applies today: Congress can regulate intrastate activity that has a substantial effect on interstate commerce, including purely local economic activity that only affects interstate commerce when viewed in the aggregate across the nation.[354] Similarly, *United States v. Carolene Products Co.*[355] in 1938 confirmed the Court's acceptance of economic regulation and its rejection of searching due process scrutiny of economic measures.[356] Also by 1939, the Court had sanctioned broad congressional delegations of policymaking power to the executive branch, including delegations to private entities, with the high-water mark of broad delegation coming in *Yakus v. United States*[357] in 1944.[358] The constitutionality of administrative adjudication subject to limited judicial review, established in *Crowell v. Benson*[359] in 1932, was now incontrovertible and sanctioned by the APA as well as subsequent case law.[360] By 1937, the Court had implicitly sanctioned the combination of legislative, adjudicatory, and executive functions against separation of powers attack, and it definitively rejected a due process challenge to such combined functions in 1948.[361] The Court also indicated that it was sometimes willing to defer to agencies' interpretative judgments, in particular when an agency elucidated the meaning of a statutory term through application.[362]

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[353] 317 U.S. 111 (1942).

[354] *Id.* at 125, 127–28; *see also* NFIB v. Sebelius, 567 U.S. 519, 552 (2012) ("*Wickard* has long been regarded as 'perhaps the most far reaching example of Commerce Clause authority over intrastate activity.'" (quoting United States v. Lopez, 514 U.S. 549, 560 (1995))).

[355] 304 U.S. 144 (1938).

[356] *Id.* at 148; *see also* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–400 (1937) (upholding a law providing minimum wages for women).

[357] 321 U.S. 414 (1944).

[358] *Id.* at 424–25; *see also* Nat'l Broad. Co. v. United States, 319 U.S. 190, 226–27 (1943) (upholding a delegation to regulate in the "public interest" under the Communications Act of 1934); Currin v. Wallace, 306 U.S. 1, 16–18 (1939) (upholding delegations under the Tobacco Inspection Act).

[359] 285 U.S. 22 (1932).

[360] 5 U.S.C. §§ 554, 706 (2012); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130–32 (1944); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 49–53 (1936); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48–49 (1937) (rejecting Seventh Amendment argument on the grounds that it does not apply where a "case is not a suit at common law or in the nature of such a suit"); ERNST, *supra* note 294, at 52–56 (discussing *Crowell*).

[361] FTC v. Cement Inst., 333 U.S. 683, 700–03 (1948); Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935) (upholding the for-cause removal structure of members of the Federal Trade Commission); *see also* United States v. Morgan, 313 U.S. 409, 420–21 (1941) (rejecting a bias challenge against the Secretary of Agriculture, who was tasked with enforcing rules promulgated by his agency).

[362] *See, e.g.*, *Hearst Publ'ns*, 322 U.S. at 130; Gray v. Powell, 314 U.S. 402, 411–12 (1941); *see also* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406 (2007) ("New Deal policymakers subscribed to . . . a prescriptive vision [under which] . . . [i]nexpert, inflexible, rule-bound courts were to recognize their

This did not mean the Court ceded all constitutional controls on administrative governance. Of particular importance, the Court periodically voiced the need for some outer congressional limit on executive authority, and concerns about the fairness of administrative hearings and executive branch overreach periodically surfaced.[363] But, strikingly, decisions overturning administrative arrangements and decisionmaking were based overwhelmingly on the APA and other statutory requirements, even if the Court read these statutes with an eye to constitutional concerns.[364] Rather than call the national administrative endeavor into constitutional question, these decisions represented an ordinary working out of its details.

The League and the Special Committee thus failed to overturn the New Deal administrative expansion. Indeed, the League has been deemed "a colossal failure"[365] and it never gained much popularity, being widely viewed as a foil for conservative industrial leaders seeking to protect their own economic interests. If anything, in 1936 the League likely damaged Republican presidential candidate Governor Alf Landon's chances by association.[366] The conservative resistance to FDR did not start to gain real strength until 1937–1938, when the League was no longer active. This growing opposition was a result of

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proper role by allowing agencies to act with minimal judicial interference. By 1940, the federal judiciary had accepted this prescriptive model of policymaking and its reduced role in it." (emphasis omitted)).

The Court's jurisprudence on deference to agency statutory interpretations in this period was notoriously unclear. *See St. Joseph Stock Yards*, 298 U.S. at 78–81 (Brandeis, J., concurring) (discussing the various circumstances in which due process does and does not require de novo judicial review); Bamzai, *supra* note 245, at 978–81.

[363] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (rejecting presidential power to seize steel mills absent statutory authorization); *Yakus*, 321 U.S. 414; Morgan v. United States, 304 U.S. 1, 18–19 (1938) (finding no fair hearing where regulated parties lacked notice of, or opportunity to respond to, government's proposed findings, and agency prosecutors consulted ex parte with decisionmaker).

[364] *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 128–29 (1958) (refusing to presume Congress intended to give the Secretary of State broad discretion to refuse a passport given constitutional rights involved); Universal Camera Corp. v. NLRB, 340 U.S. 474, 487–90 (1951) (holding that the APA and the Taft-Hartley Act require courts to assess the whole record and "assume more responsibility for the reasonableness and fairness of Labor Board decisions than . . . in the past"); Wong Yang Sung v. McGrath, 339 U.S. 33, 40–41 (1950) (emphasizing APA concern to separate the roles of prosecutor and judge and invoking due process hearing rights in concluding that the APA's separation of functions requirements applied to deportation hearings).

[365] Sheldon Richman, *A Matter of Degree, Not Principle: The Founding of the American Liberty League*, 6 J. LIBERTARIAN STUD. 145, 150 (1982); *see also* LICHTMAN, *supra* note 59, at 69 (discussing the lack of business response to request for further League funding); WOLFSKILL, *supra* note 310, at 62 (noting that at its peak the League had no more than 125,000 members).

[366] *See* BURK, *supra* note 302, at 236–49; Rudolph, *supra* note 311, at 31; *see also* President Franklin Delano Roosevelt, Acceptance Speech for the Renomination for the Presidency (June 27, 1936), 5 PUB. PAPERS 229, 233–34 (1938) (attacking "economic royalists" who opposed his candidacy, widely understood to be a reference to the League).

economic recession and FDR's overreach with his court-packing and executive reorganization plans.[367]

The Special Committee was more effective than the League. The ultimate enactment of the APA reflected its efforts, and the APA has played a critical role in governing the national administrative state in the years since — in particular providing an opening for extensive judicial review of administrative actions and the development of administrative law.[368] But the APA was only adopted once the New Deal administrative state was solidly in place, and while the statute regularized and constrained administrative practice in some respects, it is also credited with broadly legitimizing administrative governance.[369] In the Court's words, the APA "settle[d] long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest."[370] Moreover, one of the central compromises built into the APA, that of imposing trial-like procedures on administrative adjudication but creating a category of informal rulemaking subject only to notice-and-comment requirements, proved critical to the expansion of regulatory governance over the decades since.[371]

B. The Contemporary Relevance of the League and the Special Committee

Eight decades later, the national administrative state has expanded significantly from its New Deal and Progressive Era roots. The 1960s and 1970s marked the addition of major Great Society programs like Medicare and Medicaid, as well as the enactment of major new social regulatory statutes addressing the environment, worker health and

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[367] ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 16–30 (1995); GRISINGER, *supra* note 338, at 14; BARRY D. KARL, THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945, at 154–58, 160, 167 (1983); *see* RICHARD POLENBERG, THE ERA OF FRANKLIN D. ROOSEVELT, 1933–1945, at 173–80 (2000).

[368] *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (noting that the APA imposes a presumption in favor of judicial review); Metzger, *Embracing Administrative Common Law*, *supra* note 229, at 1314–16.

[369] GRISINGER, *supra* note 338, at 61–108 (discussing the political history of the APA); *see* ERNST, *supra* note 294, at 137; Sunstein & Vermeule, *supra* note 169, at 466 (describing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), as treating the APA "as an organizing charter for the administrative state — a super-statute, if you will"). *But see* PHILLIPS-FEIN, *supra* note 304, at 33–34, 53–67 (discussing sustained and growing opposition to administrative government after World War II); Kessler, *supra* note 294, at 762–73 (discussing continuing opposition to the administrative state even after adoption of the APA).

[370] Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950).

[371] Metzger, *Embracing Administrative Common Law*, *supra* note 229, at 1298–310 (discussing the transformation of administrative law from its textual roots in the APA); Shepherd, *supra* note 341, at 1649–75.

safety, and consumer protection.[372] Meanwhile, the first decade and a half of this century witnessed the national security state's dramatic growth and — albeit now under threat — new or expanded national roles in health insurance, financial regulation, and other regulatory contexts.[373]

Despite these changes, the history of the League and the Special Committee offers an instructive parallel for understanding and assessing contemporary anti-administrativism. The 1930s represent the first and the last time that the national administrative government was subject to the type of sustained constitutional challenge that we are seeing today. Strikingly, many of the current constitutional attacks are made in terms nearly identical to those used by the League, and the League's anti-administrative rhetoric rivals that of some members of the Roberts Court.[374] In addition, the legislative initiatives being offered today are closely similar to the Special Committee's proposal from eighty years before. A comparison of the Walter-Logan Act and the RAA is edifying: The Walter-Logan Act would have required a public hearing, upon request, before a rule could be adopted, while the RAA would essentially do the same for a broad range of costly rulemakings.[375] Walter-Logan would also have provided for broad access to judicial review and increased the stringency of judicial review, with the version that passed the House imposing a clearly erroneous standard that would have allowed courts to independently assess the record.[376] As noted above, the RAA — and particularly the Separation of Powers Restoration Act — would similarly expand judicial review.[377]

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[372] DECKER, *supra* note 63, at 16–25; *see* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1272–95 (1986) (discussing regulatory politics in the Great Society and in the "Public Interest era").

[373] *See* Dana Priest & William M. Arkin, *Top Secret America: A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010), http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/ [https://perma.cc/7XNS-3W96] (detailing unprecedented growth in national security programs following 9/11); *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

[374] *Compare* sources cited *supra* notes 321 and 323 (describing League pamphlets discussing delegation as leading to "dictatorship" and characterizing the "Federal bureaucracy" as "a vast organism spreading its tentacles"), *with* soures cited *supra* notes 201, 205, 206, 216, and 217 (decrying "bureaucrats" and agencies that "pok[e] into every nook and cranny" and the "titanic administrative state" with its "vast and varied" scope and "arrogation of power").

[375] *Compare* S. 915, 76th Cong. § 2 (1939), *with* S. 951, 115th Cong. § 3(e) (2017).

[376] *See* James M. Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1093 (1940); *see also* Shepherd, *supra* note 341, at 1621 (noting removal of the clearly erroneous standard by the Senate but questioning whether that removal altered the scope of judicial review under the bill).

[377] *See supra* notes 37–46 and accompanying text.

To be sure, constitutional challenges to the modern national administrative state have surfaced more recently than the 1930s. The Reagan Administration, for example, coupled its anti-administrative political rhetoric with constitutional criticisms.[378] But President Reagan's constitutional legacy on administrative power is quite ambiguous. His administration advocated a narrowing in the scope of congressional authority and sought to advance this federalism agenda through executive orders and memoranda.[379] Yet these documents remained largely internal to the executive branch; the Reagan Administration's greatest federalism impact was indirect, through its appointment of conservative Justices to the Court.[380] Moreover, despite some support for property rights, the administration's states' rights focus limited its constitutional libertarianism.[381] On the separation of powers front, the Reagan Administration is most famous for urging the Court to adopt a unitary theory of executive power, under which the President can remove all executive branch officials and control all executive branch decisionmaking.[382] Such a view, though logically consistent with advocating a narrower scope to national authority, does not suggest hostility to national administrative governance so much as a desire for greater presidential control over it. And in practice, the turn to greater presidential control over administration that began with President Reagan has led to an expansion of national administrative government, as both Republican and Democratic Presidents have seized upon administration as a central means for achieving their policy goals.[383]

Recognizing contemporary anti-administrativism's connections to the failed challenges of the 1930s thus reinforces its radical potential; if accepted, its claims would require a reformation of the constitutional order that has governed for the last eighty years. The League and the Special Committee are equally important in highlighting the role that

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[378] Rosenberg, *supra* note 181, at 628–30.

[379] *See* Exec. Order No. 12,612, 3 C.F.R. 252 (1987). For example, an Office of Legal Policy memo outlining guidelines that DOJ attorneys were required to follow argued against the aggregate approach to identifying activities subject to the commerce power demonstrated in *Wickard v. Filburn*, 317 U.S. 111 (1942). *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988); *see also* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT 186–88 (1991) (discussing concerns for federalism in the Reagan Administration).

[380] Johnsen, *supra* note 65, at 387–99 (describing the content of Reagan-era Office of Legal Policy memos but noting "President Reagan's greatest influence on the development of constitutional meaning came, not through his administration's litigation positions, but through his judicial appointments," *id.* at 397).

[381] Roger Pilon, *On the Origins of the Modern Libertarian Legal Movement*, 16 CHAP. L. REV. 255, 261–64 (2013) (discussing President Reagan's appointment of conservative, not libertarian, judges); W. John Moore, *Stopping the States*, NAT'L J., July 21, 1990, at 1758; *see also* CLINT BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM 1–92 (1993).

[382] *See supra* note 65 and accompanying text.

[383] *See infra* notes 454–56 and accompanying text.

business interests and conservative forces have played, and continue to play, in fostering resistance to national administration.[384] As noted above, business interests benefitted far more from — and initially were far more supportive of — New Deal programs and interventions than is traditionally acknowledged. That dynamic has only continued over the years since, with many businesses working closely with national administrative government or supporting liberal policies. Today, major industry leaders are often at the forefront in pushing for greater social regulation, for example on matters affecting civil rights.[385] Moreover, conservative anti-administrativism has many bases, reflecting the multiple strands — business and economic conservatism, religious and social conservatism, and nationalist and military conservatism — that make up the American conservative movement.[386] Accounts of the Tea Party, for example, identify the close interweaving of economic conservatism and racial and ethnic resentment in the group's anti-administrative views.[387] As a result, conservative antistatism often has a selective character, with simultaneous calls for reducing administrative government[388] and for expanding major parts of that government, in the form of the military and immigration enforcement.[389]

Yet it remains true that business and economic conservatives were critical in developing the New Deal attack on the modern national administrative state. They were joined in this effort by elite lawyers concerned that an expanding administrative state threatened not just their business clients' interests but also their own livelihoods by diminishing

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[384] For a detailed account of this role, see PHILLIPS-FEIN, *supra* note 304, at 10–25, describing the role of the American Liberty League, and LICHTMAN, *supra* note 59, at 67–76, 128–30, 306–07, 369, describing business support for conservative groups and their antigovernment message from the 1930s through the 1980s.

[385] *See* Jena McGregor & Damian Paletta, *Trump's Business Advisory Councils Disband as CEOs Abandon President over Charlottesville Views*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/08/16/after-wave-of-ceo-departures-trump-ends-business-and-manufacturing-councils [https://perma.cc/NH7Y-7UN7] (describing disbandment of the Trump Administration business councils after leading CEOs threatened to leave the councils to protest President Trump's equivocal statements on white supremacy); Nick Wingfield, *Tech Leaders Call for Anti-Discrimination Laws to Protect Gays in All 50 States*, N.Y. TIMES: BITS (Apr. 1, 2015, 4:45 PM), https://nyti.ms/2ud9r24 [https://perma.cc/67TH-DFZ5].

[386] *See* James R. Kurth, *A History of Inherent Contradictions: The Origins and End of American Conservatism*, *in* AMERICAN CONSERVATISM: NOMOS LVI 13 (Sanford V. Levinson et al. eds , 2016).

[387] SKOCPOL & WILLIAMSON, *supra* note 7, at 59–60 (noting that members oppose government programs seen as benefitting the "undeserving" — a category that often includes minorities — at taxpayers' expense, like mortgage bailouts or healthcare subsidies for the poor, but view programs with benefits felt to have been "earned," such as Medicare and Social Security, more positively); *see also* ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT 214–15, 218–19 (2016).

[388] *See* Rucker & Costa, *supra* note 1.

[389] Katz, *supra* note 35; Michael D. Shear, *Touring Warship, Trump Pushes Plan to Expand Military*, N.Y. TIMES (Mar. 2, 2017), https://nyti.ms/2mxfvDt [https://perma.cc/MAH5-F7XY].

the importance of courts and legal representation.[390] It was also a few business and economic conservatives who continued to resist the national administrative state after World War II. Their opposition was based heavily in anticommunist, antilabor, and anticollectivist sentiments, and they were clearly a distinct minority — not just in American society, but also within the business community.[391] Over the course of the following decades, however, business conservatives moved from fringe to center, drawing on business opposition to the expansion of social regulation, public interest litigation, and public protests in the 1960s and 1970s.[392] In 1971, soon-to-be Justice Lewis Powell penned his famous memo to the Chairman of the Chamber of Commerce's Education Committee, calling for a litigation strategy to defend business interests and the capitalist system.[393] In historian Kim Phillips-Fein's words, the conservative business organizations created in response represent "the fulfillment, in a quiet way, of the long-ago vision of the Liberty League."[394]

The fruits of Powell's strategic legal vision are evident in contemporary anti-administrativism. Business interests are particularly tied to regulatory rollbacks occurring under the Trump Administration and in Congress,[395] and business associations like the Chamber of Commerce and the National Federation of Independent Business (NFIB) are frequent participants in litigation challenging administrative action.[396]

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390 *See* Shepherd, *supra* note 341, at 1571–72.

391 LICHTMAN, *supra* note 59, at 1–3 (noting the centrality of anticommunist sentiments to the conservative movement); PHILLIPS-FEIN, *supra* note 304, at 22–25, 33, 56–67, 87–114 (detailing the relationship between conservatives and McCarthyism, anticommunism, and antilabor); *see also* ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION 102–22 (2012) (discussing the diverse interests that went into the formation of Friedrich Hayek's Mont Pelerin Society).

392 DECKER, *supra* note 63, at 39–72; PHILLIPS-FEIN, *supra* note 304, at 150–212, 236–62; TELES, *supra* note 187, at 60–63; Paul Pierson, *The Rise and Reconfiguration of Activist Government*, *in* THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM 19 (Paul Pierson & Theda Skocpol eds., 2007); Julian E. Zelizer, *Seizing Power: Conservatives and Congress Since the 1970s*, *in* THE TRANSFORMATION OF AMERICAN POLITICS, *supra*, at 105, 111.

393 Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce, Attack on American Free Enterprise System (Aug. 23, 1971), http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf [https://perma.cc/8X5P-MRG3]; LICHTMAN, *supra* note 59, at 303. For a list of foundations behind the funding of the Chamber of Commerce, see LICHTMAN, *supra* note 59, at 305.

394 PHILLIPS-FEIN, *supra* note 304, at 266.

395 *See* Ivory & Faturechi, *supra* note 28; *see also* William Kovacs, Opinion, *Separating Fact from Fiction in the Regulatory Accountability Act*, THE HILL (May 18, 2017, 7:00 PM), http://thehill.com/blogs/pundits-blog/uncategorized/334136-separating-fact-from-fiction-in-the-regulatory [https://perma.cc/LR8U-QTKS] (demonstrating Chamber of Commerce support for the RAA).

396 *See* Memorandum from Zachary Bannon on Lawyers and Organizations in Administrative Challenges to Gillian Metzger (May 11, 2017) [hereinafter Bannon] (on file with the Harvard Law

Just as a network of business lawyers was behind litigation challenging the New Deal, so too a group of lawyers appears frequently in the current judicial attacks.[397] They are joined by a number of conservative think tanks and "attorney-activists" committed to challenging the national regulatory state.[398] Conservative institutions also provide support for scholarship challenging the administrative state, helping to bring these conservative ideas more into the academic mainstream.[399] This is in keeping with extensive conservative efforts since the 1970s to develop and foster a field of lawyers, academics, and judges to advance the conservative legal agenda — nowhere more evident than in the central role of the Federalist Society's Leonard Leo in pushing then-Judge Gorsuch for the Supreme Court.[400] And as with the League, over the years a few wealthy conservative donors, using business-created fortunes, have provided extensive resources to support these efforts.[401]

The parallels to the 1930s are perhaps nowhere stronger than with respect to Charles and David Koch, the modern-day equivalents of the Du Pont brothers.[402] The Koch brothers' funding extends to a wide range of organizations associated with contemporary anti-administrativism, from conservative political organizations like the Tea Party, Americans for Prosperity, and FreedomWorks; to the libertarian Cato Institute and the conservative Heritage Foundation; to George Mason University and even more specifically George Mason's Antonin Scalia Law School, just to name a few.[403] Their engagement reflects a clear

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School Library) (listing firms, counsel, and organizations involved in litigation described in section I.B); *see also* Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG. (Mar. 16, 2008), https://nyti.ms/2lGVrg6 [https://perma.cc/M6BZ-VJJ5] (detailing the Chamber of Commerce's involvement and success in litigation before the Supreme Court).

397 *See* Bannon, *supra* note 396; *see also* Savit, *supra* note 196, at 855–56 (detailing the role of Republican state attorneys general in litigation challenging Obama administrative regulations).

398 DECKER, *supra* note 63, at 220–21.

399 *See, e.g.*, Steve Eder, *Neomi Rao, the Scholar Who Will Help Lead Trump's Regulatory Overhaul*, N.Y. TIMES (July 9, 2017), https://nyti.ms/2uZNkNz [https://perma.cc/R8NG-CNY6] (detailing the Charles Koch Foundation's significant contribution to the Antonin Scalia Law School's Center for the Study of the Administrative State); Adam White, *Welcome to the Center for the Study of the Administrative State*, CTR. FOR STUDY ADMIN. ST., ANTONIN SCALIA L. SCH., GEO. MASON U., https://administrativestate.gmu.edu [https://perma.cc/9328-ULNP] (identifying current "[p]roblems of administrative accountability," "the growth of the federal government outside the checks and balances of the Constitution," and the "heavy economic, political, and social costs" of regulation as the focus of the Center's study).

400 Eric Lipton & Jeremy W. Peters, *In Gorsuch, Conservative Activist Sees Test Case for Reshaping the Judiciary*, N.Y. TIMES (Mar. 18, 2017), https://nyti.ms/2nDbryT [https://perma.cc/JAK3-D3BS]; Toobin, *supra* note 19.

401 LICHTMAN, *supra* note 59, at 305; Savit, *supra* note 196, at 857–61.

402 *See* Frank Rich, Opinion, *The Billionaires Bankrolling the Tea Party*, N.Y. TIMES (Aug. 28, 2010), https://nyti.ms/2jHYWmo [https://perma.cc/6UKQ-LABL].

403 JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 2–10, 149–56, 178–85 (2016); SKOCPOL & WILLIAMSON,

strategy of seeking to reshape the nation's intellectual and constitutional backdrop.[404] They have pursued this strategy particularly with respect to global warming, wielding political candidate funding and broader institutional funding to change the background terms of debate as well as oppose particular regulatory initiatives.[405]

In short, as was true in the 1930s, business conservatives' support has been critical to the growing prominence of contemporary anti-administrativism. Moreover, this growing prominence suggests that the strategy of business conservatives like the Koch Brothers is working. To use Professor Jack Balkin's terms, this strategy has moved the conservative constitutional critique from "off the wall to on the wall."[406] In this regard, a historical discontinuity with the 1930s emerges. The League not only failed to generate popular support for its constitutional arguments, but also by its own unpopularity contributed to Roosevelt's landslide win in 1936.[407]

Finally, the League and the Special Committee are significant in demonstrating the inescapably political aspect of the current constitutional attack on administrative government. Despite the League's wrapping itself in the Constitution, no one doubted the political and economic interests that motivated its members or the lawyers on the NLC. The members of the Special Committee were similarly seen as acting in their business clients' interests. Their attacks on administrative government reflected disagreement with New Deal policies, in particular New Deal economic reforms and support for labor.[408] Against the background of the League and the Special Committee, the current attack appears as the latest in a series of conservative attempts to rein in national administrative government that have recurred over the past eighty years. From this perspective, it is not a coincidence that the current attack on the administrative state rose to the fore during a period

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supra note 7, at 102–04, 174 (describing Koch funding of the Tea Party); Nicholas Fandos, *University in Turmoil over Scalia Tribute and Koch Role*, N.Y. TIMES (Apr. 28, 2016), https://nyti.ms/2lqzNNr [https://perma.cc/8ZXQ-PFJ8] (detailing Koch connections to George Mason University, including funding of the Mercatus Center, a libertarian economic think tank).

404 MAYER, *supra* note 403, at 171; Eder, *supra* note 399; Fandos, *supra* note 403.

405 *See* Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. TIMES (June 3, 2017), https://nyti.ms/2rDMtna [https://perma.cc/JNM7-4XSC]; Andy Kroll, *Exposed: The Dark-Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013, 11:06 AM), http://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/ [https://perma.cc/X3E4-9TXC].

406 Balkin, *From Off the Wall to On the Wall*, *supra* note 293 (discussing "the history of formerly crazy arguments moving from off the wall to on the wall, and then being adopted by courts" in the context of NFIB v. Sebelius, 567 U.S. 519 (2012)).

407 *See supra* notes 314–15 and accompanying text.

408 *See* Landis, *supra* note 376, at 1078, 1089 (emphasizing economic interests behind the Walter-Logan Act); Shepherd, *supra* note 341, at 1560 ("[A] central purpose of the proponents of administrative reform was to constrain liberal New Deal agencies, especially the National Labor Relations Board and [the] Securities and Exchange Commission.").

of activist government and progressive regulatory initiatives by the Obama Administration.

Acknowledging this political character is not to deny contemporary anti-administrativism's deep constitutional roots. It is instead to deny the inseparability of politics from efforts to mold the constitutional contours of the American state. Constitutional scholars often distinguish between constitutional interpretation, identified as a more text-based endeavor of discerning constitutional meaning, and broader efforts at "constructing" constitutional meaning: "The process of constitutional construction is concerned with fleshing out constitutional principles, practices and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the [C]onstitution."[409] Moreover, constitutional construction is an inherently political as well as judicial activity, with "[t]he political branches build[ing] out the Constitution through everyday politics."[410] The League and the Special Committee were part of such a process of constitutional construction in the 1930s, which ultimately resulted in constitutional acceptance of the national administrative state and the APA regime.[411] Contemporary anti-administrativism may be best understood as another effort at constitutional construction, seeking to revise the reigning constitutional order and build a version of the national state more in keeping with conservative principles.[412] Viewing contemporary anti-administrativism in this way underscores the deep connections between its political, judicial, and academic varieties. To succeed, contemporary anti-administrativism will need to bring about broad-ranging changes in national institutions and constitutional culture.

