2023 Supplement to

Administrative Law and Regulatory Policy: Problems, Text, and Cases

Ninth Edition

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Note on Coverage

This Supplement reflects developments as of July 15, 2023. Its contents also appear in the chapter-by-chapter "Updates" sections of the casebook's website, www.adlawregpol.com. Additional updates covering events since July 2023, are also available on the website, along with other relevant material.

Page 87. Add the following new subsection after the Note on Nondelegation and Statutory Interpretation

5A. The (New) Major Questions Doctrine

The casebook discusses cases in which courts, confronted with broad delegations, have read statutes to contain greater constraints than Congress perhaps actually imposed, thereby avoiding nondelegation objections. Such an approach takes some of the pressure off the need for courts to police a constitutional boundary. Recently, the Supreme Court has adopted a quite different sort of "nondelegation canon" which arguably serves the same function: the so-called "major questions doctrine."

Recall the basic proposition, casebook p. 43, that an agency only has whatever power Congress has given it. Any time an agency acts, it must have a statutory basis; any agency action can in theory be challenged on the ground that it exceeds the agency's statutory authority. The major questions doctrine is a clear-statement rule that creates a presumption that agencies *lack* the statutory authority to impose regulations of "vast economic and political significance." It does not prohibit delegation of such authority, but it requires that such a delegation be explicit.

You will see in the next chapter that actually there are (or at least until the *West Virginia* decision excerpted below there *were*) two major questions doctrines. One, a weaker version, holds that a court should not defer to an agency's interpretation of a statute with regard to a "major question"; those are for courts to decide independently. This version is a carve-out to the *Chevron* doctrine. See casebook at 264. The second, stronger, major questions doctrine is not about who interprets; it is a bar on certain agency interpretations. The idea is not merely that courts will decide questions of statutory meaning on their own; it is that courts will resolve such questions unfavorably to the agency. When an agency is seeking to assert very broad power, it will lose unless Congress has clearly granted it that power. See generally Cass R. Sunstein, There Are Two "Major Questions" Doctrines, 73 Admin. L. Rev. 475 (2021). It is the strong version of the MQD that concerns us here. And, indeed, it would seem that in light of the cases that follow, it is the one and only MQD.

The major questions doctrine has been percolating for a while. Its seeds can be found in the *Benzene* case. More recently, it was floated in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). There the Supreme Court set aside an EPA regulation that required stationary sources not otherwise covered by the Clean Air Act to obtain a permit because of their emissions of greenhouse gases. The opinion stated:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without

> clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." Id., at 160; see also MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U. S. 218, 231 (1994); Industrial Union Dept., AFL–CIO v. American Petroleum Institute, 448 U. S. 607 –646 (1980) (plurality opinion). The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text.

The major questions doctrine came to full flower in the 2021-22 Supreme Court Term. Before turning to key decision, *West Virginia v. EPA*, consider two Covid-related cases from the Court's "shadow docket" that preceded, and presaged, that decision.

In September 2020, the Centers for Disease Control issued an order temporarily halting evictions of residential tenants for non-payment of rent. (Rent was still due, and unpaid rent accumulated; the order just prohibited evictions.) To be protected, a tenant had to provide a statement to the landlord under penalty of perjury that, among other things, they would earn $99,000 or less in 2021 and would likely become homeless if evicted.

In imposing the eviction moratorium, the CDC relied on two sources of authority. The first was statutory:

> The Surgeon General, with the approval of the Secretary, is authorized to make and enforce *such regulations as in his judgment are necessary to prevent* the introduction, transmission, or *spread of communicable diseases* from foreign countries into the States or possessions, or *from one State or possession into any other State or possession*. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

42 U.S.C. § 264(a) (emphases added). The second was a provision in the CDC's own regulations that itself rested on §264(a):

> Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.

42 C.F.R. § 70.2. The CDC reasoned that many people evicted then double up with friends or family, creating crowded conditions and increased disease transmission, and that a certain number of such people would travel across state lines to do so. Accordingly, preventing evictions was a tool for preventing the interstate spread of COVID.

A federal district court enjoined the CDC moratorium but stayed its judgment pending appeal. The Court of Appeals left the stay intact, but the Supreme Court vacated it, allowing the injunction to take effect.

In a per curiam opinion, the Court concluded that §264(a) just could not be read to authorize an eviction moratorium; the first, potentially broad, sentence had to be read in light of the second, much narrow, one. Furthermore:

> Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under §361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" Utility Air Regulatory Group v. EPA. . . . While the parties dispute the financial burden on landlords, Congress has provided nearly $50 billion in emergency rental assistance—a reasonable proxy of the moratorium's economic impact. And the issues at stake are not merely financial. The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship. "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."
>
> Indeed, the Government's read of § [264(a)] would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in § [264(a)] beyond the requirement that the CDC deem a measure "necessary." . . .
>
> This claim of expansive authority under § [264(a)] is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium. And it is further amplified by the CDC's decision to impose criminal penalties of up to a $250,000 fine and one year in jail on those who violate the moratorium. Section [264(a)] is a wafer-thin reed on which to rest such sweeping power.

Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2487 (2021). Justice Breyer, joined by Justices Kagan and Sotomayor, dissented.

A similar kind of case, in a similar posture, reached the Court a few months later. The Occupational Safety and Health Administration (OSHA) had promulgated a regulation requiring all employers of more than 100 employees to require that their employees either be vaccinated against COVID or take a weekly test and wear a mask. (Though generally referred to as "OSHA's vaccine mandate," the regulation was in fact a "vaccine or test" mandate.) OSHA issued the regulation under this provision authorizing "Emergency Temporary Standards":

> The Secretary shall provide . . . for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

29 U.S.C. §655(c)(1). The agency concluded that the COVID virus was a "physically harmful" "substance or agent" that posed a grave danger and that requiring vaccination or testing was "necessary" to protect employees from infection.

Challenges to the regulation were filed in almost every Court of Appeals. The Fifth Circuit initially stayed the regulation. The cases were then consolidated in the Sixth Circuit, which lifted the stay and allowed OSHA's rule to take effect. The challengers sought emergency relief from the Supreme Court. It held that the regulation exceeded OSHA's statutory authority.

> The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