Yet this political overlay poses a particular challenge for contemporary judicial anti-administrativism. Even if clothed in constitutional garb, judicial efforts to cut back on administrative governance will inevitably be seen in political terms, as part of an ongoing national struggle between conservatism and progressivism. That framing was clearly on display at Justice Gorsuch's confirmation hearings, where references

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409 Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120 (2010); *see also* JACK M. BALKIN, LIVING ORIGINALISM 3–6, 69–73 (2011) ("Constitutional construction, however, involves far more than developing doctrines and precedents that implement the Constitution. All three branches of government build institutions and create laws and doctrines that serve constitutional purposes, that perform constitutional functions, or that reconfigure the relationships among the branches of the federal government, the states, and civil society." *Id.* at 5.); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–08 (2010) (describing interpretation as "the activity that aims at discovery of the linguistic meaning" of the Constitution, *id.* at 101, and construction as giving "legal effect to the semantic content of a legal text," *id.* at 103).

410 BALKIN, *supra* note 409, at 298.

411 *See supra* pp. 58–59.

412 Sunstein & Vermeule, *supra* note 8, at 46–54.

to *Chevron* deference surfaced frequently during the four days of congressional questioning and in public commentary.[413] *Chevron* in this context served as a stand-in for administrative government writ large, with overt connections drawn to conservative political campaigns against the administrative state.[414] The Roberts Court separately has gained a reputation as a pro-business court, thereby reinforcing perceptions of it as antiregulatory.[415] And it has been increasingly politically polarized, with the Justices divided into conservative and liberal blocs that overwhelmingly vote together in ideologically contentious cases.[416] Politicization of the Court generally reached an apogee in 2016, with Republicans limiting the Court to eight Justices for over a year in a successful effort to control the appointment of Justice Scalia's successor. This external politicization may have served to dampen polarization within the Court, with the 2016 Term setting recent records for consensus and its low number of ideologically split decisions. But this was in part a result of the Court's avoiding more ideologically contentious issues and seems unlikely to last, given the number of such cases already on the docket for next year.[417]

Put together, all of this might suggest that the Court risks long-lasting institutional harm were it to follow through on its anti-administrative rhetoric and significantly cut back the administrative

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[413] *See* Gorsuch Confirmation Hearings (Day 1), *supra* note 15 (opening statements by Sens. Feinstein, Klobuchar, and Franken); *Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States (Day 4)*, S. COMM. ON THE JUDICIARY at 3:51:48 (Mar. 23, 2017), https://www.judiciary.senate.gov/hearings/watch?hearingid=A164B791-5056-A066-60D6-FF2C148F66C9 [https://perma.cc/B7L4-MASN] (testimony by Professor Jonathan Turley on *Chevron* and administrative government); *id.* at 3:57:25 (testimony by Sierra Club Environmental Law Program Director Pat Gallagher on *Chevron* and administrative government); *id.* at 4:02:21 (testimony by NFIB Small Business Legal Center Executive Director Karen Harned on *Chevron* and administrative government).

[414] *See, e.g.*, Tessa Berenson, *How Neil Gorsuch Could Dramatically Reshape Government*, TIME (Mar. 19, 2017), http://time.com/4701114/neil-gorsuch-confirmation-hearing-chevron-doctrine/ [https://perma.cc/8B7M-T84Z]; Allan Smith, *Trump's Supreme Court Nominee Just Had His First Real Day of Grilling — And There's More to Come*, BUS. INSIDER (Mar. 22, 2017, 9:01 AM), http://www.businessinsider.com/neil-gorsuch-senate-confirmation-hearing-2017-3 [https://perma.cc/L2EP-PKP4].

[415] *See* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (concluding that "the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts"); *see also* Jonathan H. Adler, *Introduction: In Search of the Probusiness Court*, *in* BUSINESS AND THE ROBERTS COURT 1, 11–12 (Jonathan H. Adler ed., 2016) ("[W]hile there is little evidence the Court seeks to help business, as such, there are aspects of the Court's dominant jurisprudence that work to the advantage of business interests.").

[416] *See* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. (forthcoming 2017), https://ssrn.com/abstract=2432111 [https://perma.cc/9FRH-K2J7].

[417] *See* Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017), https://nyti.ms/2uci8Kw [https://perma.cc/DXF9-METV].

state. The 1930s offer an interesting parallel here as well, in the institutional threat that the Court faced as a result of its opposition to the early New Deal. To be sure, the contemporary political climate is dramatically different from the 1930s. FDR's 1936 mandate made clear that the Court stood at odds with overwhelming national sentiment in favor of more active national government and that broad support existed for the Court changing its stances, even if FDR's court-packing plan raised popular concerns.[418] Today, national politics are deeply divided, and contemporary anti-administrativism appears to resonate with a sizeable part of the electorate. In pushing anti-administrativism, then, the Court is not at risk of being out of sync with most of the nation. Instead, the institutional risk it faces is of being viewed increasingly as nothing more than another arena for political combat.

III. 1930s REDUX II: THE ADMINISTRATIVE STATE AND EXECUTIVE POWER

Contemporary anti-administrativism's core constitutional attack is that the national administrative state enables the exercise of unaccountable and aggrandized executive power: Unelected bureaucrats wield a combination of de facto legislative, judicial, and executive powers outside of meaningful political or judicial constraint.[419] Contemporary anti-administrativists differ on whether the result is modern-day tyranny or, more moderately, a system of government in tension with the Constitution's commitment to separating and checking governmental power in the name of individual liberty.[420] Either way, the national administrative state is painted as constitutionally suspect.

Anxieties about executive power are understandable, particularly in our current era of presidential unilateralism and a seemingly hamstrung Congress. But the anti-administrativists' analysis gets the constitutional diagnosis almost exactly backward. The administrative state — with

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[418] FRIEDMAN, *supra* note 337, at 3–5, 202–34.

[419] *See supra* pp. 36–37. Other constitutional concerns are that the administrative state violates constitutional limits on national power and individual economic rights, but as noted above these concerns are less developed in current judicial challenges and surface more in academic commentary. *See supra* pp. 29–32.

[420] *Compare, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("It would be a bit much to describe the result as . . . tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." (internal quotations omitted)), *with* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring in the judgment) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." (alterations in original) (quoting THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003))), *and* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.").

its bureaucracy, expert and professional personnel, and internal institutional complexity — performs critical constitutional functions and is the key to an accountable, constrained, and effective executive branch. Indeed, far from being constitutionally suspect, the administrative state today is constitutionally obligatory, rendered necessary by the broad statutory delegations of authority to the executive branch that are the defining feature of modern government. Those delegations are here to stay; only the most extreme and resolute anti-administrativists are willing to suggest their invalidation, and the Supreme Court has almost never done so. From delegation, however, core features of the national administrative state follow.[421]

A. The Brownlow Committee and Presidential Administration

The 1930s are again a useful starting point for assessing the relationship between the administrative state and executive power. Two prominent accounts of this relationship — one arguing for strong presidential control of administrative government, the other emphasizing administrative expertise and specialization — were offered in 1937 and 1938, respectively. Although competing in important ways, these two accounts shared a central insight: that the administrative state was the key to ensuring accountable as well as effective exercise of executive power and guarding against its abuse. More importantly, both these accounts remain relevant today, with their combined insights capturing important constitutional functions that the administrative state performs.

Notwithstanding FDR's disdain for the Liberty League, he accepted the proposition that New Deal agencies needed more oversight. In 1936, he commissioned a committee of public administration experts, headed by Louis Brownlow, to study administration and management in the executive branch and propose recommendations.[422] Issued nearly one year later in January 1937, the Brownlow Committee's report sounded concerns strongly resonant with the anti-administrativists of its era and today. Despite its commitment to the New Deal, the Brownlow

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[421] An extraordinary body of constitutional scholarship addresses whether the administrative state can accord with the Constitution's text, structure, precedent, and history — including recently within the pages of the Foreword. *See* John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014). I am not going to repeat those efforts here; the debate has been waged as ably and exhaustively as it can be, and were I to try to list all of the important articles in this area, this would be the footnote that ate the Foreword. Framing analysis around the question of whether the administrative state is constitutional injects hesitancy about its constitutional status from the outset. My goal, instead, is to reframe the analysis by focusing on the administrative state's constitutional benefits.

[422] For background on the Committee and its three members, see generally BARRY DEAN KARL, EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL (1963), and RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT 3–27 (1966).

Committee warned of the "dangers of bureaucracy"[423] and viewed "safeguarding . . . the citizen from narrow-minded and dictatorial bureaucratic interference and control [a]s one of the primary obligations of democratic government."[424] It particularly attacked the independent regulatory commissions, for which it coined the phrase the "headless 'fourth branch,'" arguing that their lack of political accountability and requirement that "the same men . . . serve both as prosecutors and as judges" did "violence" to the Constitution's tripartite separation of powers structure.[425] Expanding presidential control over New Deal administration was the Committee's core solution, putting it diametrically at odds with the League and the Special Committee but on a page with *Free Enterprise*'s insistence on the need for "oversight by an elected President."[426] The Brownlow Committee similarly insisted that greater presidential control was essential for democracy and self-government, proclaiming that "[t]he President is . . . the one and only national officer representative of the entire Nation."[427]

Yet the Brownlow Committee differed starkly from anti-administrativists in viewing the administrative state itself as the critical means for obtaining accountability through the President. It sought to consolidate the executive branch and individual agencies' structures, expanding centralized managerial, fiscal, and planning capacity under "a responsible and effective chief executive as the center of energy, direction, and administrative management."[428] The Brownlow Committee urged expanding the White House staff under the cry of "[t]he President needs help,"[429] and also insisted on the need to expand the civil service "upward, outward, and downward,"[430] arguing that "[d]emocratic government today, with its greatly increased activities and responsibilities, requires personnel of the highest order."[431] The Committee also viewed "centralizing the determination of administrative policy [so] that there is a clear line of conduct laid down for all officialdom to follow," along with "decentralizing the actual administrative operation," as essential to accountable government.[432] Even more, the Brownlow Committee was adamant on the need for active administrative government: "A weak administration can neither advance nor retreat successfully — it can

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[423] PRESIDENT'S COMM. ON ADMIN. MGMT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 8 (1937) [hereinafter BROWNLOW REPORT].

[424] *Id.* at 30.

[425] *Id.* at 36.

[426] 561 U.S. 477, 499 (2010).

[427] BROWNLOW REPORT, *supra* note 423, at 1.

[428] *Id.* at 2.

[429] *Id.* at 5.

[430] *Id.* at 7–8.

[431] *Id.* at 7.

[432] *Id.* at 30.

merely muddle. Those who waver at the sight of needed power are false friends of modern democracy."[433]

Roosevelt sent proposed legislation incorporating the Brownlow Committee's recommendations to Congress in early 1937, just a few weeks before he submitted his court-packing plan. Controversial in its own right, the Brownlow legislation soon was attacked for being part of a broader effort by FDR to seize dictatorial powers and was never enacted.[434] Interestingly, the Brownlow legislation also faced opposition from New Deal supporters, most notably James Landis, Chair of the SEC until 1937 and eventual Dean of Harvard Law School.[435] In 1938, Landis wrote what remains the classic defense of administrative government, *The Administrative Process*, taking direct aim at the Brownlow Committee Report.[436] Landis attacked the Brownlow Committee's effort to centralize control of administrative government in the President as well as its insistence on fitting administrative government within the traditional separation of powers framework. In lieu of presidential control, Landis offered expertise, specialization, and effective regulation as the primary keys to the accountability of administrative government.[437] He also defended the combination of powers held by modern administrative agencies as essential to meeting the regulatory challenges of a modern industrial economy, famously decrying "the inadequacy of a simple tripartite form of government to deal with modern problems."[438] Yet for all that, Landis shared more points of agreement with the Brownlow Committee than he acknowledged. Professional and expert staff as well as administrative structure were central to both of their accounts, with Landis emphasizing the protections provided by internal procedure in defending administrative adjudication.[439] Both also underscored the practical realities that limited the value of external checks on the executive branch and insisted that effective administrative government had become a prerequisite of democracy.[440]

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[433] *Id.* at 47.

[434] *See* BRINKLEY, *supra* note 367, at 22; Shepherd, *supra* note 341, at 1585–86. For a detailed account of the debate over the Brownlow legislation, see generally POLENBERG, *supra* note 422, at 125–88. Despite the failure of the Brownlow legislation, presidential reorganization powers were expanded in 1939 and, a decade later, the Hoover Commission on Organization of the Executive Branch of the Government significantly expanded presidential administrative control. *See* HERBERT EMMERICH, FEDERAL ORGANIZATION AND ADMINISTRATIVE MANAGEMENT 88–90 (1971).

[435] Mariano Florentino-Cuéllar, *James Landis and the Dilemmas of Administrative Government*, 83 GEO. WASH. L. REV. 1330, 1331, 1334–35 (2015).

[436] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 4–5, 47 (1938).

[437] *Id.* at 23, 28–30, 98–100, 111; *see also* VERMEULE, *supra* note 147, at 39, 62–63.

[438] LANDIS, *supra* note 436, at 1; *id.* at 10–14, 91–98.

[439] *Id.* at 101–11.

[440] *Id.* at 8–9, 30–31, 34–38; BROWNLOW REPORT, *supra* note 423, at 47.

Landis won this battle in the 1930s, and the independent expertise model of the administrative state dominated the post–World War II era.[441] In the end, however, the Brownlow Committee won the war, with presidential power over the administrative state rising to the fore beginning with the Reagan Administration. Presidents have achieved this control by following the Brownlow Committee's advice on expanding centralized administrative capacity.[442] But Presidents have deviated markedly from the Committee's recommendations by also extensively politicizing agency staff instead of expanding the civil service.[443] Even independent agencies are also now recognized to be more susceptible to presidential influence — and to be more varied in the extent of their independence — than the Brownlow Committee and Landis ever envisioned.[444] The benefits and harms of this growth in presidential power continue to be as strongly debated as in the 1930s, but presidential administration has become the central reality of the contemporary national government.[445]

Presidential administration, in turn, has accentuated the risk of executive branch unilateralism and aggrandizement.[446] The Brownlow

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441 Schiller, *supra* note 362, at 404, 406.

442 *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 486–91 (2003).

443 *See* Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 235, 239 (John E. Chubb & Paul E. Peterson eds., 1985) (describing techniques of politicization and centralization). *See generally* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS (2008) (discussing the possible causes of increased politicization and providing a quantitative analysis of the level of politicization in federal offices).

444 For descriptions of the ways and success with which Presidents can exercise control over independent agencies, see Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 818–24 (2013), and Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 491–98 (2008).

445 *Compare* Kagan, *supra* note 191, at 2331–46 (arguing that presidential direction is important for political accountability, cost-effectiveness, priority setting, and energy), *and* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (asserting that presidential direction is constitutionally required), *with* SHANE, *supra* note 192, at 3–5 (expressing concern over the growing concentration of power in the federal executive and the dangers it raises), *and* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997) (contending that the idea of political accountability through presidential control is unduly simplistic), *and* Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. (forthcoming 2018) (manuscript at 82–93), https://ssrn.com/abstract=3018618 [https:perma.cc/TSH3-Y2AQ] (expressing skepticism about presidential administration yielding benefits in energy or accountability and noting the lack of durability of recent aggressive presidential assertions of power as well as the judicial anxiety they have aroused). *See generally* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014).

446 *See* Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 851–52 (1999); Keith E. Whittington & Daniel P. Carpenter, *Executive Power in American Institutional Development*, 1 PERSP. ON POL. 495, 499–502 (2003).

Committee's exaltation of the President may have been ahead of its time, but Presidents today are even more the focus of popular expectations for government. Presidents increasingly are "held responsible for designing, proposing, legislating, administering, and modifying public policy . . . . [Hence, a President's] chances for reelection, . . . standing with opinion leaders and the public, and . . . historical legacy all depend on . . . perceived success as the generalized leader of government."[447] Presidents thus face strong "incentives to develop and expand their power in whatever ways they can."[448] And, given the vast powers statutorily delegated to the executive branch, a prime means by which Presidents seek to push their policies is through their control over administration.[449] They are further encouraged to do so by the institutional and political realities that make enactment of legislation to overturn administrative decisions difficult. The process of passing a bill in both houses — especially given the need to get through the committee process and to reach a supermajority of sixty votes in the Senate to avoid a filibuster — and then securing presidential agreement or overturning a veto is hard enough. But the intense political and ideological divisions of our current era raise an often insurmountable barrier for significant legislation, sometimes even when the national government is under unified party control and only more so when not.[450]

The claim of unilateralism here is a qualified one. Most importantly, Presidents and agencies rely on underlying statutes for their authority to act and face the possibility of judicial invalidation if they overstep that authority.[451] Congress is hardly stuck on the sidelines. Over the

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[447] Moe, *supra* note 443, at 239; *see also* Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869, 1882–83 (2016) (reporting on empirical evidence that the public credits Presidents for successful administrative action and blames them for administrative failures). *But see* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006) (questioning whether Presidents have the nationwide popular focus they are conventionally thought to have).

[448] Moe & Howell, *supra* note 446, at 854.

[449] *See* Kagan, *supra* note 191, at 2272–319; Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 693–703 (2016).

[450] *See* Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 91–97 (2015); Metzger, *Agencies, Polarization, and the States*, *supra* note 66, at 1748–52; Gerald F. Seib, *As Donald Trump Heads to Congress, a New Polarization Is Hardening*, WALL ST. J. (Feb. 27, 2017, 5:22 PM), https://www.wsj com/articles/as-donald-trump-heads-to-congress-a-new-polarization-is-hardening-1488212273 [http://perma.cc/UJ7M-7V3F]. Other factors fuel new presidential assertions of control as well, such as the need to coordinate multiple administrative actors and overlapping regimes. *See* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1830–32 (2015) (noting that "horizontal administrative complexity" has empowered OIRA).

[451] *See, e.g.*, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 3 (2014) ("Agencies . . . do not simply 'go for broke' . . . . Instead they proceed strategically, cognizant of the preferences of their political overseers and the risk of being overturned in the courts."); Andrew Rudalevige, *Old Laws, New Meanings: Obama's Brand of Presidential "Imperialism,"* 66 SYRACUSE L. REV. 1, 7–15 (2016); Peter M. Shane, *The Presidential Statutory Stretch and the*

last decade, it has enacted several major regulatory reform statutes and it retains the ability to influence and constrain the executive branch, whether through hearings, investigations, appropriations, or by refusing to move on legislation or appointments that a President seeks.[452] Public opinion can be a potent force as well, with claims that the executive branch has abused its power or exceeded its statutory authority capable of generating substantial political pushback.[453]

Even so, Presidents are able to use their oversight of the executive branch to set the national agenda and single-handedly push national policy in significant new directions.[454] President Obama's open embrace of administrative power to advance his second-term agenda is a prime example of this phenomenon.[455] Yet in strongly asserting presidential power over administration, Obama was following in the immediate footsteps of President Bush, and President Trump is already pursuing the same path as well.[456] Partisanship affects how Presidents wield their power over administration — whether they seek to foster regulation or stymie it, for example — but not whether they assert such power in the first place.

B. The Administrative State's Constitutional Functions

This potential for presidentially driven administrative unilateralism and aggrandizement suggests limitations in relying on presidential control alone to guard against abuse of executive power. Yet the often over-

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Rule of Law, 87 U. COLO. L. REV. 1231, 1235–49 (2016) (describing this dynamic under the Reagan, Clinton, and George W. Bush presidencies).

[452] *See, e.g.*, Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 295, 297 (2008) (describing increases in congressional hearings and investigations in times of divided government); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 767, 773 (2010) (discussing increased use of appropriation riders); Seung Min Kim & Burgess Everett, *Senate Dems Plan to Drop Nominations Blockade if Health Bill Fails*, POLITICO (July 25, 2017, 12:36 PM), http://www.politico.com/story/2017/07/25/senate-democrats-drop-nomination-blockage-after-health-care-bill-240939 [https://perma.cc/SEE2-JC96] (describing how Senate Democrats had stalled confirmations of President Trump's nominees as long as Obamacare repeal was pending).

[453] Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1409–14 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND (2010)).

[454] Kagan, *supra* note 191, at 2281–84 (discussing examples of presidential agenda setting in the Clinton Administration); Watts, *supra* note 449, at 706–20 (discussing examples in the George W. Bush and Obama Administrations).

[455] Freeman & Spence, *supra* note 451, at 17–31; Kenneth S. Lowande & Sidney M. Milkis, *"We Can't Wait": Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 THE FORUM 3, 21–24 (2014); Rudalevige, *supra* note 451, at 4.

[456] *See* Farber, *supra* note 29 (describing President Trump's approach); Watts, *supra* note 449, at 693–706 (discussing centralized control under George W. Bush and Obama); *see also* Kagan, *supra* note 191, at 2277–82, 2315–17 (describing expanded presidential administration under the earlier Reagan and Clinton presidencies).

looked feature of the Brownlow Committee's approach was its recognition that *both* presidential control *and* bureaucracy were essential for accountable government.[457] Even more accurate is the picture that emerges from combining the Committee's insights with those of Landis. It is the internal complexity of the administrative state — the way it marries together presidential control, bureaucratic oversight, expertise, professionalism, structural insulation, procedural requirements, and the like — that holds the key to securing accountable, constrained, and effective exercise of executive power.

These features of the administrative state are not just beneficial in a good government sense. They also carry constitutional significance, both in satisfying constitutional structural requirements and in ensuring that broader separation of powers principles retain force in the world of contemporary governance. By thus implementing the separation of powers, the administrative state performs an essential constitutional function.

1. Bureaucratic Supervision and Internal Constraints. — Consider first the managerial supervision and oversight that the Brownlow Committee emphasized, which occur both within agencies and at a centralized level across the executive branch. This kind of bureaucratic accountability is necessary to guarantee both that low-level personnel enforce politically determined policy and that important information about administrative activity reaches high-level political officials.[458] Internal supervision is equally critical to ensuring that the executive branch acts in a lawful manner. Judicial review of agency action can articulate legal requirements, but only managerial oversight and supervision can translate judicial decisions into agency policies and actions. Moreover, internal oversight and supervision reach a far broader array of agency action than courts can, and are able to prevent unlawful agency actions from occurring in the first place, whereas courts are largely reactive.[459]

Indeed, as Mashaw has long argued, the body of internal instructions, guidance, and procedures developed through operation of bureaucratic accountability is itself a form of law — the internal law of the administrative state.[460] For the most part, these measures are not subject to judicial enforcement, but they are law-like in that they are perceived as binding and internally enforced as such within agencies. By

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457 *See supra* notes 422–33 and accompanying text.

458 Rubin, *supra* note 198, at 2119–34.

459 Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1250–58 (2017); *see also* LANDIS, *supra* note 436, at 123 ("Courts are not unconscious of the fact that, due to their own inadequacies, areas of government formerly within their control have been handed over to administrative agencies for supervision.").

460 MASHAW, *supra* note 245, at 223.

rising above the level of specific actions and embodying officials' general views on governing statutes and policies, these measures also foster important rule-of-law values such as consistency, coherence, authorization, justification, and nonarbitrary governmental action.[461] In the Brownlow Committee's words, centralizing and specifying policy "for all officialdom to follow" is essential to prevent "narrowminded and dictatorial bureaucratic interference and control."[462]

In short, the mechanisms of bureaucratic accountability are central to achieving political and legal accountability of government.[463] Moreover, both political and legal accountability are generally acknowledged to have a constitutional basis. Political accountability is embedded in the Constitution's electoral provisions, commitment to self-government, and grants of legislative power to an elected Congress and executive power to an elected President.[464] Legal accountability is a more implicit but equally central structural premise, embodied in the idea of a constitutionally controlled government and represented in the President's obligation to faithfully execute the law.[465] This means, in turn, that bureaucratic accountability also has constitutional salience: It provides the mechanisms to realize constitutionally mandated political and legal accountability. Equally constitutionally consequential is the role that bureaucratic oversight plays in guarding against abuse of executive power by ensuring consistent, coordinated governmental action.

Yet the constitutional significance of oversight and supervision goes further. As I have argued elsewhere, the Constitution itself imposes a duty to supervise on government officials.[466] This duty is most clearly embodied in Article II's direction that the President "shall take Care that the Laws be faithfully executed."[467] But it also manifests as a broader structural requirement, implicit in the repeated constitutional invocations of hierarchical oversight relationships in contexts of delegated power.[468] Such a duty to supervise is additionally rooted in due process's prohibition on arbitrary exercise of governmental power, given the need for oversight and managerial control to ensure that delegated

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461 Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 413 (2007); Metzger & Stack, *supra* note 459, at 1256–66; Rubin, *supra* note 198, at 2075.

462 BROWNLOW REPORT, *supra* note 423, at 30.

463 Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1886–99.

464 *See* U.S. CONST. pmbl.; *id.* art. I, §§ 1–3; *id.* art. II, § 2, cl. 2.

465 *Id.* art. II, § 3; Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1891.

466 Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1874–1933.

467 U.S. CONST. art. II, § 3.

468 Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1886–97.

power is not used abusively or arbitrarily.[469] Recognizing this constitutional demand for supervision may come most naturally to unitary executivists, but the duty to supervise is not limited to the President and extends throughout the executive branch as well as Congress. The bureaucratic oversight mechanisms of the administrative state represent the core means through which the constitutional duty to supervise is satisfied.

Where the Brownlow Committee emphasized top-down bureaucratic supervision, Landis connected accountability more to bottom-up and horizontal aspects of the administrative state.[470] Professor Jon Michaels has recently elaborated a horizontal account of the administrative state as composed of different forces and interests, that are often rivalrous and check each other's perceived overreaches and failures.[471] Civil servants — the career government employees both the Brownlow Committee and Landis viewed as central to effective governance — are one such internal force.[472] A critical characteristic of civil servants that allows them to check overreach is their protection from employment termination.[473] But independence protections are not the only strength of the civil service. Often professionals by training, civil servants frequently "feel bound by legal, moral, or professional norms to certain courses of action,"[474] with their concern for legal authority forming "an often unappreciated bulwark to the rule of law" within agencies.[475] Executive branch lawyers are a particularly important group when it comes to legal accountability. Lawyers operate throughout the national administrative state, in centralized legal offices at the White House and Department of Justice, in agency general counsel offices, and even on

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469 *Id.* at 1896–97; *see* Bressman, *supra* note 442, at 529–33 (describing arguments by prominent administrative law scholars contending that "the problem of arbitrary administrative decisionmaking [is] the lack of standards controlling the exercise of administrative authority"); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 121–22 (2011) (arguing for a "due process model" under which delegations to agencies must be constrained and structured so as not to "increas[e] the government's capacity for arbitrariness").

470 *See, e.g.*, LANDIS, *supra* note 436, at 60–62, 98–100, 103–06; *see also* William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS., nos. 1 & 2, 2015, at 61, 67–79 (arguing against a top-down conception of accountability).

471 Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 234–42 (2016).

472 *Id.* at 237–39; *see also* Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2331–35 (2006).

473 Michaels, *supra* note 471, at 237–39.

474 LEWIS, *supra* note 443, at 30.

475 HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 408 (2006); *see also* Gillian E. Metzger, Essay, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 445 (2009) [hereinafter Metzger, *Internal and External Separation of Powers*].

the ground with agency personnel.[476] Few agency policies and sanctioned actions go unvetted by lawyers, and agency lawyers often wield substantial power — arguably, too much power — over agency policy.[477] More broadly, the substantive expertise of agency personnel, as well as their access to information and commitment to their agencies' missions, can offer a potent check on perceived political abuse of administrative power.[478] These internal forces are often externally supported. Professional networks, for example, help to reinforce procedural and reputational norms among administrators.[479]

Agencies' structures reveal further internal divisions and checks on administrative decisionmaking. Internal separation of functions and ALJ independence protections guard against biased decisionmaking by keeping agency prosecutors and adjudicators apart.[480] Independent internal agency watchdogs such as inspectors general investigate alleged agency malfeasance, and agencies often have separate offices dedicated to advocating for civil rights in agency decisionmaking.[481] Even different agencies can check one another, with statutory schemes frequently imposing requirements of interagency consultation or building in redundancy to prevent regulatory gaps.[482] State and local governments also

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476 *See* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 28, 93–94, 136–37 (2012) (describing the role of CIA and military lawyers within the executive branch); David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 21–22, 41–45 (2012) (outlining the influence of civil service lawyers outside of the Office of Legal Counsel in the DOJ and the White House Counsel's Office); Pildes, *supra* note 453, at 1395–402, 1414–15 (discussing executive branch lawyers and presidential decisionmaking).

477 *See, e.g.*, MASHAW & HARFST, *supra* note 193, at 172–201 (describing how National Highway Safety Administration lawyers' concerns over litigation fundamentally reoriented the agency's regulatory strategy).

478 *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 544–45 (2015). *See generally* Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097 (2015) (analyzing varieties of administrative expertise).

479 DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 23–30 (2001); *see also* Michaels, *supra* note 471, at 237–39 (describing the impact of professional norms on civil servants).

480 Barnett, *supra* note 98, at 803–09.

481 *See, e.g.*, GOLDSMITH, *supra* note 476, at 95–108 (describing the position of CIA Inspector General); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 60–62 (2014) (describing the work of civil rights offices within agencies, focusing on the office at the Department of Homeland Security); Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 316–24 (2015) (discussing the executive branch's Privacy and Civil Liberties Oversight Board); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1036–39, 1074–78 (2013) (describing and evaluating national security inspectors general's increased role in individual rights protection).

482 *See* Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. (forthcoming 2017) (manuscript at 13), https://ssrn.com/abstract=2841253 [https://perma.cc/Q3VA-G874] (describing four different forms of agency monitoring and interaction: hard hierarchy, soft hierarchy, advisory or monitoring authority, and symmetrical).

can be powerful forces pushing for changes in national administrative governance.[483] Although not internal to national administration in the same manner as agency decisionmaking structures or civil servants, states and localities are often responsible for central aspects of federal regulation and federal program implementation.[484]

Like bureaucratic accountability, these internal constraints also carry constitutional significance. To begin with, they support traditional external checks on the executive branch and thus empower the Constitution's separation of powers system. Congress and the courts depend upon agency personnel for the information and expertise they need to perform their external review roles. This relationship is often reciprocal, with Congress and the courts playing central roles in reinforcing internal executive branch constraints.[485] Agency staff have relationships with congressional overseers and reports of executive branch misdeeds can trigger congressional investigation.[486] Courts can also reinforce internal checks, for example by signaling that decisions made over career staff objections — or without internal administrative consultation and review — may trigger heightened judicial scrutiny.[487] These internal mechanisms also play a constitutional role in preventing individual rights violations, such as biased decisionmaking. Indeed, recent historical scholarship has documented a wide array of instances in which agency professionals and civil rights offices sought to develop rights protections beyond those available in court.[488] In the early decades of the

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[483] *See* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 976–82 (2016) (describing how national programmatic dependence on states has allowed state governors to force Presidents to compromise on Medicaid expansion and marijuana policy).

[484] Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 470 (2012).

[485] Metzger, *Internal and External Separation of Powers*, *supra* note 475, at 442–47; *see also* Michaels, *supra* note 471, at 244–60 (discussing how Congress and the courts can rely on different forces active in the administrative sphere to compete with the President for bureaucratic control).

[486] *See* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 5–7, 95–96 (1990) (describing communication between congressional and agency staff); *see also* Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927, 952 (2014) (detailing the Government Accountability Office's (GAO) investigation, at the request of members of Congress, into the FDA's refusal to grant the morning-after pill over-the-counter status and the GAO's access to internal information and staff views).

[487] *See, e.g.*, Washington v. Trump, 847 F.3d 1151, 1165–66 (9th Cir. 2017) (per curiam) (emphasizing lack of usual intra-executive branch review in closely scrutinizing President's Trump first travel ban); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 694 (2009) (noting that the Supreme Court reversed itself and granted certiorari in *Boumediene v. Bush*, 553 U.S. 723 (2008), after "high-ranking personnel disclosed numerous administrative mistakes in the implementation of the rules governing [Combatant Status Review] tribunals"); Metzger, *Internal and External Separation of Powers*, *supra* note 475, at 444–46.

[488] *See, e.g.*, WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES 73 (2010) (describing the EEOC's interpretation of sex discrimination to include pregnancy discrimination); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the*

twentieth century, for example, "[p]rogressive lawyers within the executive branch took the lead in forging a new civil-libertarian consensus" in accommodating the civil liberties of conscientious objectors.[489]

In addition to empowering and enforcing external checks on executive power, internal administrative constraints perform a constitutional function by embedding separation of powers values into the fabric of administrative government.[490] Just as the constitutional separation of powers system diffuses power among the branches to prevent its accumulation in any single branch, internal constraints diffuse power within the executive branch to forestall presidential aggrandizement.[491] In this fashion, internal constraints also help ensure that governmental power is wielded in an articulated manner, guarding against the combination of distinct governance functions in the same administrative hands.[492] Similarly, just as requirements of bicameralism and presentment are defended as fostering deliberation before legislation is enacted, internal constraints foster deliberation by bringing a range of perspectives to bear in setting executive policy.[493] And by ensuring a major role for career bureaucrats and professionals in government decisionmaking, these constraints foster rule-of-law values of continuity and stability.[494] Implicit in this view of internal constraints as serving to realize separation of powers principles is the idea that these principles have substance beyond their specific instantiations in constitutional text. Some disagree

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Workplace, 1960 to the Present, 96 VA. L. REV. 799, 810–36 (2010) (describing the FCC's efforts to expand workplace rights). A striking feature of historical scholarship on administrative constitutionalism is the extent to which it portrays individual rights as a state-building tool, rather than as a limit on government. *See* Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 320–23 (2012).

489 Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1085 (2014); *see also* Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 338–48 (comparing enforcement of civil liberties at the NLRB and the DOJ during the 1930s).

490 For an account of the need "to adapt the framers' checks and balances principles" to the realities of contemporary governance, in particular presidential lawmaking, see Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994).

491 *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[T]he separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch . . . ."); Flaherty, *supra* note 268, at 1810 (describing "balance, accountability, and energy" as core separation of powers values); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 651–52 (2001) (explaining importance of fragmented power to separation of powers).

492 WALDRON, *supra* note 260, at 46–51, 62–70.

493 *See* INS v. Chadha, 462 U.S. 919, 948–49 (1983); *see also* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring).

494 Huq & Michaels, *supra* note 262, at 387–88.

with that proposition.[495] It remains, however, a basic aspect of the Court's jurisprudence on constitutional structure.[496]

No doubt, the suggestion that constraints limiting the President's power over the executive branch serve a constitutional function is anathema to those who believe that the Constitution grants the President full and immediate control over all aspects of executive branch decisionmaking and personnel.[497] That is a minority position, however — one that even the Roberts Court appeared to reject by upholding a regulatory scheme with one level of for-cause protection.[498] In addition, many of the internal administrative checks described above do not represent direct or formal constraints on presidential power, such as statutory independence requirements. Instead, they work indirectly and informally, for example by creating agency cultures and decisionmaking norms that have a checking effect in practice.[499] And internal checks can also operate to empower Presidents, to the extent they harness greater competency and expertise in the pursuit of presidential goals. Presidents may well support independence provisions for this reason.[500]

In short, the administrative state is awash with internal accountability mechanisms, and executive power is far more internally constrained than anti-administrativists admit. Of course, these mechanisms do not always succeed in guarding against administrative abuse of authority, and sometimes have the opposite effect. Internal administrative law can be used to advance aggressive views of an agency's authority, for instance, and there are prominent examples of executive branch lawyers sanctioning unlawful conduct.[501] The very variety and multiplicity of

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[495] Dean John Manning has forcefully argued that "the Constitution adopts no freestanding principle of separation of powers." John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) [hereinafter Manning, *Ordinary Interpretation*] (emphasis omitted); *see also* Manning, *supra* note 421, at 30–48 (critiquing the Rehnquist and Roberts Courts' use of freestanding separation of powers and federalism principles to limit the necessary and proper power).

[496] *See* Manning, *Ordinary Interpretation*, *supra* note 495, at 1942–44. I have defended reliance on such freestanding constitutional concerns elsewhere. Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98 (2009).

[497] *See* CALABRESI & YOO, *supra* note 65, at 420–25 (arguing that almost all Presidents have exercised the power to direct subordinates and that perceived limits on presidential power over the civil service and independent agencies are historically novel); Calabresi & Prakash, *supra* note 445, at 581–84 (arguing that independent agencies violate the Executive Power and Take Care Clauses).

[498] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508–10 (2010).

[499] *See supra* notes 470–79 and accompanying text.

[500] *See* GOLDSMITH, *supra* note 476, at xv–xvi; POSNER & VERMEULE, *supra* note 453, at 137–50 (arguing that Presidents often have incentives to adopt self-binding mechanisms).

[501] *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) (arguing that deferring to agency interpretations of their own regulations leads to aggrandizement); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1718–19 (2011) (reviewing BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010)) (discussing historical examples of executive branch lawyers "upholding presidential actions of, at best, highly questionable legality").

these mechanisms make claims of the beneficial impact of any particular mechanism hard to verify; lack of transparency in much executive branch decisionmaking further occludes clarity about how these mechanisms function and how much traction they have in practice.[502] That administrative accountability mechanisms fail at times, however, does not mean they are fundamentally ineffective. The many examples of their positive impact, at both the agency and presidential level, preclude such a conclusion.[503] At a minimum, whatever doubts exist about the impact of these measures, their existence alone demonstrates the inaccuracy of anti-administrative portrayals of the administrative state as simply power-aggrandizing and unaccountable.

2. Effective Governance. — The administrative state does more than oversee and constrain. It also empowers and provides the means for effective governance. As eloquently propounded by Landis, the administrative state brings expertise, specialization, and information to bear on complicated policy and regulatory challenges, and does so in a way that allows for public participation and proactive government action. In particular, Landis emphasized that the combination of legislative, adjudicatory, and executive functions in agencies is essential for effective regulation.[504] Similar consequentialist arguments remain at the forefront of contemporary defenses of the administrative state.[505] This is not to say that administrative government always or necessarily regulates well; regulatory failures and phenomena like agency capture make any such claim implausible.[506] The point is instead a comparative one. Neither legislatures nor courts have the kind of expertise and institutional capacity that agencies do, or the ability to adapt policy at the pace demanded by contemporary society, across the vast range of contexts in which administrative government is active.[507]

Effective governance is another important dimension of accountability in executive power. Although anti-administrativists focus on the danger of too-active government, an executive branch that fails to effectively perform the responsibilities Congress has assigned to it should be

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[502] *See generally* Levinson, *supra* note 264, at 43–82 (discussing the difficulty of assessing who wields power in different institutional arrangements).

[503] For a contrary view, see D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 77–92 (2017).

[504] LANDIS, *supra* note 436, at 1–5, 10.

[505] *See, e.g.*, STEINZOR & SHAPIRO, *supra* note 281; VERMEULE, *supra* note 147.

[506] For recent accounts that identify these regulatory deficiencies, and caution against too quickly assuming they are present, see REGULATORY BREAKDOWN (Cary Coglianese ed., 2012); and PREVENTING REGULATORY CAPTURE 2–12 (Daniel Carpenter & David A. Moss eds., 2014).

[507] LANDIS, *supra* note 436, at 20, 30, 48–49; Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608–11 (2016).

equally troubling. The Brownlow Committee captured this point in insisting that democracy necessitates strong government.[508] The Committee also argued that bureaucratic oversight was the key to achieving effective governance, indicating how the different varieties of administrative state accountability are often mutually supporting.[509] But they can also work at cross-purposes. In particular, internal administrative checks and constraints can render energetic and effective government harder to achieve. Now-Justice Elena Kagan has warned of "inertia and torpor" as "inherent vices" of bureaucracy that are obscured by incessant focus on the potential for agency abuse of power.[510] Her defense of presidential administration was premised in part on the importance of presidential direction to ensuring achievement of coherent objectives in an expeditious, cost-effective, and rationally prioritized way.[511] Other scholars disagree, emphasizing the importance of agency expertise, independent deliberation, and intra-executive branch conflict for better results and even better implementation of presidential policies.[512] Still others contend that efficacy measures such as strong presidential control achieve their results at too great a risk of excessive and unchecked executive power.[513] But underlying this debate is shared agreement on the value of effective government, regardless of how that value is balanced against conflicting concerns with preventing abuse of power.

Making government effective is one of the administrative state's most important constitutional functions.[514] Some anti-administrativists reject such a claim; they insist that governmental effectiveness is constitutionally irrelevant and even celebrate inefficiency as a constitutional virtue.[515] In this regard, they enjoy the support of some prior Supreme Court decisions, such as *INS v. Chadha*'s famous insistence that "the

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508 *See* BROWNLOW REPORT, *supra* note 423, at 3.

509 *See id.* at 46–47.

510 Kagan, *supra* note 191, at 2263; *see also* Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 676–78 (2015) ("In the administrative state, abuse of power is not something to be minimized, but rather optimized.").

511 Kagan, *supra* note 191, at 2339–46; *see also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 93–106 (1994).

512 *See* Farber & O'Connell, *supra* note 482 (manuscript at 54–57); Mark Seidenfeld, Foreword, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1425–26 (2013); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 101 (2000); *see also* LEWIS, *supra* note 443, at 172–201 (presenting data on improved agency performance with limited politicization).

513 SHANE, *supra* note 192, at 4–13.

514 *See* N.W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM (forthcoming 2018) (manuscript at 1–36) (on file with the Harvard Law School Library).

515 *See, e.g.*, Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting) ("But the difficulty of making new laws isn't some bug in the constitutional design: it's the point of the design, the better to preserve liberty."); Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (arguing that "bicameralism and presentment make lawmaking difficult *by design*" (alteration omitted) (quoting Manning, *supra* note 255, at 202)).

fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[516] But even though efficacy cannot justify a constitutional violation, it is not precluded from carrying constitutional significance in the absence of such a violation, nor is efficacy excluded from influencing assessments of whether a measure is unconstitutional in the first place. The Court has made this point as well, stating that "[t]he Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. . . . [And it] 'has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function.'"[517] Moreover, the Court has refused to impose requirements that would "stultify the administrative process" or make that process "inflexible and incapable of dealing with many of the . . . problems which arise."[518] Perhaps most relevant for anti-administrativists, achieving effective governance — "the promotion of energetic and responsible governance in the common interest" — was an express and central concern of the Framers in designing the national government.[519] Denying governmental efficacy constitutional significance is thus impossible to square with the constitutional separation of powers system.

C. The Administrative State as Constitutionally Obligatory

Far from representing a constitutional threat, the administrative state thus plays a critical role in both cabining and effectuating executive power. Returning to the 1930s debates helps identify important constitutional functions that the administrative state performs. But the point can be taken even further: The modern national administrative state is now constitutionally obligatory, rendered necessary by the reality of delegation.

1. Delegation and Its Implications. — Congressional delegations of authority to the executive branch date back to the nation's earliest days of existence, and have been upheld by courts for nearly as long.[520] The

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[516] 462 U.S. 919, 944 (1983).

[517] Yakus v. United States, 321 U.S. 414, 424–25 (1944) (second omission in original) (quoting Currin v. Wallace, 306 U.S. 1, 15 (1939)).

[518] SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).

[519] Pozen, *supra* note 86, at 75; *see supra* p. 45. Effective governance was also a central concern of leading separation of powers theorists such as Locke, who defended separating out executive power in efficiency terms. *See* BARBER, *supra* note 514 (manuscript at 4–6).

[520] *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017) ("[T]here was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power."). *But see Ass'n of Am. R.Rs.*, 135 S. Ct. at 1246–50 (Thomas, J., concurring in the judgment) (arguing that the delegations upheld before the New Deal were more limited).

1930s witnessed the only times that the Supreme Court has held a delegation unconstitutional, with delegation representing a central bone of contention in the constitutional battle over the New Deal.[521] The centrality of delegation to that battle should not be surprising. Reflecting the constitutional principle that administrative agencies can only exercise authority delegated to them,[522] delegation represents the foundation on which the administrative state rests. In Professor Louis Jaffe's famous words, delegation is "the dynamo of modern government."[523] The New Deal delegations sustained by the Court were notably open-ended, including instructions for agencies to regulate in the "public interest."[524] But over the ensuing eight decades the scope of delegations has expanded significantly further. Today, Congress has delegated substantial policymaking authority to the executive branch across a wide array of contexts.[525]

Many anti-administrativists maintain that the Court's multiple decisions sustaining broad delegations represent a fundamental deviation from the Constitution's separation of powers structure. These critiques rest on contested views about the meaning of "legislative" and "executive" power — contested even among anti-administrativists themselves.[526] An additional reason for skepticism is the difficulty anti-administrativists face in constructing a plausible test for constitutionally permissible delegations. Justice Thomas's effort to prohibit any delegation of policymaking authority in setting general rules is practically infeasible and at odds with longstanding practice.[527] But more functionalist assessments, focused on determining when a delegation goes too far, are similarly unworkable. As Justice Scalia argued, once "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree," it becomes hard to conclude that courts are competent or "qualified to second-guess Congress."[528]

Yet whatever their views on current nondelegation doctrine, both anti-administrativists and supporters of administrative government

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[521] *See supra* p. 53.

[522] *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2101 (2004).

[523] LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 33 (1965).

[524] Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

[525] *See* DeMuth, *supra* note 183, at 125–26.

[526] *See* Magill, *supra* note 491, at 618–23; *see also* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (arguing that legislative power simply means enactment of a congressional statute). *Compare* Lawson, *supra* note 179, at 376–78 (suggesting that the Constitution requires Congress to make "sufficiently important" decisions), *with* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1251 (2015) (Thomas, J., concurring in the judgment) (arguing that it is a mistake to assume that "*any* degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct").

[527] *See generally* Whittington & Iuliano, *supra* note 520.

[528] Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

should agree that the phenomenon of broad delegation is not at risk of judicial invalidation. Justice Thomas aside, little support exists on the Court for invalidating delegations to the executive branch on constitutional grounds.[529] More support exists for a variety of moves seen as curtailing the scope of delegated power, such as interpreting delegations narrowly or rejecting deference to agency determinations of the scope of their delegated authority.[530] All of these moves, however, accept the basic phenomenon of broad delegation and seek to tame its perceived capacity for abuse. The relevant constitutional question then becomes what the separation of powers requires in a world of substantial delegation of policymaking authority to the executive branch. It is in this context that the administrative state is constitutionally obligatory.

Put differently, the modern national administrative state is the constitutionally mandated consequence of delegation.[531] To see why, begin with the Constitution's requirement that the President shall "take Care that the Laws be faithfully executed."[532] It follows that the administrative capacity the President needs in order to satisfy the take care duty is also required. So far, few would disagree.[533] What does that administrative capacity entail in the context of broad delegations? For starters, it means sufficient bureaucratic apparatus and supervisory mechanisms to adequately oversee execution of these delegated powers. It also requires sufficient administrative resources and personnel, in particular adequate executive branch expertise and specialization, to be able to faithfully execute these delegated responsibilities in contexts of tremendous uncertainty and complexity.[534] Arguably, this means that professional and expert government employees are now constitutionally

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[529] *See supra* notes 118–19 and accompanying text. Justice Gorsuch has indicated some sympathy with Justice Thomas's view. *See supra* note 120.

[530] *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 316–17 (2013) (Roberts, C.J., dissenting) (arguing it is the role of the courts to determine whether agency has been delegated jurisdiction); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

[531] *Cf.* Greene, *supra* note 490, at 124 ("[I]f we accept sweeping delegations of lawmaking power to the President, then to capture accurately the framers' principles . . . we must also accept some (though not all) congressional efforts at regulating presidential lawmaking."); Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 362–63 (2017) (arguing for accepting the reality of delegation and analyzing what administrative structures would follow under formalist constitutionalist principles).

[532] U.S. CONST. art. II, § 3.

[533] *See supra* notes 465–69 and accompanying text (discussing the constitutional benefits of bureaucratic accountability). *Compare* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." (quoting U.S. CONST. art. II, § 3)), *with* Strauss, *supra* note 55, at 704–05 ("[W]here Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role — like that of the Congress and the courts — is that of overseer and not decider.").

[534] *Cf.* VERMEULE, *supra* note 147, at 126–54 (describing the "pervasive presence of uncertainty in the administrative state," *id.* at 153).

required as well, and perhaps also the civil service, insofar as such career staff are necessary to ensure expertise and institutional stability in agencies.[535]

Simply from the proposition that delegated power must be faithfully executed, then, the outlines of a constitutionally mandated administrative state begin to emerge. Moreover, from this proposition some proposed anti-administrative measures, such as massively underfunding the EPA without altering its statutory responsibilities or repealing environmental rules necessary to implement delegated authority without adopting an alternative enforcement regime,[536] begin to look constitutionally suspect.

Admittedly, the claim that the Constitution necessitates some level of administrative resources, personnel, and activity seems to impute more of a positive rights aspect to our generally negative rights constitutional order. An alternative view might insist that all the Constitution requires is that the President ensure the laws are executed as faithfully as possible given the resources Congress has provided, and that the Constitution grants Congress discretion over whether and how much to fund.[537] Yet such a view ignores the extent to which, combined with delegation, the take care duty and broader duty to supervise do carry an affirmative dimension. Delegation comes with constitutional strings attached. Having chosen to delegate broad responsibilities to the executive branch, Congress has a duty to provide the resources necessary for the executive branch to adequately fulfill its constitutional functions.[538] To be clear, such a duty is unlikely to be judicially enforceable. Judicially manageable standards for determining what counts as adequate supervision, staffing, and resources to fulfill delegated responsibilities will often be lacking, and a severe risk exists that courts would intrude on the constitutional responsibilities of the other branches were they to seek to play an enforcement role.[539] Yet that the duty is dependent on the political branches for its realization does not affect its constitutional basis.

The constitutional consequences of delegation can be pushed further, to include a requirement of some internal administrative constraints of

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[535] *See* BROWNLOW REPORT, *supra* note 423, at 7 (arguing that modern government "requires personnel of the highest order"); Michaels, *supra* note 471, at 237–39.

[536] Juliet Eilperin & Brady Dennis, *White House Eyes Plan to Cut EPA Staff by One-Fifth, Eliminating Key Programs*, WASH. POST (Mar. 1, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/01/white-house-proposes-cutting-epa-staff-by-one-fifth-eliminating-key-programs/ [https://perma.cc/5VG2-KV6W].

[537] *Cf.* U.S. CONST. art. I, §§ 7–8 (discussing Congress's powers to raise revenues and make appropriations).

[538] *See* Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1886–97.

[539] *See id.* at 1906–07.

the kind described above.[540] Such a requirement would rest on the danger that broad delegations to the executive branch may create an imbalance of power among the branches and breed presidential unilateralism. Moreover, external checks by Congress and the courts may be limited in practice.[541] Thus, arguably, an additional constitutional string on delegations to the executive branch is that such delegations must be structured so as to limit the potential for aggrandizement and preserve checks and balances on governmental power.[542] But even if delegation necessitates some internal constraint, it is harder (but not impossible)[543] to claim that a specific checking measure is required. Moreover, even deriving a general requirement of internal constraint is debatable, given the constitutional value also attached to effective governance and to presidential oversight and supervisory control over the executive branch. Hence, the fact that internal constraints play an important constitutional function in implementing the separation of powers is not enough, on its own, to conclude that such structural measures are constitutionally mandated.

Finally, what about delegation itself: should any delegations of authority to the executive branch that typify contemporary government be considered constitutionally mandated? The idea that delegation mandates delegation has an obvious and troubling circularity. It also risks undercutting a critical formal link to democratic choices that justifies imposing conditions from delegation. If Congress lacks power to rescind delegations, and if delegations come with substantial administrative requirements attached, then decisions about the shape of government are no longer subject to popular control. In the end, however, the most important point is that the phenomenon of delegation represents such a fundamental and necessary feature of contemporary government that it is mandatory in practice. And from delegation key features of the administrative state follow.

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[540] *See supra* notes 474–88 and accompanying text.

[541] *See* Metzger & Stack, *supra* note 459, at 1263–64 (describing limitations of external constraints on agencies); *see also* Wurman, *supra* note 531, at 385–89 (arguing that allowing the legislative veto would significantly enhance Congress's capacity to check the executive branch and should be held constitutional as a result of delegation).

[542] *See* Farina, *supra* note 194, at 487, 497–98 ("The issue posed by the delegation of regulatory authority has come to be viewed purely in terms of whether the new allocation of power can be adequately checked . . . ." *Id.* at 487.); Greene, *supra* note 490, at 125–26 ("[M]uch of the Court's post–New Deal checks and balances jurisprudence can be justified as an attempt to ensure fidelity to the original understanding of checks and balances in a post–nondelegation doctrine world."); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 1004 (2007) (arguing that *Chenery*'s contemporaneous statement requirement serves to cabin delegated power). The requirement of some internal executive branch division also follows from the prohibition on "omnicompetent" and "omnipowered" delegations that Professor Todd Rakoff identifies as the *A.L.A. Schechter* principle. Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 21–24 (1992).

[543] *See supra* notes 534–35 and accompanying text (arguing that professional staff and the civil service may be required today).

2. Delegation and Current Anti-Administrative Challenges. — Recognizing the implications of delegation has particular relevance for current constitutional attacks on the administrative state. Many of the features of the administrative state that anti-administrativists condemn — the combination of legislative, executive, and judicial powers; administrative adjudication of private rights; and judicial deference to administrative statutory interpretations — arguably follow simply from the phenomenon of delegation.

Take first the combination of powers: Adequately supervising executive branch personnel to ensure they faithfully execute their delegated responsibilities means agency officials must specify what those responsibilities are for agency staff — and the broader the delegation, the more specification is required. This entails interpreting statutes delegating authority to determine what they require and allow, as well as developing and adopting policy that conforms to those delegations. Moreover, faithfully executing delegated authority also entails applying these policies and requirements to specific actions and contexts within their ambit. Such actions of interpretation and application can be viewed as simply different dimensions of executing the law, or as combined exercises of legislative, adjudicatory, and executive powers.[544] The broader the delegation, as Chief Justice Roberts suggested, the more the latter appears descriptively accurate.[545] Either way, the important point is that these actions become constitutionally necessary activities for executive branch officials to perform as a result of delegation. Furthermore, the constitutional imperatives to ensure that delegated authority is faithfully executed and to supervise delegated power entail that high-level agency officials be able to review applications of that authority by lower-level agency staff. Or in other words, these legislative, judicial, and executive functions must be combined not just in executive branch agencies, but more particularly in the heads of departments charged with overseeing their respective department's activities.

Full-blown administrative adjudication follows less obviously from delegation. It seems a stretch to claim that faithfully executing delegated authority requires agencies to do so through a trial-type proceeding. Certainly, if Congress has required an agency to implement its delegated authority through rulemaking, it would be implausible to claim that an agency must nonetheless engage in administrative adjudication to faithfully execute its delegated powers. Similarly, if Congress has prohibited or even not authorized an agency to issue binding rules, then the power

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[544] *See* Magill, *supra* note 491, at 608–26; *see also* City of Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013) ("Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of . . . the 'executive Power.'" (quoting U.S. CONST. art. II, § 1, cl. 1)).

[545] *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting).

to do so cannot be inferred from delegation.[546] On the other hand, the constitutional requirement to ensure that delegated authority is faithfully executed does entail action applying that authority. That means agency staff will need to engage in actions that qualify as adjudication in the constitutional sense — applying general rules to specific cases.[547] And insofar as an agency is therefore depriving an individual of property or liberty in a manner that would trigger due process, it may be required to provide notice and an opportunity to be heard before acting.[548] Hence, some form of administrative adjudication may follow as a constitutionally necessary consequence of delegation.

This leaves the question of judicial deference, increasingly the flashpoint for anti-administrativist attacks.[549] Although some anti-administrativists maintain that judicial deference is prohibited by Article III, giving due weight to delegation complicates such a claim. As Professor Henry Monaghan elaborated before *Chevron* was decided, judicial deference can be viewed as simply an acknowledgement of the scope of authority delegated to the executive branch.[550] Unless such delegations are unconstitutional, the constitutional separation of powers system requires that the courts honor congressional policy choices. And honoring congressional choices to delegate means deferring to agency judgments within the sphere of the agency's constitutionally delegated authority.[551]

This delegation argument for deference is contingent on a determination that Congress has delegated authority over the question at issue.[552] That is a question subject to robust debate. Scholars have long criticized *Chevron*'s presumption that when Congress delegates agency authority to implement a statute it intends to delegate authority to fill

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[546] Current doctrine requires Congress to authorize rulemaking for an agency to have power to do so, although grants of rulemaking authority are read broadly. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) ("We have said that a rule has [the] force [of law] only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule."); *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 472, 544–70 (2002) (describing the current practice of reading rulemaking grants broadly and arguing this approach is historically mistaken).

[547] *See* Londoner v. City & County of Denver, 210 U.S. 373, 385–86 (1908).

[548] *See id.*

[549] *See supra* section I.B.2, pp. 24–28.

[550] Monaghan, *supra* note 235, at 26 ("Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency." (emphasis omitted)).

[551] *See, e.g.*, Strauss, *supra* note 244, at 1145 (discussing "*Chevron* space").

[552] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015) ("It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

gaps and ambiguities in the statute, arguing that the presumption is empirically unsound, at odds with the APA's text, and in tension with institutional incentives. Others have countered that the presumption has greater empirical, textual, and institutional support than generally allowed, particularly given that the question is not whether Congress has delegated but whether it has chosen an agency or a court as its delegate.[553] To some extent, the answer to this question turns on the level at which it is asked — congressional intent to delegate authority on a specific issue is much harder to presume, but congressional intent to give an agency broad authority to implement a statutory regime is easier to identify.[554] Regardless, this debate does not undercut the constitutional point that *if* Congress has delegated such authority, then a necessary consequence of acknowledging Congress's power to delegate is that courts should defer to agencies' exercise of their delegated authority — and Chief Justice Roberts has acknowledged as much.[555] Hence, a strong case can be made that accepting delegation does beget deference, leaving open the question of how much evidence of delegation should be required.

Moreover, the strongest separation of powers responses to this delegation argument for deference also sound in delegation terms. Professor Cynthia Farina's critique of *Chevron*, for example, contends that the *Chevron* doctrine misunderstands the basis on which broad congressional delegations to the executive branch are constitutional: "If Congress chooses to delegate regulatory authority to agencies, part of the price of delegation may be that the court, not the agency, must hold the power to say what the statute means."[556] This view that the constitutional "price" of delegation is independent judicial judgment is debatable. It is at odds not only with Monaghan's account but also that offered by Chief Justice Roberts in *City of Arlington*, under which the "price" of delegation is determining whether Congress has delegated jurisdiction over the issue in question, with *Chevron* deference acceptable if so.[557] Perhaps most interestingly, however, Farina offers this argument not as

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553 *See* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–38 (2006) (listing reasons Congress delegates, including why Congress might delegate to agencies over courts). *Compare* Beermann, *supra* note 194, at 788–94, 829 (critiquing *Chevron* as empirically unsound and at odds with the APA), *with* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995–1006 (2013) (presenting empirical evidence that both supports and undermines *Chevron*'s presumption).

554 *See* City of Arlington v. FCC, 569 U.S. 290, 307 (2013) (arguing that delegation should be assessed at a general level).

555 *Id.* at 316 (Roberts, C.J., dissenting).

556 Farina, *supra* note 194, at 498.

557 *See City of Arlington*, 569 U.S. at 317 (Roberts, C.J., dissenting) ("Whether Congress has conferred such power is the 'relevant question[] of law' that must be answered before affording *Chevron* deference." (alteration in original) (quoting 5 U.S.C. § 706 (2012))); Monaghan, *supra* note 235.

an attack on administrative government as unconstitutional, but instead much on the terms sketched here: accepting delegation and assessing what constitutional requirements follow.

CONCLUSION

The 1930s are long past, but eerily salient today in the face of widespread attacks on the national administrative state. Encompassing measures from budgetary and regulatory rollbacks to broad new legislative constraints on rulemaking to legal challenges questioning the fundamental constitutionality of administrative government, these attacks harken back to battles over administrative governance that took place during the New Deal. As was true in that era, contemporary anti-administrativism is inseparably political and constitutional, rooted in conservative antistatist constitutional commitments and opposition to strong regulatory government. Yet to the extent anti-administrativism rests on fears of unconstrained and consolidated power, the administrative state is the solution and not the problem. Against a background of broad delegations to the executive branch and rising presidential unilateralism, the administrative state performs essential constitutional functions in supervising, constraining, and effectuating executive power. Even further, in the world of broad delegations in which we live, core features of the administrative state are now constitutionally required. Few anti-administrativists are willing to seriously challenge delegation, and judicial anti-administrativism in particular has a notably rhetorical air, seemingly unwilling to follow through on the radical implications of its constitutional complaints.

It is time to move past the constitutional anti-administrativism of the 1930s. That constitutional vision failed to persuade in its own time and is now deeply out of step with the realities of national government. Repeatedly voicing its claims threatens the administrative state's legitimacy for little practical gain and risks further politicizing the Court. Doing so also precludes developing accounts of the separation of powers that accept and build on the administrative state's essential role in our constitutional order. Particularly in the face of the current siege of the administrative state, there is a pressing need for engagement on questions too long excluded from our reigning constitutional discourse, such as the scope and nature of constitutional obligations to govern.

A BUREAUCRACY — IF YOU CAN KEEP IT†

*Mila Sohoni**

In her Foreword,[1] Professor Gillian Metzger portrays the administrative state as laid under siege by an array of judicial, political, and academic attackers. Expertly curating and deftly dissecting a century's circus of intellectual debate and political conflict, the Foreword demonstrates the myriad ways in which today's struggles over administrative government reprise the turmoil of the New Deal period.

Indeed, the parallels between the present moment and the 1930s may extend further than she draws them. The history of that era suggests how the "rhetorical antipathy"[2] towards the administrative state that Metzger carefully documents and critiques may yet cross over from the realm of rhetoric to the realm of reality. That, of course, only makes it that much more urgent to answer the central question addressed by the Foreword — the question of how to respond to the "anti-administrativist"[3] complaint that the federal bureaucracy is extralegal, unconstitutional, and tyrannical.

Metzger's response is the provocative rejoinder that the administrative state is not merely constitutionally permissible and not merely constitutionally beneficial, but also constitutionally *obligatory*.[4] This argument diverges in critical respects from long-held conceptions of the administrative state's constitutional status and role. It is bold in its premises and startling in its possible implications. It aims to break the siege — to quell, at once and en masse, the renascent attacks upon administrative government. But her argument for a constitutional obligation of administrative government pivots upon the threshold assumption that the Supreme Court will continue to regard broad delegations as constitutionally permissible — a point about which I do not feel as sanguine. And even if delegation doctrine persists in its present form, the full contours of the contingent constitutional obligation posited by Metzger seem to me to be both potentially enormous and — at the same time — hard to trace with precision. At the brass-tacks level,

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† Responding to Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

* Professor of Law, University of San Diego School of Law. Many thanks to Adam Cox, Chris Egleson, Richard Fallon, Daryl Levinson, David Pozen, and Adam Zimmerman for helpful comments and conversations, and to the editors of the *Harvard Law Review* for their excellent editorial work.

1 *See* Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

2 *Id.* at 34.

3 *Id.* at 4 (defining "anti-administrativism").

4 *Id.* at 87–95.

it is difficult to map out what exactly honoring the constitutional obligation of administrative government would require in the many and varied contexts in which it might be pitted against countervailing targeted arguments that regulatory power ought to be restrained. Politicians, scholars, lawyers, and judges gave us the modern administrative state; whether we can keep it remains to be seen.

I. RHETORIC AND REALITY

Metzger situates the current mood of anti-administrativism in its early twentieth-century roots, in the struggle over the New Deal.[5] During the 1930s, the constitutionality of the burgeoning administrative state was hotly contested, in particular by the Liberty League, a coalition of businesses funded by the du Pont brothers.[6] The landslide 1936 reelection of President Franklin Delano Roosevelt, the unpopularity of the League, and the Court's change of constitutional course at the close of the 1930s ended that fight for a time.[7] But that hiatus is now over. Politicians are now launching multipronged campaigns against the apparatus of administrative government, while an accumulating mass of academic writing challenges the constitutionality of fundamental features of the regulatory state.[8] Perhaps most importantly, the Justices seem to be reentering the fray too. Today, flights of "rhetorical excess[]"[9] and "strong rhetorical condemnation of administrative government"[10] have featured in concurring or dissenting opinions by no fewer than four members of the current Court.[11]

What should we make of such judicial opinions "decry[ing] the dangers of the ever-expanding administrative state,"[12] when — as

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[5] *Id.* at 6 ("[T]he real forebears . . . are . . . the conservative opponents of an expanding national bureaucracy in the 1930s.").

[6] *Id.* at 53–56.

[7] *Id.* at 63 ("The 1930s represent the first and the last time that the national administrative government was subject to the type of sustained constitutional challenge that we are seeing today.").

[8] *Id.* at 9–17; 31–33. This uptick in anti-administrativist attacks is surely linked to the more general — and also increasingly prevalent — notion that America suffers from the malady of "too much law," whether statutory or regulatory. For an examination and critique of various incarnations of that claim, see generally Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585 (2012).

[9] Metzger, *supra* note 1, at 35.

[10] *Id.* at 4.

[11] *Id.* at 3 ("Led by Justice Thomas, with Chief Justice Roberts, Justice Alito, and now Justice Gorsuch sounding similar complaints, they have attacked the modern administrative state as a threat to liberty and democracy and suggested that its central features may be unconstitutional."); *see id.* at 8–9; *id.* at 63 ("[M]any of the current constitutional attacks are made in terms nearly identical to those used by the League, and the League's anti-administrative rhetoric rivals that of some members of the Roberts Court.").

[12] *Id.* at 6.

Metzger stresses — their "bottom-line impact does not match their polarizing rhetoric"?[13] Such opinions seem to bash the bureaucracy for no evident "practical gain";[14] but does that fully capture what these opinions may signify?

Like Metzger, I believe that much light can be cast on our present situation by looking back to the landmark battles between progressive and conservative Justices in the early part of the twentieth century.[15] The dissenters of that period — Justice Holmes chief among them — famously argued that the extant jurisprudence of the *Lochner* era[16] was anachronistic, unprincipled, and illegitimate. In opinions that set the bar for future dissents, they systematically hacked away at the philosophical underpinnings of that era's jurisprudence,[17] whilst also writing extramurally so as to leave no doubt as to their discontents.[18] These Justices may not always have been consistent,[19] and they may not always have been correct.[20] But what they most certainly *were* was in deadly earnest.

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[13] *Id.* at 7.

[14] *Id.* at 95 ("Repeatedly voicing [anti-administrativist] claims threatens the administrative state's legitimacy for little practical gain and risks further politicizing the Court."); *id.* at 50 ("But the constant repetition of this motif [of the administrative state's unconstitutionality], combined with the Court's rhetorical invocations of liberty-threatening bureaucrats, undermines the administrative state's sociological and moral legitimacy as well."); *id.* at 44 ("[F]ew Justices seem willing to embrace the rollback in national administrative government that the posited antimony of separation of powers and contemporary national administrative government would seem to entail."); *id.* at 47 ("[G]ood reasons exist to conclude that few of these more radical political moves will come to pass. So far the judicial bark has been fiercer than its bite . . . .").

[15] *See* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1175, 1217–25 (2013) (explaining how recent debates between the Justices on the modern Court reprise New Deal–era debates concerning the constitutional doctrine of due process notice).

[16] I use the term the "*Lochner* era" roughly, to denote the period between the end of the nineteenth century and the end of the 1930s. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1344 (2000). Scholars have long disagreed on when precisely the *Lochner* era began and ended. *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 105 (1998) ("The empire of substantive due process was already in a state of collapse when the [*West Coast Hotel v.*] *Parrish* decision [in 1937] officially lowered the flag over its last colony."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437 n.64 (1987) (defining the *Lochner* era as "roughly" the years "between 1905 and 1937").

[17] *See, e.g.*, Tyson & Brother–United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting); Adkins v. Children's Hosp., 261 U.S. 525, 567 (1923) (Holmes, J., dissenting); Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

[18] *See, e.g.*, Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

[19] *Compare, e.g.*, *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (pointing out that "school laws" show that the idea that the "liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same" is a "shibboleth"), *with* Pierce v. Soc'y of Sisters, 268 U.S. 510, 530, 534–35 (1925) (invalidating under the Due Process Clause, with no dissent from Justice Holmes, a law requiring that children be sent to public schools).

[20] *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927) (Holmes, J.).

Today's dissenters[21] should be seen as the mirror image and foil of those *Lochner*-era dissenters, who toiled so long and so assiduously until their point was won by a later and more fatal majority. That today's Justices have not fully embraced every logical consequence of their views does not mean they do not hold the views.[22] The litigants' arguments and the rationales reached by the lower courts may hem in what a particular Justice deems proper to say in a given case. The modern dissenters, in other words, are applying their principles in the context of particular cases, and they are embracing the logical consequences of their views to the extent they feel it appropriate to do so as a matter of judicial craft.[23] On top of that, anti-administrativist opinions play other important roles. For one, they send signals to litigants, who then bring lawsuits that *do* place more fundamental questions squarely at issue, and to judges on lower courts, who may then start to "percolate" particular questions more aggressively.[24] For another, on those occasions when an anti-administrativist opinion *is* able to com-

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[21] I say "dissenters" here to capture the thrust of their sentiments, but some of the anti-administrativist opinions are technically concurrences.

[22] *Cf.* Metzger, *supra* note 1, at 36 (noting, with respect to Chief Justice Roberts's critical statements about administrative power in City of Arlington v. FCC, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting), that "[t]he logical inference from such language is that modern administrative government is systematically unconstitutional, yet all the Chief Justice sought was an exclusion of jurisdictional determinations from the ambit of *Chevron* deference").

[23] Metzger underscores that today's judicial anti-administrativists save the bulk of their "rhetorical concerns about executive power spinning out of control or being exercised at odds with the constitutional structure" for the "domestic and administrative contexts," *id.* at 37, while often accepting very broad claims of executive power in the arenas of foreign relations and national security. *Id.* at 37–38. Indeed, it was ever thus. *Lochner*-era jurisprudence shows that authentic judicial anti-administrativism in domestic policy can coexist with a deeply deferential stance towards executive branch authority in the foreign relations realm. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 34 (2000) ("The Supreme Court's extension of federal power in foreign affairs took place at the same time that a Court majority was resisting extensions of federal power in the domestic arena. The principal early twentieth-century architect of a rationale for extensive federal foreign relations power, Justice George Sutherland, has typically been described as an opponent of the New Deal and rejected several pieces of New Deal domestic legislation on constitutional grounds.").

[24] *See* Elbert Lin, *At the Front of the Train: Justice Thomas Reexamines the Administrative State*, 127 YALE L.J.F. 182, 192–94 (2017) (noting that a "likely effect" of Justice Thomas's opinions is "a change in the way litigants approach cases involving agency action," *id.* at 194, and that another "likely effect" is that "lower court judges may feel empowered to develop the conversation [about how to rethink administrative law] further in their own separate writings," *id.* at 193). From the Court's expression of doubts about the constitutionality of agency adjudication in *Stern v. Marshall*, 564 U.S. 462, 494–95 (2011), we can draw a line to the circuit split concerning the constitutionality of SEC administrative adjudication, as well as to the Court's grant of certiorari in *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 137 S. Ct. 2239 (2017) (mem.) (granting certiorari). *See* Metzger, *supra* note 1, at 21–22; *see also* Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1594 n.143 (2013) ("One might also see in *Stern* an indication that some members of the Supreme Court believe that the public rights exception has been too broadly drawn and that agency adjudication involving private rights is vulnerable to Article III challenge.").

mand a majority — perhaps precisely *because* of its modest "bottom-line impact"[25] — then that opinion may begin the process of a death by a thousand cuts, which is a time-honored way to kill off a disfavored doctrine.[26]

There is not much in any of this to reassure supporters of administrative government. Conversely, to opponents of administrative government, the timeline of the decline of *Lochner*-era jurisprudence might teach the lessons of patience, resolve, and staying the course. When one begins the work of undermining an entire body of jurisprudential thought, one may not live to see the whole thing come crashing down.[27]

Viewed in this historical light, the Roberts Court's recent expressions of judicial anti-administrativism may appear less a rhetorical threat — and more a real one — than their immediate lack of a "bottom-line impact" would otherwise indicate. Viewed in the light of the present day, two additional factors external to the Court may give added impetus to the Justices' anti-administrativist impulses. For one, this happens to be a time when many (more) Americans are experiencing an instinctive or "almost visceral"[28] resistance to claims to strong executive branch power. President Trump's Administration may prove to be a great boon to those who would portray the administrative state as tyrannical,[29] unaccountable,[30] unconcerned with individual rights,[31]

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[25] Metzger, *supra* note 1, at 7.

[26] Consider *King v. Burwell*, 135 S. Ct. 2480 (2015). The Court's opinion did not make a frontal attack on *Chevron* deference; instead, merely by invoking the major questions exception to *Chevron* deference, *id.* at 2489, the opinion may destabilize that doctrine by expanding that exception's scope. *See, e.g.*, Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam); *see also* Metzger, *supra* note 1, at 26–27 (noting that *King* is an instance of "a more modest attack on *Chevron*," *id.* at 26); Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1098–105 (2016).

[27] *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (setting out, at the dawn of the *Lochner* era, the framework for judicial deference that would ultimately become modern rational basis review).

[28] *Cf.* Metzger, *supra* note 1, at 34 (noting that a "theme" of anti-administrativism is a "rhetorical and almost visceral resistance to an administrative government perceived to be running amok").

[29] *See, e.g.*, Sarah Stillman, *The Mothers Being Deported By Trump*, NEW YORKER (July 22, 2017), https://www.newyorker.com/news/news-desk/the-mothers-being-deported-by-trump [https://perma.cc/68GB-LPQ2] (describing the evolution of immigration enforcement under Trump and how this evolution threatened with deportation many individuals "for whom public-safety justifications for removal don't apply").

[30] *See, e.g.*, Rebecca Ballhaus, *Ethics Watchdog Declines White House Request to Suspend Lobbying Inquiry*, WALL ST. J., May 23, 2017.

[31] *See, e.g.*, Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017) (per curiam); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 589 (4th Cir.) (en banc), *vacated*, 2017 WL 4518553 (U.S. Oct. 10, 2017) (mem.); *id.* at 628 (Wynn., J., concurring) (stating that an executive order issued by President Trump "was likely borne of the President's animus against Muslims and his intent to rely on national origin as a proxy to give effect to that animus"); Press Release, Palm Ctr., Fifty-

or capable of destroying Congress's handiwork.[32] Some of the underlying themes of anti-administrativism, if not all of its precise recommendations, may find voice on the left as well as on the right. For another, the currently sitting President may not prove to be very effective at accomplishing the project of sweeping regulatory reform to which he has committed. Earlier Presidents have signally failed at that task.[33] While one might construe that failure as a symptom of the absence of an underlying widespread political resolve to "deconstruct[] . . . the administrative state,"[34] a President's unwillingness (or inability[35]) to translate anti-administrativist rhetoric into reality may just deepen some anti-administrativists' conviction that the administrative state cannot be politically "tamed"[36] and that a constitutional remedy from the bench is therefore required. Either or both of these dynamics might tend to push judicial anti-administrativism out of the periphery of concurrence and dissent and onto the main stage.

If, however, Metzger carries the day with her most intriguing claim — that the administrative state is constitutionally *obligatory* — then all these quickening crosscurrents of judicial anti-administrativist sentiment, whether rhetorical or sincere, won't matter much; the Constitution, if it is understood as Metzger argues it ought to be, will curb and contain what anti-administrativists can accomplish.

II. THE ADMINISTRATIVE STATE'S CONNECTION TO THE CONSTITUTION

In order to understand Metzger's constitutional argument, it is useful to begin by identifying how her account departs from another idea that connects the administrative state with constitutional law — the

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Six Retired Generals and Admirals Warn that President Trump's Anti-Transgender Tweets, If Implemented, Would Degrade Military Readiness (Aug. 1, 2017), http://www.palmcenter.org/fifty-six-retired-generals-admirals-warn-president-trumps-anti-transgender-tweets-implemented-degrade-military-readiness/ [https://perma.cc/PS5H-3EHQ].

[32] *See, e.g.*, Haeyoun Park & Margot Sanger-Katz, *Four Ways Trump Is Weakening Obamacare, Even After Repeal Plan's Failure*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/07/19/us/what-trump-can-do-to-let-obamacare-fail.html (last updated Sept. 27, 2017) [https://perma.cc/R2K5-R9RD].

[33] Metzger, *supra* note 1, at 14–17.

[34] *See* Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight For "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/7KTJ-QPTJ].

[35] Metzger, *supra* note 1, at 16 (noting that "[m]any government programs are popular or lobbied for by well-connected interest groups").

[36] Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121 (2016).

idea of the "administrative constitution."[37] The basic notion of the "administrative constitution" is that core aspects of administrative law — including the Administrative Procedure Act[38] (APA), the key precedents and conventions that shape agency action, and other transsubstantive doctrines and rules such as open-government laws and presumptions of judicial review of agency action — have come to supply the administrative state with an internal structure and a framework of control that operate essentially as a constitution for regulatory government.[39] By "legitimating, through controlling rules and procedures, the exercise of power over private interests by officials not otherwise formally accountable,"[40] the administrative constitution performs the function of an "unwritten"[41] or quasi-constitution for the regulatory state.[42]

The important thing to remember about this type of quasi-constitutional law is that the chief answer to the questions "Where does the administrative constitution come from? Who made it?" is Congress.[43] The administrative constitution is akin to the kind of quasi-constitutional law most famously presented by Professors William Eskridge and John Ferejohn in their book, *A Republic of Statutes*,[44] which explains how framework or "super-statutes," elaborated by courts and agencies, have come to play a constitutive role in the fabric of American law and government despite the fact that the

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[37] *See* Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 931–43 (2016).

[38] Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)).

[39] *See* Sohoni, *supra* note 37, at 931–43; *see also* Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363 (noting the "obvious" fact that "the Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process").

[40] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671 (1975).

[41] *See* Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1221 (2014).

[42] Even some of its critics see it as such. *See, e.g.*, DeMuth, *supra* note 36, at 121 ("But administrative law is nonetheless positive law, with highly developed procedures, precedents, doctrines, and institutions for crafting and enforcing its commands. Indeed it has come to operate as a sort of shadow constitution, channeling the actions of Article I legislators, Article II executives, and Article III judges and calibrating the balance of power among the three branches.").

[43] Certain features of the administrative constitution, such as requirements of internal separation of functions within agencies, are shaped by due process doctrines. Sohoni, *supra* note 37, at 939–40.

[44] WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010). Ferejohn and Eskridge only lightly touch on the APA, but Professor Kathryn Kovacs has subsequently written what one might think of as that missing chapter by explaining the APA's claim to super-statute status. *See* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2014).

statutes are not embodied in the text of the Constitution.[45] The administrative constitution is rooted in the enactment of such statutes — most importantly the APA[46] — and in the meaning and conventions encrusted around those statutes by agency practice and judicial elaboration, including by watershed holdings such as *Chevron*[47] and *State Farm*.[48] Needless to say, the administrative constitution is nowhere codified as such, nor is it "formally entrenched against change."[49] But rather than rendering it vulnerable, those very features have seemed to make the administrative constitution that much more resilient and adaptable.[50]

The notion of the administrative constitution has been a helpful organizing framework. But the fragility of that model has become increasingly evident. For one thing, it leaves the administrative state vulnerable to shifting political coalitions and erosion of legislative support for administrative government. If Congress made the administrative constitution, then Congress can break it.[51] For another thing, the now-evident permeability of the administrative constitution has made it seem not as robust a framework as it was long assumed to be. The administrative constitution is riddled with "outs" and "loopholes."[52] Many techniques — including waiver, delay, nonenforcement, and dealmaking — allow the executive branch to *lawfully* avoid the constraints of the administrative constitution, to act unilaterally, without advance public input and without judicial review, even though the resulting policies affect millions of people.[53] The growth of OIRA review — an executive branch procedural innovation[54] — has made it harder to credit the notion that Congress is the ultimate steward of important administrative procedure.[55] And Congress itself has tinkered with the ground rules at times, by enacting on an ad hoc basis broadly worded preclusions of judicial review to insulate consequential

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45 ESKRIDGE & FEREJOHN, *supra* note 44, at 183–88; *see also* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

46 Sohoni, *supra* note 37, at 936–38; Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 466 (2015).

47 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

48 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

49 Sohoni, *supra* note 37, at 933; *see also* Bremer, *supra* note 41, at 1233–34.

50 Bremer, *supra* note 41, at 1233.

51 *Id*.

52 Sohoni, *supra* note 37, at 943–44, 963 (citing Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271, 1273 (2010)).

53 *Id.* at 944–63.

54 Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1183 (2014) ("[M]ost of OIRA's operation is entirely a creature of administrative fiat. It is anomalous that such an important feature of the regulatory state has no statutory basis.").

55 *See id.* at 1140, 1164–67.

executive branch policymaking from being examined by courts.[56] As unconventional uses of administrative power have expanded in scope and consequence, the exceptions to the administrative constitution have seemed to swallow the rule;[57] ordinary administrative law seems to have become a "lost world."[58] In short, because the administrative constitution has come to appear both politically vulnerable and outmoded by administrative practice, its utility as an organizing framework has seemed increasingly questionable.

By breaking with this framework, Metzger's account might offer remedies for these worries. She derives the backbone of the constitutional case for the administrative state from Article II as well as Article I. Her emphasis is upon how the Constitution secures the executive branch's capacity to govern in an effective and accountable way, not just upon how the Constitution constrains administrative government.[59]

With this one stroke, Metzger's account would counter both frailties of the model of the administrative constitution. First, by anchoring the administrative state to the executive branch instead of only to Congress, Metzger's account would help to shield the administrative state against swings in support in Congress for administrative government. If the administrative state is "constitutionally mandated,"[60] if it is the "constitutional string" attached to delegation,[61] then Congress may *make* administrative power as an initial matter — by delegating — but it might not then be able to *unmake* it — by withdrawing or cabining the personnel and resources that the executive branch requires to carry that delegation out.[62]

Second, Metzger's account might rationalize the more exotic variations of administrative power that the model of the administrative constitution has struggled to defend. Indeed, Metzger's account —

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[56] *See* Sohoni, *supra* note 37, at 961, 970–71.

[57] *Id.* at 963–64.

[58] Farber & O'Connell, *supra* note 54, at 1177 ("The changing realities of administrative law have left behind the mechanisms that the APA and the courts have drafted to achieve these [rule of law] values.").

[59] *See* Metzger, *supra* note 1, at 7 (urging the "reorient[ation]" of "constitutional analysis to consider[] not just constitutional constraints on government but also constitutional obligations to govern").

[60] *Id.* at 90 ("Simply from the proposition that delegated power must be faithfully executed, then, the outlines of a constitutionally mandated administrative state begin to emerge.").

[61] *Id.* ("Delegation comes with constitutional strings attached. Having chosen to delegate broad responsibilities to the executive branch, Congress has a duty to provide the resources necessary for the executive branch to adequately fulfill its constitutional functions."); *id.* at 89 ("It follows [from the Take Care Clause] that the administrative capacity the President needs in order to satisfy the take care duty is also required.").

[62] *Id.* at 89–90.

important aspects of which she has also defended elsewhere[63] — has the potential to flip the fundamental terms of the debate over such actions. Consider, for example, one of the Obama Administration's deferred-action immigration programs and the dangling question the Supreme Court left undecided concerning its legality[64] — the question, posed by the Court itself, "[w]hether the Guidance violates the Take Care Clause of the Constitution."[65] While the lower court and some scholars have been engrossed in debating whether the deferred-action policy ought to have been promulgated in compliance with the ordinary procedures for notice-and-comment rulemaking,[66] or whether it comported with the values that the "small-c" administrative constitution seeks to shield,[67] Metzger has swept above that skirmish by placing this policy on the plane of the "large-C" Constitution. Such a prospective nonenforcement policy, Metzger has argued, has "strong constitutional roots"[68] because it enables the President to perform his Article II–based duty to supervise the execution of the laws.[69] Given the de facto delegation of immigration lawmaking power to the executive,[70] and the President's obligation to supervise how lower-level officials enforce that law,[71] Metzger has contended, it would raise constitutional problems to *forbid* the adoption of categorical and prospective programs of non-enforcement in the immigration context.[72] In other

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[63] *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) [hereinafter Metzger, *Duty to Supervise*].

[64] United States v. Texas, 136 S. Ct. 2271 (2016) (mem.) (per curiam) (affirming the judgment below by a 4–4 equally divided Court).

[65] United States v. Texas, 136 S. Ct. 906 (2016) (mem.) (granting writ of certiorari and posing additional question).

[66] *See* Texas v. United States, 809 F. 3d. 134, 146, 150, 186–88 (5th Cir. 2015) (holding that Texas had standing to challenge DAPA and granting nationwide preliminary injunction against enforcement of DAPA because, inter alia, the plaintiffs were likely to succeed on the merits of the claim that the administration should have used notice-and-comment rulemaking to adopt DAPA), *aff'd by an equally divided court*, 136 S. Ct. 2271; Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 269–72 (2017); Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106 (2017); Kathryn Watts, *Rethinking Remedies*, JOTWELL (Jan. 17, 2017), http://adlaw.jotwell.com/rethinking-remedies/ [https://perma.cc/D9DD-JRZL].

[67] Sohoni, *supra* note 37, at 950–56.

[68] Metzger, *Duty to Supervise*, *supra* note 63, at 1929 ("Acknowledging a constitutional duty to supervise thus indicates that presidential efforts to direct nonenforcement on a categorical, prospective, and transparent basis can have strong constitutional roots.").

[69] *Id.* at 1929 ("[B]y openly stating a generally applicable policy and then instituting an administrative scheme to implement that policy, the President and DHS Secretaries Napolitano and Johnson were actually fulfilling their constitutional duties to supervise.").

[70] Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 108 (2015).

[71] *See* Metzger, *Duty to Supervise*, *supra* note 63, at 1929.

[72] *Id.* ("The public articulation of the administration's policies ensured that enforcement choices would be more transparent, thereby enhancing political accountability, as well as more consistent across the nation and among immigration personnel. Precluding prospective and cate-

words, the question that the Court posed — whether the Guidance *violated* the Take Care Clause — had it almost backwards; instead, the correct question to ask was whether the Take Care Clause *required* that the President be able to issue the Guidance.

III. THE CONSTITUTIONAL OBLIGATION OF ADMINISTRATIVE GOVERNMENT

Had the Court posed the question thus, the challenge would still remain how to answer it — and how to answer the analogous questions that will be raised in myriad contexts across the regulatory state. The Foreword's answer is simple — and radical. The project of constitutional analysis must be "reorient[ed]," Metzger urges, to encompass not merely "constitutional constraints on government but also constitutional obligations to govern."[73] That obligation to govern, she contends, means that we *must* have an administrative state, "with its bureaucracy, expert and professional personnel, and internal institutional complexity."[74] The obligation to ensure "accountable, constrained, and effective" administrative government, she contends, may *require* that the executive branch be able to promulgate regulations, conduct policymaking, adjudicate cases, and oversee the combined exercise of legislative, adjudicative, and executive functions.[75] Giving due weight to the duty to govern may *require* judicial deference as well, both because that deference gives effect to a congressional decision to delegate power to an agency,[76] and also because courts must defer to agencies if courts are to "reach accurate, coherent and consistent determinations" in cases requiring "expert elucidation" of specialized statutory schemes.[77] Honoring the duty to govern may also impose limits on

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gorical articulation of immigration enforcement policy and priorities is tantamount to insisting that nonenforcement decisions be made by lower-level officials, a requirement as much at odds with constitutional structure as a presidential dispensation power." (footnote omitted)).

[73] Metzger, *supra* note 1, at 7.

[74] *Id.* at 71–72; *see also id.* at 89.

[75] *Id.* at 72; *see also id.* at 89–94.

[76] *Id.* at 93 ("[T]he constitutional separation of powers system requires that the courts honor congressional policy choices. And honoring congressional choices to delegate means deferring to agency judgments within the sphere of the agency's constitutionally delegated authority."); *id.* at 94 ("*[I]f* Congress has delegated such authority, then a necessary consequence of acknowledging Congress's power to delegate is that courts should defer to agencies' exercise of their delegated authority — and Chief Justice Roberts has acknowledged as much. Hence, a strong case can be made that accepting delegation does beget deference, leaving open the question of how much evidence of delegation should be required." (footnote omitted)).

[77] *Id.* at 41 ("Article III may in fact militate in favor of deference to expert elucidation of statutory standards if the questions at issue require specialized expertise or experience that the federal courts lack. In such contexts, preserving the federal courts' ability to perform their constitutional function and reach accurate, coherent, and consistent determinations may mandate deference to agency determinations.").

congressional power; given that the Environmental Protection Agency (EPA) has to be able to faithfully execute its delegated powers, she contends, it may "begin to look constitutionally suspect" for Congress to "massively underfund[] the EPA" or to "repeal[] environmental rules necessary to implement delegated authority without adopting an alternative enforcement regime."[78]

In sum, the Foreword claims that a proper understanding of the Constitution makes the administrative state "constitutionally obligatory";[79] it contends that given "the phenomenon of broad delegation," the constitutionality of which is "not at risk of judicial invalidation,"[80] the administrative state must also follow as the "constitutional consequence[] of delegation."[81] The executive branch may not always get what it wants; but — at least once it is delegated power — it must get what it needs.

On two scores, these claims give pause for thought. First, to conclude that the administrative state is constitutionally obligatory in nearly any respect would entail a sharp break with constitutional practice and historical understandings.[82] The Foreword emphasizes that there is scant support on the current Court for holding delegation unconstitutional,[83] but no support seems to have been voiced for the view that when Congress chooses to delegate, the Take Care Clause then places an affirmative duty on Congress to supply the executive branch with the financial resources needed to govern effectively or to enforce the laws adequately.[84] Nor has *Chevron* deference been treated as a "necessary consequence"[85] of delegation, if we take that claim to mean that it is constitutionally obligatory for courts to presume that when Congress delegates, it intends to delegate to agencies the authority to resolve ambiguities in the statute;[86] clearly, the Court regards itself to

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[78] *Id.* at 90.

[79] *Id.* at 7.

[80] *Id.* at 89.

[81] *Id.* at 90.

[82] I set aside here procedural requirements upon adjudications, which the Court has long held are constitutionally obligatory as a matter of due process. *See id.* at 93 & nn.547–48 (citing Londoner v. City & County of Denver, 210 U.S. 373, 385–86 (1908)).

[83] *Id.* at 88–89.

[84] *Cf. id.* at 90.

[85] *Id.* at 93.

[86] *See* Jack Goldsmith & John F. Manning, Essay, *The President's Completion Power*, 115 YALE L.J. 2280, 2299 (2006) ("[T]he Court has never suggested that the *Chevron* rule is constitutionally required."); Thomas W. Merrill & Kristin Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 864–67 (2001) (critiquing arguments that *Chevron* "rests on the constitutional principle of separation of powers"); *cf.* Cass R. Sunstein, Essay, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) ("In the years since *Chevron*, a consensus has developed on an important proposition, one that now provides the foundation for *Chevron* itself: The executive's law-interpreting power turns on congressional will. If Congress wanted to repudiate *Chevron*, it could do precisely that.").

be empowered to deny deference or to cut back on the boundaries of *Chevron*'s domain, and — as evidenced by the existing system of enforcing the federal criminal code — even broad delegations of authority to implement statutory provisions have not been treated as mandating judicial deference to the agency charged with implementing the scheme.[87] Nor has the principle of separation of powers yet been treated as requiring either the creation or the continued existence of internal administrative constraints,[88] such as expert government employees or an independent civil service, even though these elements of administrative government may help to prevent presidential unilateralism and ensure that the executive branch will exercise delegated power in a legally or politically accountable manner.[89] In advancing these propositions, the Foreword urges shifts in constitutional law that could both greatly increase executive branch power and also sharply rein in unilateral presidential power. But it refrains from supplying a metatheory for evaluating when changes in the constitutional regime of such potential scope and consequence are warranted. Nor does it expressly address why one should feel confident that, as an empirical matter, these cross-cutting effects would, on net, leave us with an adequately constrained executive branch and President.

Second, the claim that the administrative state is constitutionally obligatory pivots on a threshold premise that some will find hard to stomach: the proposition that delegation is both constitutional and "such a fundamental and necessary feature of contemporary government that it is mandatory in practice."[90] After all, the conviction that delegation is unconstitutional is the igniting spark, if not the entire engine, of anti-administrativism; the idea that delegation is "fundamental," or "necessary," or "mandatory in practice," is precisely the kind of idea that many anti-administrativists most fiercely contest. From the early twentieth-century history of political contestation about the administrative state, many have gleaned the message that Metzger draws — that those who do battle against delegation's constitutionality are fighting the last war.[91] But the history of the 1930s equally may be

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[87] Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment); *cf.* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law*, 110 HARV. L. REV. 469 (1996) (arguing for reforming deference doctrine so that the Department of Justice would receive *Chevron* deference in its interpretation of criminal laws).

[88] *Cf.* Metzger, *supra* note 1, at 90–91 ("The constitutional consequences of delegation can be pushed further, to include a requirement of some internal administrative constraints of the kind described above."); *id.* at 89–90.

[89] *See id.* at 83–84 (describing how internal administrative constraints "diffuse power within the executive branch to forestall presidential aggrandizement," *id.* at 83).

[90] *Id.* at 91.

[91] *See id.* at 95 ("It is time to move past the constitutional anti-administrativism of the 1930s. That constitutional vision failed to persuade in its own time and is now deeply out of step with

read to demonstrate the huge scale of the transformations in constitutional law that can occur because of a shift in the Court's stance following the election of a President bent on making a radical break with extant constitutional understandings.[92] Today, the sitting President was placed into office in part by campaigning on an anti-administrativist platform,[93] and he may have the opportunity to appoint hundreds of judges that share his anti-administrativist aims.[94] To assume that the status quo on delegation will persist is to elide a key lesson of the 1930s — that constitutional revolutions happen.

Let us set these points aside, and stipulate that the courts will continue to regard broad delegations as constitutional,[95] in order to probe the Foreword's contention that, given delegation, the administrative state comes clothed with affirmative constitutional protections.[96] Put another way, if we take it as a given that delegation is constitutional and a necessary feature of government, what are the kinds of arrangements that are also constitutionally necessary to ensure that the executive branch has the necessary tools to carry out its duty to govern accountably and effectively? For future executive branch lawyers who want to argue for the validity of a given type of regulatory power, or for future litigants who wish to attack some perceived agency overreach, what will have to be demonstrated to establish (or to defeat) the claim that a given aspect of administrative law or practice is a constitutionally required "consequence" of delegation?[97]

Perhaps the broadest way to implement Metzger's account (and this is my own formulation, not one proposed by Metzger) would be to view Article II as implicitly giving the executive branch something like its own "necessary and proper" power.[98] On this view, anything that

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the realities of national government."); *id.* at 72 (noting that "broad statutory delegations of authority to the executive branch . . . are here to stay"); *id.* at 89.

92 *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 342–43 (1991); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2170 (1999).

93 *See* Eliza Newlin Carney, *Trump's Assault on the "Administrative State*," AM. PROSPECT (May 18, 2017), http://prospect.org/article/trump's-assault-'administrative-state' [https://perma.cc/GE2N-KAPG]; Rucker & Costa, *supra* note 34.

94 *See* Metzger, *supra* note 1, at 5 & n.19, 6 & n.20.

95 *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

96 Due to length limitations, I bracket for the remainder of the discussion Metzger's equally interesting suggestion that honoring the constitutional obligation to govern may entail the existence of "internal administrative constraints" on executive branch power. *See* Metzger, *supra* note 1, at 90–91.

97 The "claim" does not necessarily need to be a claim in court; Professor Metzger writes that Congress's "duty to provide the resources necessary for the executive branch to adequately fulfill its constitutional functions" is one that is "unlikely to be judicially enforceable." *Id.* at 90.

98 This formulation for implementing Metzger's account draws its inspiration from an essay by Professor Jack Goldsmith and Dean John Manning in which they contend, inter alia, that the executive branch has a defeasible and presumptive ability to carry out statutes grounded in Article

the executive branch deemed necessary and proper to carrying out a delegation would be deemed constitutionally protected,[99] and the executive branch would receive deference in determining any "factual predicates necessary to conclude that a given action is appropriate."[100] This approach would effectively extend an umbrella of constitutional protection to anything that the executive branch did that was plausibly connected to implementing its delegated powers — whether that was rulemaking, guidance, waiver, prospective nonenforcement policy, OIRA review, or in-house adjudication. This approach would, as well, mandate deferring to the executive branch's interpretation of statutes and to its own regulations, because such deference would promote the value of democratically accountable executive branch control over government.[101]

Adopting that approach would have the benefit of simplicity. It would, however, also have the uncomfortable consequence of ousting Congress almost entirely from the role of specifying how administrative government ought to operate — a result that sits uneasily with historical understandings and democratic principles. It would also carry risks; as Professor Jack Goldsmith and Dean John Manning have pointed out in reference to James Madison's cautionary remarks on Congress's necessary-and-proper power, "one can always spin out ways in which remoter and remoter means can be related to some broadly framed end."[102]

I doubt that Metzger would find appealing that implementation of her account,[103] and I know that I do not.[104] If, however, one attempts

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II, and that *Chevron* deference can be justified as a default assumption that Congress would have intended the executive branch to enjoy such deference. *See* Goldsmith & Manning, *supra* note 86, at 2298–99.

[99] *See id.* at 2306–07 (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006) ("The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise." (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866)))); *cf.* McCulloch v. Maryland, 17 U.S. (4. Wheat.) 316 (1819) (setting out Congress's power under the Necessary and Proper Clause).

[100] *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 584 (2004) (Thomas, J., dissenting) (arguing for this type of deference in the national security realm).

[101] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices [left unresolved by Congress]." *Id.* at 865.).

[102] Goldsmith & Manning, *supra* note 86, at 2307.

[103] As Metzger notes, a "critical formal link to democratic choices . . . justifies imposing conditions from delegation": decisions "about the shape of government" should be "subject to popular control," that is, control by Congress. Metzger, *supra* note 1, at 91.

[104] To illustrate my own misgivings, consider that the SEC has argued that it should have the authority to set by regulation the existence of selective waiver — that is, it has claimed that to achieve the "end" of enforcing securities laws, it must be able to use the "remote[] means" of altering the background rules of the law of evidentiary privileges. *See* Mila Sohoni, *The Power to*

to construct a narrower formulation of what the executive branch requires in order to govern, then some difficult line-drawing problems arise. Begin with rulemaking. Certainly, to implement a statute as complex as the Affordable Care Act (ACA), many regulations must be promulgated. But what if the Department of Health and Human Services were to use that rulemaking power to create exemptions to statutory requirements for entities who had philosophical objections to the ACA's rules — say, to the rule requiring the provision of contraceptives without cost sharing?[105] Such an exemption might reflect the executive branch's considered conclusion that effectively carrying out its regulatory mission requires it to draw the rules with large holes in them, in order "to reduce and relieve regulatory burdens and promote freedom in the health care market."[106] Is the power to craft such an exemption, for such a reason, a part and parcel of — a "constitutional string" attached to[107] — the initial delegation?

Turning to adjudication, consider the SEC's recent shift away from courts and toward administrative settlement, which Professor Urska Velikonja has described.[108] As Velikonja explains, rather than face the scant handful of federal judges willing to ask rude questions about its settlement choices,[109] the SEC moved a large proportion of its administrative settlements in-house, with the consequence that courts did not review them until after they were finalized.[110] For the SEC to have the capacity to settle cases is surely valuable;[111] and dealing with such

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Privilege, 163 U. PA. L. REV. 487, 512–16 (2015). I have cautioned against giving agencies the power to create evidentiary privileges through regulation. *Id.* at 534–43.

105 *See* Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147) [hereinafter Moral Exemptions Rule]; Robert Pear, *Trump Rule Could Deny Birth Control Coverage to Hundreds of Thousands of Women*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/us/politics/birth-control-women-trump-health-care.html [https://perma.cc/GLD5-ZDXA] ("[T]he administration says . . . it will 'exempt any entity possessing religious beliefs or moral convictions against the coverage required by the mandate, regardless of its corporate structure or ownership interests.'").

106 Moral Exemptions Rule, *supra* note 105, at 47,848.

107 Metzger, *supra* note 1, at 90 ("Delegation comes with constitutional strings attached.").

108 Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J.F. 124 (2016).

109 *Id.* at 126 ("Most judges perceived their review duties as limited and rubber-stamped most settlements. But sometimes, judges pushed back. As a result, both the SEC and defendants perceived in-court settlements as costly and unpredictable with ambiguous benefit to them.").

110 *Id.* ("Before Dodd-Frank, 40% of settlements were filed in administrative proceedings; in fiscal year 2015, over 80% were."); *id.* at 133 ("In administrative proceedings, the SEC opens and closes a settled action on the same day; there is never an opportunity for third-party review before the settlement is finalized, even informally.").

111 *See* N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1213 (D.C. Cir. 1993) ("As a general matter, the FCC is best positioned to weigh the benefits of pursuing an adjudication against the costs to the agency (including financial and opportunity costs) and the likelihood of success; moreover, it is not exercising coercive power over an individual."); *cf.* SEC v. Randolph, 736 F.2d 525, 529–30 (9th Cir. 1984) ("Compromise is the essence of a settlement. . . . The SEC's resources are

settlements in-house may enhance the ability of the SEC's leadership to steward and supervise the administration of the securities laws. But does the SEC also *have* to have the power to reach so many of its settlements in-house, without meaningful judicial review before the settlements are finalized? Is such a power constitutionally obligatory, too, as a "string" attached to the SEC's delegated authority?

One or two of the regulatory reform ideas that are now under consideration would also pose tough questions. Consider, for example, the proposal that Congress enact legislation requiring all rules to sunset after fifteen years.[112] Would such a law be permissible in a world in which the "administrative capacity" necessary to carry out delegations was treated as constitutionally mandated?[113] If the law is viewed as a post hoc limit upon the scope of an earlier delegation — akin to a statutory restriction on whether an agency can adjudicate cases or not, or issue binding rules or not — then perhaps it would be entirely permissible.[114] On the other hand, a regulatory sunset law would surely consume agency resources by forcing ongoing and costly reconsiderations of slews of earlier-promulgated regulations. Holding constant the resources that Congress supplied to the agency, such a law would hinder the agency from executing the other functions that Congress has also delegated to it — a consequence that, on Metzger's logic, may be "constitutionally suspect."[115] If that level of hindrance were sizeable, would this new string on delegation snap, or would the older strings give way?

The point is just that recognizing a constitutional obligation to govern contingent upon delegation still leaves us with the challenge of tethering particular administrative procedures, or particular degrees of executive branch latitude, to the initial anchor of a delegation. Many things might be *consistent* with carrying out a delegation; but saying that any are *obligatory* is far more difficult. Judges (or politicians or scholars), even those wholly convinced of the benefits of the modern

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limited, and that is why it often uses consent decrees as a means of enforcement. . . . The initial determination whether the consent decree is in the public interest is best left to the SEC and its decision deserves our deference.").

112 *See* DeMuth, *supra* note 36, at 182–83.

113 Metzger, *supra* note 1, at 89.

114 Metzger, *supra* note 1, at 92–93 ("Certainly, if Congress has required an agency to implement its delegated authority through rulemaking, it would be implausible to claim that an agency must nonetheless engage in administrative adjudication to faithfully execute its delegated powers. Similarly, if Congress has prohibited or even not authorized an agency to issue binding rules, then the power to do so cannot be inferred from delegation.").

115 *Id.* at 90 ("Moreover, from this proposition [that delegated power must be faithfully executed] some proposed anti-administrative measures, such as massively underfunding the EPA without altering its statutory responsibilities or repealing environmental rules necessary to implement delegated authority without adopting an alternative enforcement regime, begin to look constitutionally suspect." (footnote omitted)).

administrative state, may hesitate to regard any particular facet of administrative government as a necessary consequence of delegation, as a feature that Congress cannot defease or that courts must ratify. That, in turn, would leave ample room for the accretion of various anti-administrativist challenges and legislative cutbacks, the sum total of which may eventually resemble the wholesale rejection of administrative government for which some voices plead.[116]

To state the obvious, the questions just raised have largely been questions of application and implementation. They have sought to specify, rather than to deny, the Foreword's highly original claim: the proposition that the obligation to govern should carry affirmative constitutional protections, not just constitutional constraints. Constitutional principles, new and old, gain their substance from the type of iterative line-drawing that comes from posing and answering such questions. And there is no escaping the urgency of the Foreword's core message — that supporters of administrative government would do well to devote their energies to the task of making an affirmative case for the regulatory state, instead of just defensively responding to attacks on it.

CONCLUSION: OF PENNIES, POUNDS, AND PENCE

The Foreword portrays the current moment as a "redux" of the 1930s. I agree; and I think, too, that adopting that viewpoint places into its proper perspective Metzger's own intervention. In it, one can discern echoes of the words spoken by President Franklin Delano Roosevelt in a barn-burner of a speech he delivered at Madison Square Garden in New York, in the fraught days just before his landslide reelection in 1936. For a dozen years before he took office, President Roosevelt said, the nation had been "afflicted with hear-nothing, see-nothing, do-nothing Government."[117] "Powerful influences," he warned, were "striv[ing] today to restore that kind of government with its doctrine that that Government is best which is most indifferent."[118]

In its reframing of the constitutional stakes of the debate over the administrative state, the Foreword seeks to accomplish for administrative law something akin to what President Roosevelt sought to accomplish for the idea of government and all it might accomplish. Instead of seeing that administrative state as best which is most enfeebled and most externally limited, Metzger urges us to see that administrative

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116 *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

117 President Franklin D. Roosevelt, Campaign Address at Madison Square Garden: We Have Only Just Begun to Fight (Oct. 31, 1936), *in* 5 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 566, 568 (1938).

118 *Id.*

state as best which is most energetic, most internally accountable, and most effective at governing. Today, as when President Roosevelt spoke in 1936, giving full effect to Metzger's vision would require a sharp shift in the "reigning constitutional discourse" — now, a shift away from questions of constitutional constraints on administrative government and toward the "scope and nature of constitutional obligations to govern."[119]

It is there, then, that I end, very nearly where I began, with a reluctant word of caution on the potential shifts in "reigning constitutional discourse" we may now face — a word on pennies, pounds, and Pence. The Foreword's contention is that if you are in for a penny — with delegation — then you are in for a pound — the administrative state. But *if* delegation does come with strings attached, and *even if one is fully persuaded that these are the strings*, the fact would still remain that the administrative state is only constitutionally obligatory *if* delegation is constitutionally permissible. Future Justices in the mold of Justice Thomas or Justice Gorsuch may rather take back the penny than pay the pound.[120] There is, after all, no Franklin Delano Roosevelt sitting in the White House today. And we may be (at most) one President Pence away from seeing the Supreme Court controlled by a majority of such Justices.

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[119] Metzger, *supra* note 1, at 95.

[120] *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153–55 (10th Cir. 2016) (Gorsuch, J., concurring); United States v. Nichols, 784 F.3d 666, 668–70 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

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RESPONSES

CONFESSIONS OF AN "ANTI-ADMINISTRATIVIST"†

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You got me, I confess: I'm an "anti-administrativist."[1] Of course, I am not entirely sure what that means, and I certainly do not embrace all criticisms of the administrative state. But I do think administrative law is a work in progress and has its share of problems. From this year's Foreword, I learn that makes me an anti-administrativist. But you know what? You probably are an anti-administrativist too! And if you aren't, well, you should be. The truth is that the administrative state is not "under siege" because some sinister cabal has started singing from old hymnals. Instead, it is because administrative law can be *better* as a matter of procedural fairness, substantive outcomes, and compliance with statutory and constitutional law. Recognizing that the administrative state has value but that it also is fallible and sometimes loses its way is the essence of anti-administrativism — at least the anti-administrativism I confess to.

In this spirit of confession, I am pleased to respond to the Foreword. And I will say upfront that Professor Gillian Metzger's analysis is timely and insightful. That should be no surprise — she knows her stuff. Her bottom-line conclusion, moreover, is provocative. One should not dismiss out of hand her claim that in a world in which delegation is ubiquitous, sometimes the administrative state itself can serve an important "cabining" role on the exercise of delegated power.[2] Nonetheless, despite its virtues, I fear the Foreword does not fully capture what is driving calls for additional restraints on agencies. The hard reality is that 1930s administrative law is not a good fit for today. In fact, it was not a good fit for the 1930s — which is why Congress reformed it in the 1940s. Unfortunately, the system created in the 1940s does not always work as

† Responding to Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

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1 Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017).

2 *Id.* at 87.

well as it once did or was intended. And figuring out what to do next requires asking and answering difficult questions.

In this short space, I cannot respond to every point the Foreword makes. But I can offer four quick thoughts. First, although I will accept a label if I must, dividing the world between "anti-administrativists" and those who are "committed to the administrative project"[3] is not helpful. These labels are so broad that essentially everyone falls into both camps. Second, I agree that focusing on history is important, but the lessons it teaches are more complicated than the Foreword captures. In truth, much has changed since the Administrative Procedure Act[4] (APA) was enacted in 1946, and new dynamics are straining the old system. Thus, I do not think it is accurate to say that calls for reform threaten the "order that has governed for the last eighty years"[5] because there is no such continuous "order." Third, because its historical analysis does not account for all that has changed, the Foreword may misdiagnose what motivates the Supreme Court's and Congress's renewed interest in administrative law. And finally, Professor Metzger is right that today's skepticism is not a "passing craze."[6] Yet rather than bemoaning what may be coming round the bend, regulatory scholars should start looking for common ground.

I. WHAT DOES IT MEAN TO BE ANTI-ADMINISTRATIVE?

At the outset, consider how the debate has been framed. The Foreword labels me an "anti-administrativist."[7] I accept the label because, apparently, it also includes a majority of members of Congress,[8] at least four justices of the Supreme Court (and that number should be higher),[9] a bipartisan collection of former Presidents,[10] legal academics holding a

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[3] *Id.* at 33.

[4] Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)).

[5] Metzger, *supra* note 1, at 64.

[6] *Id.* at 5.

[7] *See id.* at 32 & n.183 (citing Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2014)).

[8] *See id.* at 10–12.

[9] *See id.* at 3 (listing Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch). For some reason, Justice Kennedy is excluded, even though he has joined many "anti-administrativist" opinions, including the Chief Justice's dissent in *City of Arlington v. FCC*, 569 U.S. 290 (2013). If one includes *Citizens United v. FEC*, 558 U.S. 310 (2010), which the Foreword does, *see* Metzger, *supra* note 1, at 28 — though I would not — then Justice Kennedy authored one. And shouldn't Justice Breyer be included? He wrote *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which did not make it *easier* for agencies. He also approves of "context-specific" limits on deference. *City of Arlington*, 569 U.S. at 309 (Breyer, J., concurring). Indeed, *all* of the Justices have joined "anti-administrativist" opinions. *See, e.g.*, Sackett v. EPA, 566 U.S. 120 (2012).

[10] *See* Metzger, *supra* note 1, at 13–15.

wide variety of views,[11] and a Nobel Prize winner.[12] No doubt, many of the ideas coming from this group are not worth pursuing, and the group surely has some bad eggs — every group does. But if that is the club, I am pleased to be a member.

Even so, I am not sure *why* I'm a member. The Foreword distinguishes between "anti-administrativists" and "those who are committed to the administrative project."[13] The problem is I have never met *anyone* who is opposed to "the administrative project." Maybe at the fringe of the fringe of society, someone thinks *all* administrative action is bunk. And maybe someone, somewhere, thinks the administrative state can do no wrong. But 99.999% of us are somewhere in between. In fact, if being an "anti-administrativist" means opposing agencies altogether, then even Justice Thomas — the Foreword's bête noire — should not be included. Granted, Justice Thomas has argued that judges should decide legal questions de novo, only Congress can regulate coercively, and adjudication belongs in Article III courts.[14] But he seems to accept agency action *sometimes*.[15] The same is true for Philip Hamburger.[16] These are the two most aggressive critics discussed in the Foreword. There are also many other "anti-administrativists" who hold different views; as far as I can tell, no one is marching in lockstep on these issues. In fact, even progressive heroes have expressed distaste for aspects of administrative law. Justice Douglas, as pure a New Dealer as they come, dissented, for instance, from the Supreme Court's evisceration of formal rulemaking.[17] Justice Jackson, another prominent New Dealer, attacked a key pillar of modern administrative law as "conscious lawlessness" and "administrative authoritarianism."[18] And Justice Brennan, the liberal lion himself, sternly challenged non–Article III adjudication.[19]

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[11] *See, e.g.*, *id.* at 31–33.

[12] *See id.* at 66 n.391 (Friedrich Hayek). And the number is almost certainly greater. *See, e.g.*, *All Prizes in Economic Sciences*, NOBELPRIZE.ORG, https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/ [https://perma.cc/3A5L-NY6K].

[13] *See* Metzger, *supra* note 1, at 33.

[14] *See, e.g.*, Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J.F. 94, 94 (2015).

[15] *See id.* at 99–100. To provide just one recent example, see *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (approving of "the Patent Office['s ability] to promulgate rules governing its own proceedings").

[16] PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 2–4 (2014) (explaining that "many executive acts are entirely lawful," including those granting or denying money, services, information, or other benefits).

[17] *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 246 (1973) (Douglas, J., dissenting) (criticizing the Court's "sharp break with traditional concepts of procedural due process").

[18] SEC. v. Chenery Corp., 332 U.S. 194, 216–17 (1947) (Jackson, J., dissenting); *see also id.* at 216 (criticizing the Court's blessing of "the Commission's assertion of power to govern the matter *without* law").

[19] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (plurality opinion) (urging that "the independence of the Judiciary be jealously guarded"); *see also* CFTC v. Schor,

All the while, what does it mean to be "committed to the administrative project?"[20] From the Foreword, we learn one can oppose *Chevron*[21] and still be committed.[22] The committed can also "criticize[] executive branch excesses" and attack "agency failures."[23] One can even rush to court to challenge administrative action.[24] Nor does it appear that the Foreword's attempt to draw lines is just a fancy way of saying there are political differences. After all, the Tenth Circuit's decision[25] — lamented in the Foreword[26] — that struck down the Securities and Exchange Commission's method for appointing administrative law judges was authored by a judge who had run for high political office as a Democrat earlier in his career, and who had been appointed to the bench by President Obama.[27] The en banc D.C. Circuit too split on that same question,[28] even though judges appointed by Democratic Presidents outnumber their colleagues appointed by Republican Presidents. And the proposed Regulatory Accountability Act,[29] also lamented by the Foreword, is prominently backed by "Senators Rob Portman of Ohio, a Republican, and Heidi Heitkamp of North Dakota, a Democrat."[30]

To be sure, the Foreword offers a test. It says there are three defining qualities of anti-administrativism: (1) "a rhetorical and almost visceral resistance to an administrative government perceived to be running amok"; (2) a look "to the courts as the means to curb administrative power"; and (3) an objection against the administrative state that suggests it is "at odds with the basic constitutional structure and the original understanding of separation of powers."[31] But this does not help. Consider prong one. The Foreword seems to treat Professor Cass Sunstein

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478 U.S. 833, 859 (1986) (Brennan, J., dissenting) (similar).

20 Metzger, *supra* note 1, at 33.

21 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

22 *See* Metzger, *supra* note 1, at 33–34.

23 *Id.* at 33.

24 The Foreword says "many progressives are now turning to the courts to counter the Trump Administration's regulatory rollbacks." *Id.* at 34. Yet it also acknowledges that not everything challenged has been a "rollback." *See, e.g.*, *id.* at 11.

25 Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016) (Matheson, J.).

26 *See* Metzger, *supra* note 1, at 20–21.

27 *See* Lee Davidson, *Scott Matheson Jr. Senate Questionnaire Reveals Little-Known Facts*, DESERET NEWS (Mar. 27, 2010, 12:29 AM), https://www.deseretnews.com/article/700019806/Scott-Matheson-Jr-Senate-questionnaire-reveals-little-known-facts.html [https://perma.cc/XP7X-9GUQ].

28 Raymond J. Lucia Cos. v. SEC, 868 F.3d 1021 (D.C. Cir. 2017) (mem.) (denying petition for review by an evenly divided en banc court).

29 S. 951, 115th Cong. (2017); H.R. 5, 115th Cong. (2017).

30 Cass R. Sunstein, Opinion, *A Regulatory Reform Bill that Everyone Should Like*, BLOOMBERG VIEW (June 22, 2017, 8:30 AM), https://www.bloomberg.com/view/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like [https://perma.cc/6HHT-D8V5]; *see also id.* ("Look! Bipartisanship is alive, and cranking out good ideas.").

31 Metzger, *supra* note 1, at 34.

as someone "committed" to the administrative state.[32] Yet he has criticized agencies for falling victim to "myopia, interest-group pressure, draconian responses to sensationalist anecdotes, poor priority setting, and simple confusion."[33] Now consider prong two. Whatever one thinks of, say, the REINS Act,[34] its sponsors are not looking to the *courts* — they are looking to *Congress*. And as to prong three, remember again Justice Brennan and non–Article III adjudication. Presumably the Foreword includes Justice Brennan among the "committed," but he thundered that "[t]he Framers knew that '[t]he accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'"[35] *Tyranny*. That's a strong word. By contrast, Justice Alito — a supposed anti-administrativist[36] — does not appear to share that view.[37] The Foreword's test, in short, does not hold up.[38]

Two final examples help illustrate my confusion. First, I am listed as an "anti-administrativist."[39] Why? It is not because I think there is no place for agencies.[40] Rather, it is because I have written that formal rulemaking — which has always been part of the APA[41] — merits greater experimentation due to the potential benefits of cross-examination. Yet I think cross-examination makes sense in the courtroom too.[42]

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[32] *See, e.g.*, *id.* at 3 (citing Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 42–43).

[33] Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 4 (1995). To be sure, perhaps Sunstein's rhetoric is not "visceral" enough. Or perhaps he is an anti-administrativist too. He is, after all, on record "largely supporting" the Regulatory Accountability Act. Metzger, *supra* note 1, at 12 n.43 (citing Sunstein, *supra* note 30).

[34] Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017).

[35] CFTC v. Schor, 478 U.S. 833, 859–60 (1986) (Brennan, J., dissenting) (quoting THE FEDERALIST NO. 46, at 334 (James Madison) (H. Dawson ed., 1876)). He was joined in full by Justice Marshall. *Id.* at 859.

[36] *See, e.g.*, Metzger, *supra* note 1, at 3, 86 & n.515.

[37] *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1949 (2015) (Alito, J., concurring in part and concurring in the judgment) (declining to second-guess *Schor*).

[38] In its footnotes, the Foreword also says "the shared network of lawyers, scholars, advocates, and funders" helping with legal challenges "and the parallels to claims raised against administrative government in the 1930s" help to distinguish true anti-administrativism. Metzger, *supra* note 1, at 34 n.197. Yet lawyers and the like find themselves on both sides of these issues. For instance, Neal Katyal, who is favorably cited, *see* Metzger, *supra* note 1, at 80 n.472 (citing Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006)), argued that giving preclusive effect to agency rather than judicial decisions may be unconstitutional. *See* Brief for Respondent at 37–42, B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293 (2015) (No. 13-352).

[39] *See* Metzger, *supra* note 1, at 32 n.181 (citing Nielson, *supra* note 7).

[40] Indeed, rigorous procedures can sometimes *benefit* agencies. *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. (forthcoming 2018).

[41] *See* Administrative Procedure Act, ch. 324, §§ 7–8, 60 Stat. 237, 241–42 (1946).

[42] *See* Nielson, *supra* note 7, at 266–67.

Does that make me "anti-judiciary"? Perhaps it just means I'm pro-cross-examination. And second, the most cutting critique of administrative law in recent times aired on late-night TV, not in a judicial opinion, law review article, or political stump speech.[43] Why be concerned about being an anti-administrativist when even *Saturday Night Live* fits the definition?

II. THE HISTORY OF ADMINISTRATIVE LAW IS RICH WITH LESSONS

The Foreword helpfully walks us through the 1930s and the body of administrative law that emerged. It then argues that the APA, enacted in 1946, "broadly legitimiz[ed] administrative governance," even though, to be sure, the APA "constrained administrative practice in some respects."[44] Building on that premise, the Foreword urges that calls for reform threaten the "order that has governed for the last eighty years."[45]

This history is worth exploring and the Foreword makes many interesting points. Even so, I think it moves too quickly and misses important lessons. For instance, I am not sure the APA is a mere continuation of the 1930s rather than a break from it. After all, in the 1940s, the APA was attacked "as nothing short of a 'sabotage of the administrative process'"[46] that would "severely cramp the style of government regulation."[47] (It seems that *anti*-anti-administrativists sometimes use aggressive rhetoric too.) Likewise, cases like *Chenery I*[48] — arguably a forerunner of "hard look" review[49] — suggest that even the New Deal Supreme Court was not convinced that agencies can always police themselves. And by the 1940s, many recognized that James Landis's vision of "expertness" was more than a little naïve.[50]

Leave all of that aside, however. There is another complication: history did not end in 1946. True, the Supreme Court has said that "the

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[43] *See Saturday Night Live: How a Bill Does Not Become a Law* (NBC television broadcast Nov. 22, 2014), http://www.nbc.com/saturday-night-live/video/capitol-hill-cold-open/2830152.

[44] Metzger, *supra* note 1, at 62.

[45] *Id.* at 64.

[46] Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 90 (2008) (citing Frederick F. Blachly & Miriam E. Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213 (1946)).

[47] *Id.* (quoting Fritz Morstein Marx, *Some Aspects of Legal Work in Administrative Agencies*, 96 U. PA. L. REV. 354, 354 n.2 (1948)).

[48] SEC v. Chenery Corp., 318 U.S. 80 (1943).

[49] *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 526 (1985) ("The origins of the hard look doctrine can be traced to the Supreme Court's holding in *SEC v. Chenery Corp.*").

[50] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261 (2001) (rejecting the Landis theory as "almost quaint" because agency decisions obviously "involve value choices" and noting that "even then it provoked strong opposition").

APA 'settle[d] long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest.'"[51] But the way administrative law works today often does not use the same "formula" upon which compromise was reached.[52] Of course, the *vocabulary* is often the same; we still speak of "rule making" and "adjudication."[53] And *Bowles v. Seminole Rock & Sand Co.*[54] — the source of the idea that agencies should receive deference when interpreting their own decisions — comes from that era. Moving beyond labels, however, the world of administrative law today can be very different from that of 1946. Thus, it is a mistake to suggest that today's criticisms somehow challenge the last "eighty years" of administrative law, as if we are simply replaying the 1930s, or less aggressively, to argue that the pattern of the 1930s necessarily provides a good parallel to today. Instead, because administrative law has continued to evolve, new challenges have emerged and more intense pressure has been placed on old compromises.

I've taken a stab at my own history of the evolution of administrative law and will not repeat it here.[55] A few points, however, bear mentioning. Consider first the *structural* framework of administrative law.[56] For example, although the Foreword is correct that the APA blesses rulemaking, the nature of rulemaking has changed significantly since 1946: rulemaking today is a bigger part of administrative law and is used for much more transformational policies.[57] Likewise, informal rulemaking has seemingly overgrown the APA's fence. In 1946, use of formal rulemaking, complete with robust procedural protections, was anticipated to be significant.[58] The Supreme Court, however, essentially banished formal rulemaking in 1973[59] — in a decision that Judge Friendly and others have questioned.[60] The nature of deference has also changed. To be sure, *Seminole Rock* was decided before the APA was

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[51] Metzger, *supra* note 1, at 62 (alterations in original) (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)).

[52] *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, Essay, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800 (2015).

[53] *See* 5 U.S.C. §§ 553–554, 556–557 (2012).

[54] 325 U.S. 410 (1945).

[55] *See* Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757 (2015).

[56] Some describe this as the basis for "administrative constitutionalism." *See, e.g.*, Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1899–900 (2013).

[57] *See, e.g.*, Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1140 (2001).

[58] *See* Nielson, *supra* note 7, at 246.

[59] *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 237–38 (1973).

[60] *See* Nielson, *supra* note 7, at 253 (citing, inter alia, Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1309 (1975)); *see also* Kent Barnett, Essay, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1 (2017).

enacted. But at the time it was a narrow doctrine with significant limits.[61] It was not until decades later that the modern, less restrained version emerged.[62] Along similar lines, it is hard to argue that *Chevron* was compelled by 1940s precedent,[63] and, in any event, the way *Chevron* is used arguably has changed even since 1984. Judge Silberman, one of *Chevron*'s early champions,[64] seems to think so. He recently explained that because courts have been more lackadaisical about step two than *Chevron* itself called for, agencies now "exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion."[65]

The *internal* culture and operations of the administrative state have also changed. As then-Professor Elena Kagan noted, Presidents, for instance, have increasingly turned to administrative action rather than legislation for domestic policy.[66] Agencies nowadays also can be quite strategic,[67] a trend that may only increase in the face of congressional opposition to aggressive agency actions.[68] And beyond what is happening in beltway politics, other broad social changes also have implications for the internal world of administrative law. Agency officials, for instance, may face new pressures because the nature of the global marketplace has evolved since the 1940s.[69] Indeed, as society changes for *whatever* reason, the pressures put on administrative law almost inevitably change too.

This is not a complete list of all that has happened since 1946, but hopefully it makes the point: things are different. And because not everything has worked out as rosily as the optimists in the 1940s hoped, today's anti-administrativists are not chasing boogeymen. Instead, anti-administrativists generally are responding to the real challenges of an evolving administrative state.

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[61] *See* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 52–53 (2015).

[62] *See id.* at 53.

[63] *See* Metzger, *supra* note 1, at 61 n.362 (citing Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 978–81 (2017)).

[64] *See* Laurence H. Silberman, Chevron — *The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990).

[65] Global Tel*Link v. FCC, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring).

[66] *See* Kagan, *supra* note 50, at 2248.

[67] *See* Nielson, *supra* note 7, at 267.

[68] *See, e.g.*, Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012).

[69] *See, e.g.*, Nielson, *supra* note 55, at 805–14.

III. ANOTHER TAKE ON THE SUPREME COURT AND CONGRESS

With this view of history in mind, reread the Foreword's assessment of today's Supreme Court. Why are the anti-administrativist Justices (in other words, *all* Justices, at least sometimes) concerned about administrative law? It is not because they long for the nineteenth century. Instead, it is because the "compromise" of 1946 often no longer reflects how things work. At the same time, the Justices are confronting today's reality in a familiar way: the Court's opinions suggest respect for stare decisis but also recognition that "a precedent is not always expanded to the limit of its logic."[70] Looking at the last decade or so of cases, it appears that the Justices hope to prevent the extension of certain cases but are hesitant to overrule precedent.

To see this dynamic in action, I recommend a close reading of Chief Justice Roberts's opinions, with particular focus on his *City of Arlington*[71] dissent[72] — especially because that dissent was joined in full by Justices Kennedy and Alito, and Justices Thomas and Gorsuch may be sympathetic to it. The Foreword is right that the Chief Justice used sharp rhetoric in this opinion about many aspects of administrative law.[73] But in fairness to the Chief Justice, his concerns are not frivolous, especially when one recalls (as the Chief Justice reminded us in another opinion) that the Constitution "is concerned with means as well as ends."[74] The Chief Justice's main point seems to be that "*effective*" government[75] may not always be *lawful* government — "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way."[76] And it is

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[70] Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 615 (2007).

[71] 569 U.S. 290 (2013).

[72] *Id.* at 312 (Roberts, C.J., dissenting).

[73] Metzger, *supra* note 1, at 36. In his dissent, which addressed whether *Chevron* extends to jurisdictional questions, the Chief Justice argued that agencies appear to exercise legislative power: "[T]he citizen confronting thousands of pages of regulations — promulgated by an agency directed by Congress to regulate, say, 'in the public interest' — can perhaps be excused for thinking that it is the agency really doing the legislating." *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting). Agencies, he argued, also appear to exercise judicial power "by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *Id.* at 312–13. And he worried that agency independence may hinder a President's ability "to keep federal officers accountable." *Id.* at 313. Against that backdrop, the Chief Justice observed that "[t]he Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." *Id.* (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).

[74] Horne v. Dep't of Agric., 135 S. Ct. 2419, 2428 (2015) (Roberts, C.J.).

[75] Metzger, *supra* note 1, at 85 (emphasis added). Of course, one cannot measure effectiveness without asking, "Effective at what?" Different forms of government serve different purposes.

[76] *Horne*, 135 S. Ct. at 2428 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

not "political" for the judiciary to recognize this; indeed, biting one's tongue can itself be political.

Yet the Foreword is correct that this strong rhetoric has not been paired with equally strong decisions.[77] The Court has not taken a wrecking ball to anything. Rather than striking down laws as violating the nondelegation doctrine, for instance, the Court construes statutes narrowly[78] and sometimes appears reluctant to infer a delegation.[79] Similarly, rather than eliminating non–Article III adjudication, the Court, more modestly, has clarified that there are meaningful limits on it.[80] And although the logic of *Free Enterprise Fund v. Public Company Accounting Oversight Board*[81] may cast doubt on agency independence altogether,[82] the Court did not take its judgment anywhere near that far. Similarly, even if the Court eventually overrules *Seminole Rock*, the Justices likely will replace it with something like *Skidmore* deference — which is probably how *Seminole Rock* was originally understood anyway.[83] In other words, the Court uses strong language but does not appear inclined to rethink everything.

Why not? Might it be because the Court respects precedent? As I read the cases, the Court does not want to tear everything down. But when confronted with new problems — or the emergence of more virulent strains of old problems — the Court also recognizes that it is not bound by stare decisis and so uses traditional legal tools to try to get the law right. This process sometimes requires considering constitutional first principles to answer the legal questions. Yet it is not the Justices' fault that "our administrative law is inextricably bound up with constitutional law."[84]

If I am correct that the Court is concerned about both agency overreach and stare decisis, then strong rhetoric makes a great deal of sense. The Court does not want its decisions *upholding* precedent to be mis-

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[77] *See* Metzger, *supra* note 1, at 3.

[78] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (explaining how the Court reads statutes narrowly to avoid nondelegation problems).

[79] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (refusing to apply *Chevron* where the policy implications of the potential ambiguity are significant).

[80] *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 493–94 (2011) (retaining but reading narrowly, inter alia, CFTC v. Schor, 478 U.S. 833 (1986), and Crowell v. Benson, 285 U.S. 22 (1932)).

[81] 561 U.S. 477 (2010).

[82] *See, e.g.*, Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2569–75 (2011).

[83] *See, e.g.*, Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, GEO. J.L. & PUB. POL'Y (forthcoming), https://ssrn.com/abstract=2993473 [https://perma.cc/PW3F-PPQH]. Sometimes it makes sense to overrule cases. Indeed, the law of stare decisis itself allows overruling if there is a good reason for it. Thus, if the Court determines that some of its administrative law cases need to be revisited outright or trimmed in some applications, doing so would not necessarily offend the judicial process.

[84] Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927).

understood as licenses to *expand* precedent. This might also explain why the Court seems hesitant to allow agency-empowering innovation.[85] Because agencies already have long leashes, the Court may worry about blessing even more discretion, especially because the Court itself has acknowledged for decades that agencies are not always angelic.[86] And does anyone doubt that aspects of administrative law *can* be threatening to liberty[87] and even sometimes unconstitutional?[88]

Along similar lines, a quick word about Congress is also warranted. The Foreword's most provocative claim is that because delegation is so rampant in the modern world, perhaps the administrative state comes with it.[89] But the Foreword also — surprisingly — expresses concern about Congress's proposed measures to take back some of the authority it has delegated.[90] Yet if, in fact, the price of delegation is the administrative state and, if, in fact, Congress is unhappy with aspects of the administrative state, then wouldn't it be logical on the Foreword's own terms for Congress to decide that there is too much delegation and do something about it? Or at least to *experiment* to see if things can be improved?[91] The Foreword also acknowledges that some checks and balances are necessary.[92] But if Congress believes that today's checks and balances are not enough, why not add more? And why wouldn't members of Congress sometimes use rhetoric to make their points, especially for a subject as important as checks and balances? None of this is to say that there are easy answers when it comes to the *specifics* of what administrative law ought to look like. But conceptually, congressional action should not be unthinkable, especially because society and administrative law are anything but static.

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[85] *See, e.g.*, Metzger, *supra* note 1, at 18–19.

[86] *See, e.g.*, Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962) ("*[E]xpertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." (internal quotations omitted)).

[87] *See, e.g.*, True the Vote, Inc. v. IRS, 831 F.3d 551, 562 (D.C. Cir. 2016) ("Parallel to Joseph Heller's catch, the IRS is telling the applicants in these cases that 'we have been violating your rights and not properly processing your applications. You are entitled to have your applications processed. But if you ask for that processing by way of a lawsuit, then you can't have it.' We would advise the IRS: if you haven't ceased to violate the rights of the taxpayers, then there is no cessation. You have not carried your burden, be it heavy or light.").

[88] The Foreword does not contain a great deal of case analysis about every topic. But is it fair to ask whether, say, Justice Alito is *wrong* about the arbitration provision in *Amtrak*? Using traditional legal tools, doesn't he make a pretty good case? *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring). The same is true for the Tenth Circuit's Appointments Clause analysis. *See* Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016). Of course, these opinions might be wrong, but the Foreword has not demonstrated it.

[89] *See* Metzger, *supra* note 1, at 87–88.

[90] *See id.* at 11–13 (criticizing proposed legislation).

[91] *See, e.g.*, Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480 (2008).

[92] Metzger, *supra* note 1, at 91.

IV. Preparing For the Future of Administrative Law

Finally, the Foreword is right that change is coming. Even today, there may be five votes for something like the Chief Justice's *City of Arlington* dissent, at least when it comes to imposing more context-specific limits on *Chevron*.[93] Congress also may be poised to enact regulatory reform. The question administrative law scholars should ask is how to respond.

There are at least two options. One is to resist. The other is to search for common ground. I urge the latter option. Because administrative law is complex, there are many ideas, some better and some worse — and all needing further thinking. Hopefully then, reform can be a collaborative effort in which all ideas are carefully considered as we move beyond old battle lines. This does not mean everyone will magically agree about everything. But it does mean we can still work together to try achieve the best balance of risk and reward that the law allows.

* * *

At base, the Foreword asks a simple question: agencies do many good things, so why can't we learn to stop worrying and love the administrative state? And here is the answer: true, agencies do many good things, but they also sometimes do bad things, and they would do even more bad things in a world without "consequence[s]."[94] This need for both energetic government *and* safeguards on it drives much of the concern about today's administrative law, just as it helped drive the APA's creation and the Constitution's. Because I think there is a place for agencies but also that administrative law can be improved, I confess: I'm an "anti-administrativist." And you should be too.

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[93] *See* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1425 (2017).

[94] Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1652–53 (2015).

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Comments

BUSINESS ROUNDTABLE V. SEC: RISING JUDICIAL MISTRUST AND THE ONSET OF A NEW ERA IN JUDICIAL REVIEW OF SECURITIES REGULATION

Leen Al-Alami*

INTRODUCTION 542
I. BACKGROUND 543
A. Setting the Stage: From New York to Washington, D.C.....543
B. Judicial Review of Agency Rules.....545
C. Judicial Review of SEC Actions 547
II. *BUSINESS ROUNDTABLE II* AND ITS SEVEN SISTERS.....548
A. The Road to Business Roundtable II 548
1. *Business Roundtable I*.....549
2. *Teicher v. SEC* 550
3. *Chamber of Commerce I*.....551
4. *Chamber of Commerce II* 552
5. *Goldstein v. SEC*.....552
6. *Financial Planning Ass'n v. SEC* 553
7. *American Equity Investment Life Insurance Co. v. SEC* ...553
B. The SEC's Latest and Biggest Defeat in the D.C. Circuit.....554
III. THE IMPLICATIONS OF HEIGHTENED JUDICIAL SCRUTINY 557
IV. TO MAINTAIN THE STATUS QUO OR SEEK ALTERNATIVES?.....562
CONCLUSION.....564

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INTRODUCTION

The U.S. Securities and Exchange Commission (SEC) was born out of the Securities and Exchange Act of 1934[1] (1934 Act) in the aftermath of the Great Depression as a means for regulating the stock market, enhancing transparency and corporate information-sharing and, ultimately, protecting investors. Armed with Congress' grant of rulemaking and enforcement authority, the SEC, since its inception, has promulgated rules aimed at realizing the SEC's mandate. But securities regulation by the SEC did not come about unopposed. Indeed, since as early as 1936, interest parties have challenged a number of the SEC's promulgated rules.[2] This Comment will explore the recent history of judicial challenge to SEC rulemaking, specifically in the area of securities regulation. Through an examination of the eight cases since 1990, where the D.C. Circuit invalidated an SEC-promulgated rule in the area of securities regulation, this Comment argues that the D.C. Circuit's most recent ruling in *Business Roundtable v. SEC*[3] (*Business Roundtable II*) represents a turning point indicative of an unprecedented level of heightened judicial scrutiny of securities regulation. Such heightened scrutiny, epitomized by *Business Roundtable II*'s elevated demands—and, in effect, substantive review—of the SEC's cost-benefit analysis, poses a real threat to future attempts at securities regulation, as well as SEC rulemaking abilities more generally.[4]

1. Securities Exchange Act of 1934 § 4, 15 U.S.C. § 78d (2006).

2. *See* Jones v. SEC, 298 U.S. 1 (1936) (challenging the SEC's ability to prevent a party's withdrawal of a registration statement in the face of an SEC proceeding challenging the truth and sufficiency of that statement); *see also* E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571 (2004) (examining every U.S. Supreme Court decision on a securities issue between 1933 and 2004).

3. 647 F.3d 1144 (D.C. Cir. 2011).

4. During the final editorial work on this Comment, the Columbia Business Law Review published Anthony W. Mongone, Note, *Business Roundtable: A New Level of Judicial Scrutiny and Its Implications in a Post-Dodd-Frank World*, 2012 COLUM. BUS. L. REV. 746 (2012). While there is some overlap, Mr. Mongone's Note and this Comment are different because they each examine *Business Roundtable II* through a different lens. Most notably, Mr. Mongone analyzes the court's holding by looking at the legislative history of the National Securities Markets Improvement Act of 1996 and the standard of judicial review contemplated by the Act. This Comment, conversely, approaches *Business Roundtable II* through an examination of the D.C. Circuit's analysis in prior cases concerning SEC rules and regulations. Separately, James D. Cox and Benjamin J.C. Baucom argue in *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1813 (2012) (also published during the final editorial work on this Comment), that "the level of review invoked by the D.C. Circuit in *Business Roundtable* and its earlier decisions is dramatically inconsistent with the standard enacted by Congress." Though similar, my Comment and the Cox and Baucom

I. BACKGROUND

A. Setting the Stage: From New York to Washington, D.C.

In July of 2011, only eleven days before the D.C. Circuit issued its opinion in *Business Roundtable II*, Judge Rakoff of the Southern District of New York held that Rajat Gupta, a corporate executive tied to the insider-trading scheme the SEC was investigating at Raj Rajaratnam's Galleon Group, may bring a lawsuit against the SEC alleging that the SEC, in its investigation, had violated Gupta's rights under the Equal Protection Clause.[5] In so deciding, Judge Rakoff served the SEC a number of strong blows, from questioning the SEC's motives when it filed an administrative proceeding against Gupta,[6] to all but accusing the SEC of arbitrarily discriminating against identical defendants.[7]

Just a few months after that opinion, Judge Rakoff struck once again in *SEC v. Citigroup Global Markets Inc.*, where he departed, though not unprecedentedly,[8] from the trend of courts accepting settlements that the SEC reaches with other parties.[9] The SEC and Citigroup had reached the

articles are different, because the latter compares the D.C. Circuit's standard of review in *Business Roundtable II* and its predecessors with that prescribed by Congress. This Comment, however, compares the court's approach in *Business Roundtable II* with the approach in that case's predecessors. The Journal of Corporation Law also published Grant M. Hayden & Matthew T. Bodie, *The Bizarre Law and Economics of* Business Roundtable v. SEC, 38 J. CORP. L. 101 (2012). In that piece, the authors focus on the issue of shareholder voting rights and discuss how *Business Roundtable II* is part of a "growing preference amongst some law and economics commentators for a Potemkin-Village version of shareholder democracy . . . ." *Id.* at 102. By contrast, this Comment examines the D.C. Circuit's approach to all SEC rulemaking, not just rules related to proxy access. Finally, in Rachel A. Benedict, Note, *Judicial Review of SEC Rules: Managing the Costs of Cost-Benefit Analysis*, 97 MINN. L. REV. 278 (2012), the author reviews a trilogy of cases that includes *Business Roundtable II*, *id.* at 284, and advocates the need for a more clearly defined scope of SEC cost-benefit analysis. *Id.* at 279. This Comment takes a different approach in that it provides a comprehensive historical case law analysis of judicial review of SEC rulemaking since the first *Business Roundtable* case in 1990. This Comment is also different in that it sees *Business Roundtable II* as a turning point in judicial review of SEC rulemaking, and thus discusses this latest case's significance and consequences for federal securities law generally.

5. Gupta v. SEC, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011).

6. *See id.* at 506 (describing the SEC's move as a "seeming exercise in forum-shopping").

7. *See id.* at 514 ("[W]e have the unusual case where there is already a well-developed public record of Gupta being treated substantially disparately from 28 essentially identical defendants, with not even a hint from the SEC, even in their instant papers, as to why this should be so.").

8. *See, e.g.*, SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507 (S.D.N.Y. 2009).

9. 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011).

settlement at issue in the form of a consent judgment.[10] In this case, as had been practiced by the SEC and regulated parties before, the consent judgment required Citigroup to pay a penalty, but allowed it to refrain from making any admissions as to the charges.[11] When first faced with the SEC-Citigroup consent judgment, Judge Rakoff put some questions to the parties, asking, as the basis of his questions, how the settlement would provide any substantive relief to harmed parties.[12] Ultimately, the court refused to approve the proposed settlement, because, Judge Rakoff wrote, it "has not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment."[13] In refusing to rubberstamp the consent judgment, Judge Rakoff further wrote that "[a]n application of judicial power that does not rest on facts is worse than mindless, it is inherently dangerous"[14] and concluded that a consent judgment such as the one presented "serves no lawful or moral purpose and is simply an engine of oppression."[15]

A number of commentators have viewed such opinions from the Southern District of New York as a sign of rising hostility towards the SEC. For example, Michael McConnell, a former judge on the U.S. Court of Appeals for the Tenth Circuit, called the *Citigroup* opinion "startling to say the least."[16] He continued: "Judge Rakoff has effectively taken on the role of a prosecutor, second-guessing the SEC's law enforcement decisions" and ultimately, he projected, leading to impossibly costly litigation that would prevent the SEC from pursuing many enforcement actions.[17] On the other hand, some see the circuit court's opinions as less of a criticism of the SEC and more an expression of concern with holding Wall Street and financial institutions accountable.[18] This view prompts the

10. *Id.* at 330.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 335.
15. *Id.*
16. Joe Palazzolo, *Law Blog Expert Panel: Ex-Judges on Rakoff's Citi Ruling*, LAW BLOG (Dec. 19, 2011, 10:21 AM), http://blogs.wsj.com/law/2011/12/19/law-blog-expert-panel-ex-judges-on-rakoffs-citi-ruling/.
17. *Id.*
18. *See e.g.*, Reynolds Holding, *Courts More Willing to Second-Guess Wall Street*, BREAKINGVIEWS (Dec. 05, 2011), http://blogs.reuters.com/breakingviews/2011/12/05/courts-more-willing-to-second-guess-wall-street/ ("[Judge Rakoff's] opinion showed little fear of creating market uncertainty, arguing that the public interest is better served by holding companies' feet to the fire than by quietly settling disputes without any admission of wrongdoing."); Daniel Kaufmann & Veronika Penciakova, *Judge Rakoff Challenge to the S.E.C.: Can Regulatory Capture be Reversed?*, BROOKINGS INST. (Dec. 02, 2011), http://www.brookings.edu/opinions/2011/1202_rakoff_challenge_kaufmann.aspx ("The judge's

question: Is it within the courts' purview to seek accountability from private institutions?

The Second Circuit has since granted a stay to Judge Rakoff's ruling in *Citigroup*.[19] In its decision, the Second Circuit criticized Judge Rakoff's view that the SEC-Citigroup settlement was not in the public interest. "It is not . . . the proper function of federal courts to dictate policy to executive administrative agencies," read the opinion.[20] "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ."[21]

Irrespective of the Second Circuit's stay in *Citigroup*, the New York court's opinions give pause for thought as to whether we are at a new junction in the relationship between the SEC and the judiciary. To explore the existence and extent of such a phenomenon, this Comment will look to the very center of judicial review of the SEC—the D.C. Circuit and its line of opinions on SEC securities regulation

B. Judicial Review of Agency Rules

Over the years, and as the SEC, along with other agencies, was challenged in the courts, a number of administrative law doctrines were developed to demarcate the limits of judicial review of agency rules and orders. Most relevantly, agency action became entitled to greater judicial deference after *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*[22] Under what became known as "*Chevron* deference," a court reviews an agency's construction of a statute with a two-step test.[23] First, the court asks "whether Congress has directly spoken to the precise question at issue."[24] If Congressional intent is clear, the court's inquiry ends. If, however, the court finds the intent of Congress ambiguous, or if the statute is silent with respect to the issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[25]

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ruling brings to light, once more, the extent to which the regulatory agency may have been subject to capture and undue influence by financial institutions, while also potentially challenging the status quo.").

19. U.S. SEC v. Citigroup Global Mkts. Inc., 673 F.3d 158, 169 (2d Cir. 2012).

20. *Id.* at 163.

21. *Id.* (*citing* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)) (internal quotation marks omitted).

22. 467 U.S. 837 (1984).

23. *Id.* at 842-43.

24. *Id.* at 842.

25. *Id.* at 843.

A second enhancement to judicial review of agency decisions and rules was the enactment of the Administrative Procedure Act (APA), which requires, among other things, that a court set aside agency actions it finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[26] In determining whether an agency action is arbitrary or capricious, a court must ensure that the agency in question has "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.'"[27] Unlike *Chevron*, the APA and the Supreme Court's interpretation of it in *State Farm*, demonstrate heightened judicial scrutiny for agency actions. Indeed, the APA's instruction became known as the "hard look doctrine," because it requires courts to more closely examine information the agency provides in its reasoning.[28] Enacted in 1966, the "arbitrary and capricious" standard was viewed as a response to the "pervasive distrust of administrative agencies and the growth of public interest regulation."[29] By virtue of the nature of lawsuits brought to them, the judges of the D.C. Circuit played a key role in the development of "arbitrary and capricious" review of agency decisions, unanimously agreeing that the court should not "continue the deference that characterized judicial review of administrative agency action during the 1940s and 1950s."[30] The standard of review has been wielded by the D.C. Circuit to invalidate countless agency actions over the decades, including the SEC's Rule 14a-11 in *Business Roundtable II*. Indeed, "courts continue to develop administrative common law doctrines and to employ those already in their doctrinal arsenal . . . with regularity and vigor."[31]

Congress has also enacted the National Securities Market Improvement Act of 1996 to amend the Investment Company Act of 1940 (ICA) to require the SEC in its rulemaking to consider: (1) "whether an action is necessary or appropriate in the public interest," (2) "the protection of investors," and, (3) "whether the action will promote efficiency, competition, and capital formation."[32] The Act thus in a way complements "arbitrary and capricious" review by specifying what the SEC in particular

26. Administrative Procedure Act § 10(e)(1), 5 U.S.C. § 706(2)(A) (2006).

27. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

28. *See* Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599 (2002).

29. *Id.* at 2599.

30. *Id.* at 2600.

31. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1320 (2012).

32. National Securities Markets Improvement Act of 1996 § 106(a), 15 U.S.C. § 77b(b) (2000).

must consider so that its actions are not found to have violated the APA's hard look doctrine.

Most recently, President Barack Obama issued Executive Order 13563,[33] "Improving Regulation and Regulatory Review," requiring administrative agencies to: (1) run a cost-benefit analysis of its proposed rules, (2) tailor its regulations such that society is least burdened, (3) select approaches that maximize net benefits, (4) specify performance objectives, and (5) consider alternatives to direct regulations.[34] The order further requires all agencies to use the "best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[35] Because the SEC is an independent regulatory commission and not an executive agency, Executive Order 13563 technically does not apply to the SEC's rulemaking.[36] The order was thus extended to explicitly apply to independent regulatory agencies through Executive Order 13,579,[37] "Regulation and Independent Regulatory Agencies." The latter order underscores that "[i]ndependent regulatory agencies, no less than executive agencies, should promote that goal [outlined in Executive Order 13,563]."[38]

C. Judicial Review of SEC Actions

It is against this administrative law backdrop and the still-evolving balance between agency rulemaking authority and judicial review that the securities regulations of the SEC have been challenged in courts. Over more than two decades, since 1990, the SEC has had to (unsuccessfully) defend eight securities-related regulations in the D.C. Circuit.[39] This Comment will

33. Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

34. *Id.*

35. *Id.*

36. *See Assessing Agency Cost-Benefit Analysis for Dodd-Frank Rules*, SECURITIES LAW DAILY, Apr. 30, 2012, *available at* 2012 WL 1452277 (explaining that although Executive Orders like this one technically do not apply to the SEC because it is an independent regulatory commission and not an executive branch agency, agencies have traditionally followed the spirit of executive orders).

37. Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011).

38. *Id.*

39. The eight cases are: Bus. Roundtable v. U.S. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (challenging SEC rule on proxy access and shareholder-nominated candidates); Am. Equity Life Ins. Co. v. U.S. SEC, 613 F.3d 166 (D.C. Cir. 2009) (challenging SEC regulation of fixed income annuities); Fin. Planning Ass'n v. U.S. SEC, 482 F.3d 481 (D.C. Cir. 2007) (challenging exemption of broker-dealers from the Investment Advisers Act); Goldstein v. U.S. SEC, 451 F.3d 873 (D.C. Cir. 2006) (challenging SEC rule on hedge fund exemptions); Chamber of Commerce of U.S. v. U.S. SEC, 443 F.3d 890 (D.C. Cir. 2006) (challenging same upon remand); Chamber of Commerce of U.S. v. U.S. SEC, 412 F.3d 133 (D.C. Cir. 2005) (challenging SEC regulation of mutual funds); Teicher v. U.S. SEC, 177 F.3d 1016 (D.C. Cir. 1999) (challenging SEC limitations on persons who commit certain offenses

examine each of these cases and argue that, while the D.C. Circuit vacated the rule at issue in each instance, the most recent of the cases, *Business Roundtable II*, represents a turning point in judicial review of the SEC's actions. Unlike in preceding cases, the D.C. Circuit in *Business Roundtable II* conducted an unusually aggressive examination of the factual record the SEC presented in support of its rule.[40] Indeed, especially viewed in tandem with recent court actions in New York, *Business Roundtable II* amounts to the D.C. Circuit's "strongest admonition of the SEC to date"[41] and may hint at general rising distrust, or even hostility, by the federal courts towards the SEC. The court's analysis in *Business Roundtable II* also raises serious questions about the SEC's rulemaking power in the area of securities regulation, as it sets an unprecedentedly high bar for the SEC to meet before it promulgates a new rule.

This Comment will explore the recent history of the adjudication of securities regulation, bookended by the two *Business Roundtable* cases, and the possible implications of the D.C. Circuit's ruling in the 2011 case. Part II of this Comment looks at *Business Roundtable II*, its precedents, and how the two differ. In Part III, I examine the significance of the phenomenon of heightened judicial scrutiny of SEC actions and its potential repercussions. Finally, Part IV briefly addresses any alternatives that exist to the looming status quo.

What we see today could signal the onset of a new era in the relationship between federal courts and the SEC. It is important to be aware of these undercurrents of change, signaling rising distrust of SEC rulemaking. It is equally important to consider what the consequences of such a change, if realized, would be, so that the strides made in securities regulation since the 1934 Act are not undermined.

II. *BUSINESS ROUNDTABLE II* AND ITS SEVEN SISTERS

A. The Road to Business Roundtable II

The SEC has no doubt had a tumultuous relationship with the D.C. Circuit and the Supreme Court. While judicial analyses of SEC action have ranged between "expansive" and "restrictive,"[42] in the few years before

related to investment advising); Bus. Roundtable v. U.S. SEC, 905 F.2d 406 (D.C. Cir. 1990) (challenging rule regarding corporate listings on national security exchanges).

40. *Business Roundtable II*, 647 F.3d 1144 (D.C. Cir. 2011).

41. Thomas Stratmann & J.W. Verret, *Does Shareholder Proxy Access Damage Share Value in Small Publicly Traded Companies?*, 64 STAN. L. REV. 1431, 1445 (2012).

42. *See* Sullivan & Thompson, *supra* note 2 (examining every U.S. Supreme Court decision on a securities issue between 1933 and 2004 and categorizing each as exhibiting

1990, the SEC was experiencing a period of relatively low judicial resistance—the SEC "often prevailed in the lower courts and saw the Supreme Court deny numerous petitions for certiorari."[43] These few years of deference to the SEC came to an abrupt end with the D.C. Circuit's 1990 ruling in *Business Roundtable v. SEC* (*Business Roundtable I*),[44] striking an SEC rule pertaining to self-regulatory organizations ("SROs"), thus marking "increasing hostility towards SEC regulations not specifically grounded in statutory text"[45] and "presag[ing] the current attitude towards SEC rulemaking."[46]

In the twenty-one years bookended by the D.C. Circuit's decisions in *Business Roundtable I* and *Business Roundtable II*, the SEC defended securities-related rules against challenges seven times in the same court. It lost every time.

1. *Business Roundtable I*

In *Business Roundtable I*, analyzing the issue under *Chevron* deference, the D.C. Circuit found "in excess of the Commission's authority"[47] its Rule 19c-4, which barred SROs from listing the stock of "a corporation that takes any corporate action with the effect of nullifying, restricting or disparately reducing the per share voting rights of [existing common stockholders]."[48] Declaring that Rule 19c-4 "directly interferes with the substance of what the shareholders may enact,"[49] the court reasoned that it was impermissible for the SEC to promulgate a rule that "directly controls the substantive allocation of powers among classes of shareholders,"[50] which is normally in the purview of state corporate law.[51] The court examined the SEC's claim that it could promulgate such a rule

either an "expansive" or "restrictive" reading of the statutes granting the SEC rulemaking authority).

43. *Chasing the Devil Around the Stump: Securities Regulation, the SEC and the Courts*, SEC. & EXCH. COMM'N HISTORICAL SOCIETY (Feb. 23, 2012), http://www.sechistorical.org/museum/galleries/ctd/ctd_05a_era_caution_adjusts.php (citing Sullivan & Thompson, *supra* note 2).

44. 905 F.2d 406 (D.C. Cir. 1990).

45. Jodie A. Kirshner, *What Rough Beast . . . Slouches Towards Bethlehem:* Business Roundtable v. SEC *and the SEC's Delegated Rulemaking Authority*, 25 ANN. REV. BANKING & FIN. L. 497, 513 (2006).

46. *Id.*

47. 905 F.2d at 407. "SEC" and the "Commission" are used interchangeably.

48. *Id.* (internal quotations marks omitted).

49. *Id.* at 411.

50. *Id.* at 407.

51. *Id.* at 412.

because it falls under its mandate of protecting public interest.[52] To this, the court plainly said, "'public interest' is never an unbounded term."[53] Finally, the court held that it was not the intent of Congress for the SEC to regulate corporate governance.[54]

In sum, the court looked at the SEC's interpretation of congressional intent through the lens of *Chevron*, deemed that Rule 19c-4 regulated substance whereas Congress had only meant for the SEC to regulate procedure, and held the rule invalid. For nine years thereafter, *Business Roundtable I* was the D.C. Circuit's final and clearest word on what the SEC can and cannot regulate, marking a clear departure from how the SEC had fared in lower courts in previous years.[55]

2. *Teicher v. SEC*[56]

The *Teicher* rule challenge originally stemmed from the SEC's action against two individuals who had been criminally convicted for participation in an insider-trading scheme.[57] Upon being barred from participating from various branches of the securities industry, the two challenged the SEC's interpretation of section 15(b)(6) of the 1934 Act, which allowed the SEC to "place limitations on the activities or functions of [such convicted persons] . . . ."[58] Applying *Chevron*, the court held that the SEC's interpretation that the section allows it to bar convicted persons' participation in *any* securities industry it controls was unreasonable and contrary to the intent of Congress.[59] Once again, the opinion looked solely at the SEC interpretation of a statute and compared it with context and congressional intent.

52. *Id.* at 413.

53. *Id.* at 413.

54. *Id.* at 417.

55. *Chasing the Devil Around the Stump: Securities Regulation, the SEC and the Courts*, VIRTUAL MUSEUM AND ARCHIVE OF THE HISTORY OF SECURITIES REGULATION (Feb. 23, 2012), http://www.sechistorical.org/museum/galleries/ctd/; *see also* Kirshner, *supra* note 45, at 513 (contending that "the *Business Roundtable [I]* holding appears more likely today than it did fourteen years ago when the case was decided").

56. 177 F.3d 1016 (D.C. Cir. 1999).

57. *Id.* at 1017.

58. Securities Exchange Act of 1934 § 15(b)(6), 104 Stat. 931, 952-53 (1990) (current version at 15 U.S.C. § 78o(b)(6)(A) (2006)).

59. *Teicher*, 177 F.3d at 1021.

3. *Chamber of Commerce I*[60]

In *Chamber of Commerce of the United States v. SEC* ("*Chamber of Commerce I*"), the D.C. Circuit invalidated an SEC rule that required mutual funds to have no less than seventy-five percent independent directors and an independent chairman.[61] While the court found that the SEC had authority to promulgate the rule under the ICA and that the rule was not arbitrary or capricious under the APA, it faulted the SEC for its failure under the ICA to consider the impact of the rule on efficiency, competition, and capital formation.[62] Recognizing the difficulty of running reliable empirical studies, the D.C. Circuit wrote that "uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation . . . ."[63] In addition, the SEC, in explaining why it had adopted the rule, did not address an alternative to the rule put forward during the notice and comment period and raised by two dissenting Commissioners.[64] The court found that this was equally fatal to the rule's promulgation, because while the "Commission is not required to consider 'every alternative . . . conceivable by the mind of man . . .[,]'"[65] that particular alternative was "neither frivolous nor out of bounds and the SEC therefore had an obligation to consider it."[66] While the court did not require that the SEC always conduct an empirical study (the "decision not to do an empirical study does not make that an unreasoned decision"[67]), the case provided guidance on the *process* of SEC rulemaking by suggesting that the SEC "would be well served to [conduct empirical studies] when facts are available"[68] and to "set out a vague standard for when agency decisions must be based on empirical data and provide[] open-ended guidelines for future determinations regarding when it is appropriate for agencies to engage in rulemaking without considering empirical studies."[69]

60. Chamber of Commerce of U.S. v. SEC, 412 F.3d 133 (D.C. Cir. 2005).

61. *Id.*

62. *Id.* at 144.

63. *Id.* at 144.

64. *Id.*

65. *Id.* (citing *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983).

66. *Id.* at 145.

67. *Id.* at 142.

68. David S. Ruder, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 PACE L. REV. 39, 51 (2005).

69. Brett Friedman et al., *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Administrative Law*, 74 GEO. WASH. L. REV. 619, 656

4. *Chamber of Commerce II*[70]

In *Chamber of Commerce I*, the D.C. Circuit remanded the rule to the SEC "to address the deficiencies."[71] On remand, the SEC re-adopted the same conditions invalidated in *Chamber of Commerce I*, adding some empirical data to bolster its decision. The Chamber of Commerce once again challenged the rule, and the D.C. Circuit once again held that the SEC's *process* was flawed because the SEC "failed to comply with section 553(c) of the APA, 5 U.S.C § 553(c), by relying on materials not in the rulemaking record without affording an opportunity for public comment, to the prejudice of the Chamber."[72] Here, the court held, "[t]he Commission's extensive reliance upon extra-record materials in arriving at its cost estimates, and thus in determining not to modify the two conditions [at issue in *Chamber of Commerce I*], however, required further opportunity for comment . . . "[73]—a procedural step that the SEC was deemed to have failed to follow. In other words, the rule once again failed on a relatively trivial *process* ground.

5. *Goldstein v. SEC*[74]

At issue here was the SEC's rule requiring that hedge fund investors be counted as fund clients for purposes of an exemption that excused investment advisers with fewer than fifteen clients from registering under the Investment Advisers Act (IAA).[75] The SEC once again failed to defend the rule, as the D.C. Circuit invalidated it for conflicting with statutory purpose.[76] Analyzing the case through *Chevron*, the court wrote that although no official definition existed for "client," "[t]he lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous."[77] The court also highlighted that the definition the Commission now sought to apply inexplicably diverged from the SEC's own prior definition, rendering it "completely arbitrary."[78] And finally, because the new rule/definition "create[d] a situation in which funds with one hundred or fewer investors are exempt from the more demanding

(2006).

70. Chamber of Commerce of U.S. v. SEC, 443 F.3d 890 (D.C. Cir. 2006).
71. 412 F.3d at 145.
72. 443 F.3d at 894.
73. *Id.* at 901.
74. Goldstein v. SEC, 451 F.3d 873, 884 (D.C. Cir. 2006).
75. *Id.* at 874.
76. *Id.* at 884.
77. *Id.* at 878.
78. *Id.* at 883.

Investment Company Act, but those with fifteen or more investors trigger registration under the Advisers Act," the court held that the rule was arbitrary.[79] Here again, the court found that the SEC statutory interpretation was impermissible through "narrow"[80] reasoning pertaining to interpretation and process.

6. *Financial Planning Ass'n v. SEC*[81]

In this case, the SEC had attempted to exempt broker-dealers from the requirements of the IAA when they receive special compensation for their services.[82] The court found that the first step of *Chevron* had been satisfied such that the IAA was not ambiguous as to the definition of "investment adviser."[83] Consequently, the SEC's rule exceeded its authority and the SEC was held to lack the power to craft new exemptions under the Act.[84]

7. *American Equity Investment Life Insurance Co. v. SEC*[85]

The final precedent to *Business Roundtable II* provides some foreshadowing for what the court would eventually do in *Business Roundtable II*. The SEC rule at issue here classified fixed indexed annuities (FIAs) offered by insurance companies as non-annuity contracts, thus requiring that they be subject to regulation under the Securities Act of 1933.[86] While the D.C. Circuit held that the SEC's classification of FIAs was not unreasonable under *Chevron*,[87] it still found that the SEC had "failed to consider the efficiency, competition, and capital formation effects of the new [r]ule" and invalidated the rule under the APA.[88] In its analysis, the court criticized the SEC's claim that the rule would enhance competition because of the ambiguity that the absence of a rule on the

79. *Id.* at 884.

80. Dustin G. Hall, *The Elephant in the Room: Dangers of Hedge Funds in Our Financial Markets*, 60 FLA. L. REV. 183, 187 (2008).

81. 482 F.3d 481 (D.C. Cir. 2007).

82. *Id.* at 483.

83. The IAA carved out six exemptions from its broad definition in § 202(a)(11), including "(C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." 15 U.S.C. § 80b-2(a)(11) (2006). The text of the act also read that "(H) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order." 15 U.S.C. § 80b-2(a)(11).

84. *Fin. Planning Ass'n*, 482 F.3d at 492.

85. Am. Equity Inv. Life Ins. Co. v. U.S. SEC, 613 F.3d 166 (D.C. Cir. 2009).

86. *Id.* at 167.

87. *Id.* at 174.

88. *Id.* at 176.

matter had created. "The SEC cannot justify the adoption of a particular rule based solely on the assertion that the existence of a rule provides greater clarity to an area that remained unclear in the absence of any rule."[89] Rather, the court said, the APA requires "an analysis of whether the *specific rule* will promote efficiency, competition and capital formation."[90] From there, the court held insufficient the SEC's entire cost-benefit analysis, as it was largely based on the weak foundation of the "rule clarity" rationale, and the SEC had failed to provide empirical data to support its presumptions.[91]

In the nineteen years between 1990 and 2009, the D.C. Circuit invalidated all seven SEC securities regulations challenged in the court.[92] The grounds for invalidation varied between faulty statutory interpretation or lack of authority under *Chevron* and failure to meet the demands of the ICA and the APA.[93] With this line of holdings, and especially the court's reasoning in *Chamber of Commerce I* and *American Equity Life Insurance*, the SEC had been warned that empirical studies will often be required of it, and that such studies will have to be rule-specific. In no case, however, did the court engage in aggressive substantive review of the SEC's empirical rationale behind its rulemaking.

B. The SEC's Latest and Biggest Defeat in the D.C. Circuit

In *Business Roundtable II*, the D.C. Circuit overturned a proxy access rule promulgated by the SEC, Rule 14a-11, aimed at allowing shareholders to more easily and cheaply nominate non-incumbent candidates for corporate boards. Had it been upheld, Rule 14a-11 would have "require[d] a company subject to the [1934] Act proxy rules . . . to include in its proxy materials 'the name of a person or persons nominated by a [qualifying] shareholder or group of shareholders for election to the board of directors.'"[94] In invalidating the rule, the court held that the SEC had "acted arbitrarily and capriciously for having failed . . . adequately to assess the economic effects of a new rule."[95] Stating the rationale plainly, Judge Ginsburg, writing for the court, wrote that the SEC "inconsistently and opportunistically framed the costs and benefits of the rule; failed

89. *Id.* at 177-78.
90. *Id.*
91. *Id.* at 179.
92. *See* cases cited *supra* note 39.
93. *Id.*
94. *Bus. Roundtable v. U.S. SEC,* 647 F.3d at 1147 (quoting 75 Fed. Reg. 56,668, 56,682-83, 56,782-83).
95. *Id.* at 1148.

adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to the substantial problems raised by commenters."[96]

The court's approach in *Business Roundtable II* departs from that in the case's precedents in a number of ways. First, in terms of standard of review, whereas the SEC had been entitled to *Chevron* deference in some of the prior cases, *Chevron* had no place in *Business Roundtable II*, because there was no issue of statutory interpretation or ambiguity. At its outset, therefore, the court's reasoning rested solely on the strict requirements of the ICA and the APA, without the SEC being owed any deference in its rulemaking.

Second, the court here showed no recognition for the difficulties an agency might face in developing its cost-benefit analysis and predicting future trends. In *Chamber of Commerce I*, for example, the court exhibited acute awareness "that an agency need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency may be 'entitled to conduct . . . a general analysis based on informed conjecture.'"[97] In *Business Roundtable II* on the other hand, without considering whether this instance would be one where an agency could base its decision on "informed conjecture," the court found that "the Commission's prediction directors might choose not to oppose shareholder nominees had no basis beyond mere speculation."[98]

Third, unlike in prior cases, the D.C. Circuit here conducted a substantive assessment of the numbers and data the SEC relied on or forewent relying on. For example, assessing the SEC's argument that Rule 14a-11 would improve board performance and increase shareholder value, the court strongly criticized the SEC for "rel[ying] exclusively and heavily upon two *relatively unpersuasive* studies, one concerning the effect of 'hybrid boards' (which include some dissident directors) and the other concerning the effect of proxy contests in general, upon shareholder value."[99] The court found it insufficient that the SEC had discounted those studies "because of questions raised by subsequent studies, limitations acknowledged by the studies' authors, or [the Commission's] own concerns about the studies' methodology or scope."[100] It is unclear why the court found the studies the SEC did rely on "relatively unpersuasive," or why the

96. *Id.* at 1148-49.

97. *Chamber of Commerce I*, 412 F.3d at 142 (quoting Melcher v. FCC, 134 F.3d 1143, 1158 (D.C. Cir. 1998)).

98. *Business Roundtable II*, 647 F.3d at 1150.

99. *Id.* at 1151 (emphasis added).

100. *Id.*

court found itself, in contrast to other securities-related cases, in a position to assess the soundness of methodology and empirical data regarding a promulgated SEC rule.[101] Rather, the court "simply chose the opposite side of a politically charged debate."[102] The court's intervention here thus differs widely from its approach in the two other cases where the SEC's cost-benefit analysis was found insufficient. In finding that the SEC had failed to meet its statutory obligation to assess the economic consequences of a proposed regulation in *Chamber of Commerce I*, the court did not go so far as to evaluate the substance of the different studies the SEC had considered. Rather, acknowledging that the SEC would be "excused for failing to consider [an] alternative if it were, for whatever reason, unworthy of consideration,"[103] the court merely found that the alternative not assessed by the SEC was neither frivolous nor out of bounds and thus required inclusion in the SEC's weighting.[104] In *American Equity*, where the court held arbitrary and capricious the SEC's consideration of efficiency, competition, and capital-formation implications, the court here, too, did not assess the soundness of empirical data.[105] Rather, it faulted the SEC for having based its entire reasoning on the shaky assumption that the existence of a rule—any rule—would have positive repercussions in the three areas requiring analysis under the APA.[106] In contrast, the SEC submitted to the D.C. Circuit a brief of over sixty pages and thorough explanations for its promulgation of Rule 14a-11 in preparation for litigation in *Business Roundtable II*.[107] Furthermore, the court in *Business Roundtable II* wrote that the agency "failed to make tough choices about which of the competing estimates is most plausible, [or] to *hazard a guess as to which is correct*."[108] Query whether the D.C. Circuit, under the bar it had just set for the SEC, would have found acceptable or adequate reasoning based on a hazarded guess.

Finally and relatedly, whereas the court's objections to SEC action in many of *Business Roundtable II*'s precedents can be attributed to the SEC's failure to follow required procedure, it is arguably impossible to do the same in the 2011 decision. In *Business Roundtable I*, the court applied *Chevron* to reject the SEC's statutory interpretation that it may take action

101. *Id.*

102. *D.C. Circuit Finds SEC Proxy Access Rule Arbitrary and Capricious for Inadequate Economic Analysis*, 125 HARV. L. REV. 1088, 1094 (2012).

103. 412 F.3d at 144.

104. *Id.* at 145.

105. 613 F.3d at 179.

106. *Id.* at 177-79.

107. Brief for Respondent, Bus. Roundtable v. U.S. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (No. 10-1305), 2011 WL 2014799.

108. 647 F.3d at 1150 (emphasis added) (internal quotation marks omitted).

on issues of substantive corporate governance; action in the area of substantive corporate governance is reserved for the states, the court reasoned.[109] In *Teicher*, *Goldstein*, and *Financial Planning Association*, the issue was a matter of statutory interpretation and the court never in these decisions invalidated the SEC rule based on the SEC's cost-benefit analysis.[110] In *Chamber of Commerce I*, as discussed above, the rule at issue was remanded to the SEC because the SEC failed to utilize any empirical studies per the demands of the ICA and had failed *entirely* to consider alternatives, not because the court deemed those alternatives more persuasive than the empirical evidence presented by the SEC.[111] In *Chamber of Commerce II*, the basis of the court's ruling was purely procedural, given the SEC's failure to subject new evidence to notice and comment.[112] Finally, in *American Equity Life Insurance*, the court rejected the SEC rule because the SEC provided a weak rationale as to how its new rule improves efficiency, competition and capital formation ("any rule is better than no rule."). The SEC's reasoning was nowhere as thorough as it was in its adoption of Rule 14a-11.

Lastly, it is also important to note the context of *Business Roundtable II*. The SEC promulgated Rule 14a-11 after the enactment of the Dodd-Frank Consumer Protection Act and its express grant of authority to the SEC to adopt proxy access rules.[113] This context further highlights the D.C. Circuit's aggressive approach to reviewing the SEC's rulemaking.

III. THE IMPLICATIONS OF HEIGHTENED JUDICIAL SCRUTINY

The new attitudes exhibited by the D.C. Circuit, for the time being, and especially if the attitudes self-realize into a long-term trend, will not be without repercussions for the general field of corporate governance. *Business Roundtable II* leaves open the question of just how much empirical evidence the D.C. Circuit would require to accept SEC action on corporate governance as adequately reasoned. In the area of shareholder voting alone, opinions abound as to whether increasing proxy access is

109. *Business Roundtable I*, 905 F.2d 406, 408-09 (D.C. Cir. 1990).

110. *Fin. Planning Ass'n*, 482 F.3d at 483; *Goldstein*, 451 F.3d at 874; *Teicher*, 177 F.3d at 1017.

111. *Chamber of Commerce I*, 412 F.3d at 145.

112. *Chamber of Commerce II*, 443 F.3d at 909.

113. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 103 Stat. 440 (codified as amended in scattered sections of 2, 5, 7, 11, 12, 15, 16, 18, 19, 20, 22, 25, 26, 28, 29, 30, 31, 41, 42, 44, 49, and 112 U.S.C.). The Act was effective in July 2010. Rule 14a-11 was to be effective in November 2010. Shareholder Nominations, 75 Fed. Reg. 56,782 (to be codified at 17 C.F.R. §240.14a-11), *invalidated by* Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

desirable for the market and, by extension, increases shareholder value. For example, in an extensive event analysis, Ali C. Akyol concluded that proxy access diminishes shareholder value.[114] In contrast, Bo Becker, also employing event analysis, concluded that "financial markets placed a positive value on shareholders access" and, by extension, proxy access maximizes shareholder value.[115] Had the SEC presented one of these studies over the other, would the court have accepted that? It is indeed questionable whether it is for the courts, based on the judiciary's generally limited expertise in such specialized areas, to assess the substance of these studies and approve just one as a satisfactory basis for regulatory action.

It is true that some judges are particularly learned and experienced in securities regulation, with a sophisticated understanding of the field. However, given the doctrine of stare decisis, as well as the judicial tradition of courts and judges borrowing from each other across circuit lines, one judge's successful heightened scrutiny in a single instance or action is only in a limited way, if at all, generally acceptable for all judges and courts.[116]

Even if one deems judges sufficiently well-prepared to so incisively scrutinize the substance of empirical evidence selected by the SEC as a check on SEC balance and impartiality, it is difficult to argue that judges themselves are any more immune to political and other external influences in their decision-making. For example, Delaware judges take into consideration the state's supremacy in charter competition and in setting national corporate law standards, actively attempt to balance their opinions with the interests of the state.[117]

Furthermore, while courts are generally deferential to agencies' statutory interpretations and other rulemaking under *Chevron*, the recent decisions related to statutory interpretation in the D.C. Circuit seem to dilute that deference—by setting ever-higher bars for meeting the requirements of the ICA and the standards of arbitrary and capricious review under the APA, the D.C. Circuit weakens the policy reasons

114. Ali C. Akyol et al., *Shareholders in the Boardroom: Wealth Effects of the SEC's Rule to Facilitate Director Nominations*, (Dept. of Fin., Univ. of Melbourne, Working Paper, June 7, 2010), *available at* http://ssrn.com/abstract=1526081.

115. Bo Becker et al., *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable Challenge* 4 (Harvard Bus. Sch., Working Paper No. 11-052, 2010), *available at* http://hbswk.hbs.edu/item/6581.html.

116. *See D.C. Circuit Finds SEC Proxy Access Rule Arbitrary and Capricious for Inadequate Economic Analysis*, *supra* note 102, at 1092 ("Courts hardly outperform the SEC at evaluating the imperfect science of economics. Judges can struggle with expert testimony in their own decisions, and traditional training leaves most jurists ill-prepared to engage with sophisticated econometrics.").

117. Renee M. Jones, *Legitimacy and Corporate Law: The Case for Regulatory Redundancy*, 86 WASH. U. L. REV. 1273, 1292 (2009).

underlying *Chevron*.

Business Roundtable II, in particular, extends the boundaries of arbitrary and capricious review—an implication that must not go unchecked. The holding raises serious questions about how the SEC or any other agency can succeed at a cost-benefit showing. While cost-benefit analysis should ideally provide an objective, impartial basis for decision-making, "[it] has become a powerful weapon in the hands of vocal opponents of regulation."[118] In their book on the use of cost-benefit analysis in health and environmental regulation, Frank Ackerman and Lisa Heinzerling discuss how cost and benefit calculations may be skewed.[119] For example, "there is a tendency to overestimate the cost of regulations in advance of their implementation."[120] In other words, while ideally objective, cost-benefit analysis is a highly manipulable tool—governments and businesses alike may influence its outcome based on the desired result. On the agency side, "officials are not pure technocrats, but political beings who routinely make decisions based not on their scientific merit, but as a result of 'congressional pressure, interest group lobbying, bureaucratic (but non-expertise-based) policy views, or bureaucratic protection of turf or other self-interest.'"[121] Pressures from other (non-scientific) sources and self-interest similarly lead businesses to take their own positions.

The court in *Business Roundtable II* also seems to underestimate the difficulty of accurately predicting the impact of rules to make a truly falsifiable empirical cost-benefit case. Especially in the field of financial and securities regulation, "key variables may be difficult to quantify"[122] and too many externalities are possible. In addition, no guidelines exist for what the D.C. Circuit will consider sound cost-benefit analysis. If cost-benefit analysis is to become a permanent and aggressively reviewed fixture in SEC rulemaking, the agency must be able to turn to a series of guidelines or standards such that its analysis is sound without being overly cumbersome. The SEC would also have to add to its staff industry and economics experts for the sole reason of keeping up with the standards set

118. FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 35 (2004). The authors criticize the use of cost-benefit analysis in health and environmental regulation, but many of the points they make are relevant to financial regulation as well.

119. *Id.* at 36.

120. *Id.* at 37 (citing ROBERT CAMERON MITCHELL & RICHARD T. CARSON, USING SURVEYS TO VALUE PUBLIC GOODS: THE CONTINGENT VALUATION METHOD 34 (1989)).

121. Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons from the SEC's Stalled Mutual Fund Reform Effort*, 12 STAN. J.L. BUS. & FIN. 1, 54 (2006) (quoting Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2278-90 (2001)).

122. *Id.* at 59.

in *Business Roundtable II*.[123]

The D.C. Circuit has yet to hear another SEC case since *Business Roundtable II*, so it is unclear whether the court will attempt to limit the applicability of its holding. Nonetheless, the courts have cited *Business Roundtable II* in a number of opinions examining rules and regulations by other agencies and departments. On the one hand, there are signs that the D.C. Circuit may attempt to cabin the holding of *Business Roundtable II* to its facts—or perhaps just to the SEC. For example, in *American Petroleum Institute v. EPA*, the D.C. Circuit attributed the outcome of *Business Roundtable II* to "the [SEC's] larger failure to deal with the weight of the evidence against it."[124] Accordingly, the court stated that the American Petroleum Institute had "mistakenly place[d] much weight" on *Business Roundtable II*, because the EPA's analysis related to a rule on a national ambient air quality standard for nitrogen dioxide "[is] materially better than the analysis" for which the SEC was faulted.[125] In another opinion, the court distinguished *Business Roundtable II* from *Ass'n of Private Sector Colleges & Universities v. Duncan*, where the Association sued the Department and Secretary of Education under the APA for regulations promulgated under the Higher Education Act.[126] The court highlighted that the Department of Education does not share the "unique [statutory] obligation" that the SEC has to consider the effect of a rule on efficiency, competition, and capital formation.[127] The court set clear lines for itself when it put the onus on the regulation challenger to point to data or a study that an agency ignored. The Association having failed to do so, the court wrote, renders "*Business Roundtable* . . . of no help to its argument."[128] Most recently, in *Investment Co. Institute v. U.S. Commodity Futures Trading Commission*, the D.C. Circuit upheld against challenge amendments that the Commodity Futures Trading Commission (CFTC) made to regulations regarding commodity pool operators.[129] Distinguishing the CFTC's decision-making process from that of the SEC in *Business Roundtable II*, the court wrote that:

> the CFTC not only considered what regulations were already in

123. *See* Henry T.C. Hu, *Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm*, 90 TEX. L. REV. 1601, 1686 (2012) (stating that a practical consequence of *Business Roundtable II* is "the need both for additional SEC staff with the requisite specialized expertise and a process of rulemaking that is more demonstrably interdisciplinary . . . .").

124. 684 F.3d 1342, 1351 (D.C. Cir. 2012).

125. *Id.*

126. 681 F.3d 427 (D.C. Cir. 2012).

127. *Id.* at 448 (quoting *Business Roundtable II*, 647 F.3d at 1148).

128. *Id.*

129. No. 12-00612 (BAH), 2012 WL 6185735 (D.D.C. Dec. 12, 2012).

> place but committed to streamlining the agency's compliance requirements. This shows that, unlike the SEC in *Business Roundtable [II]*, the CFTC considered and evaluated whether other regulatory requirements "reduce the need for, and hence the benefit to be had from" registration and reporting requirements with the CFTC.[130]

The court concluded: "these cases are distinguishable."[131]

On the other hand, in at least one instance, *Business Roundtable II* proved helpful to a district court in overturning an agency rule for failure to present a "satisfactory explanation for [the agency's] action including a rational connection between the facts and the choice[s] made."[132] Further, the distinctly heightened level of judicial scrutiny in *Business Roundtable II* may have practical implications. On the one hand, it may increase litigation as organizations like the Business Roundtable and the Chamber of Commerce are emboldened to challenge SEC regulations. At the same time, however, the case exhibited such a high level of scrutiny that it may, at least temporarily, paralyze the SEC's ability to promulgate new rules.[133] In essence, not only could litigation become unpredictable in the aftermath of *Business Roundtable II*, but the case is also "sufficiently threatening that an overworked and underfunded SEC may feel intimidated and compromise its rules, watering them down, to avoid the risk of another humiliating decision . . . ."[134]

How the D.C. Circuit and other courts will interpret *Business Roundtable II* in future cases is thus unclear. When it comes to SEC rules, however, the D.C. Circuit's emphasis on cost-benefit analysis prompts the question: How can the court decide which empirical case is more convincing without giving deference to one party over another, engaging in aggressive substantive review or, worse, simply exercising a substantive veto over regulations it does not like?[135]

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130. *Id.* at *50.

131. *Id.*

132. *See, e.g.*, Berge v. United States, No. 10-0373, 2012 WL 3039736, at *34 (D.D.C. Jul. 26, 2012) (citing *Business Roundtable II*) (holding that the applied behavioral analysis aspect of the Department of Defense health system for the Armed Services was arbitrary and capricious).

133. *See* John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1066 (2012) (arguing that *Business Roundtable II* "cast[s] a substantial cloud over the SEC's continuing ability to adopt other rules implementing the Dodd-Frank Act, even those not related to corporate governance").

134. *Id.* at 1067.

135. *See also* J. Scott Colesanti, *Laws, Sausages, and Bailouts: Testing the Populist View of the Causes of the Economic Crisis*, 4 BROOK. J. CORP. FIN. & COM. L. 175, 194 (2010) ("As 2010 unfolds, courts occasionally remind observers that the judiciary shall play

IV. TO MAINTAIN THE STATUS QUO OR SEEK ALTERNATIVES?

Business Roundtable II raises new challenges for the SEC in the area of securities regulation, and the agency will have to adapt to the heightened standards set forth in the D.C. Circuit decisions. Short of the D.C. Circuit retracing a few of its own steps in *Business Roundtable II*, I see four possible alternatives that, separately or jointly, can help avoid paralysis in securities regulation and corporate governance more generally.

First, there is the possibility of private ordering in corporate governance and particularly on the issue of proxy access and the balance of power between shareholders and managers. In an article commenting on proxy access and the fate in the D.C. Circuit of Rule 14a-11, Professor Jill Fisch argues that "federal regulation is poorly suited for regulating corporate governance," whereas "[p]rivate ordering offers a more flexible mechanism" for doing so.[136] Fisch outlines the many deficiencies in the SEC's basis for Rule 14a-11 while criticizing the court's oversight of these problems in favor of taking "the unprecedented approach of second-guessing the conclusions of the SEC's economic analysis."[137] Private ordering could help prevent such judicial moves while alleviating the "destructive ambiguity" of proxy access.[138]

Conversely, and as a second alternative, Congress could enact legislation that explicitly states what the SEC will have to promulgate as a final rule on contentious governance and securities issues, such as proxy access. Of course, this alternative is far from ideal because it undermines the SEC's rulemaking authority and, more importantly, puts corporate governance in the hands of non-expert actors (members of Congress) who often yield to political pressures.

Third, a sort of "rapprochement" between the D.C. Circuit and the SEC could be brokered if the former begins to recognize, and the latter begins to admit, the role of politics in rulemaking.[139] This would entail the agency acknowledging instances where politics superseded empirical reasoning and courts viewing certain political influences as appropriate and legitimate.[140] The benefits of such a relationship include de-politicizing science, softening the "ossification" charge increasingly directed at

a role in the resolution of the economic crisis.").

136. Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435, 435 (2012).

137. *Id.* at 439.

138. *Id.*

139. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

140. *Id.*

arbitrary and capricious review, and enabling greater political accountability by forcing disclosure of agencies' political influences.[141] Under this scenario, the SEC may still have to analyze costs and benefits, but legitimate political influences in its decision-making would not prove automatically fatal to a rule.

Fourth, the change could come from *within* the SEC, whereby the SEC would "reorient the reasoning supporting the proposed regulatory initiative"[142] and would do so "as a lawyer, not as an econometrician or empiricist."[143] In other words, that the D.C. Circuit has struck each one of the challenged SEC rules since *Business Roundtable I* could be more about the approach and methodology of the SEC team defending the rule. The SEC must recognize the key role that "[s]ophisticated number crunching" has come to play in the development of contemporary corporate law,[144] and must strengthen its abilities accordingly. It could also draw some lessons from the way other agencies go about conducting cost-benefit analyses to overcome judicial challenges to their rules and regulations.[145]

Finally, if cost-benefit analysis is to be accepted as an essential tool in securities regulations and other SEC rulemaking, reform measures can be undertaken to prevent two evils: that judges and courts substitute the SEC's judgment for their own as a sort of substantive veto, and that the Commission "draft lengthy statements of basis and purpose filled with lengthy explanations and data that courts ultimately may, or may not, consider" adequate.[146] Such reforms could include promulgating formal cost-benefit analysis guidelines for the SEC to follow in its rulemaking, creating a cost-sharing structure between the SEC, other financial regulators, and industry actors so that running the analysis would not become too costly for the SEC (a stick for the industry), and requiring ex post analyses of promulgated regulation in an effort to inform future empirical studies (a stick for the SEC).[147] In addition, the SEC could be allowed to subject the cost-benefit analysis tool to a cost-benefit analysis to ascertain whether the tool is worthwhile in specific instances of rulemaking, thus "limit[ing] the use of [cost-benefit analysis] to those cases where the efficiency gains resulting from such analysis are likely to exceed

141. *Id.* at 40-45.

142. Cox & Baucom, *supra* note 4, at 1839.

143. Cox & Baucom, *supra* note 4, at 1840.

144. Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1037 (2012).

145. *See generally* Cox & Baucom, *supra* note 4, at 1840–43 (examining "recent signs" that cost-benefit analysis and economists more generally would be given a greater role in the Commission's rulemaking processes).

146. Watts, *supra* note 139, at 41 (internal quotation marks omitted).

147. Sherwin, *supra* note 121, at 53–58.

its costs."[148]

CONCLUSION

This Comment has explored the D.C. Circuit's holdings in cases challenging the SEC's rulemaking in the area of securities regulations since 1990. While the D.C. Circuit invalidated the SEC rule in question in each of the eight challenges before it, the most recent decision, *Business Roundtable II*, constitutes a turning point in judicial review of SEC action. By undertaking aggressive substantive review of the SEC's economic analysis and empirical reasoning, the D.C. Circuit engaged in unprecedented heightened judicial scrutiny towards the SEC and set forth new (if vague) demands for extensive empirical basis and cost-benefit analysis in SEC rulemaking. The case thus raises questions about the SEC's future rulemaking ability and whether it will be able to make falsifiable empirically-based cases for its rules that the court could deem adequate.

With the relationship between the judiciary and the SEC at a clear crossroads and a phenomenon of judicial aggression identified, it is now important to think about the road ahead and the measures necessary to serve the public interest such that years of advances in corporate governance and regulation are not so easily—or inadvertently—eviscerated.

148. Sherwin, *supra* note 121, at 59.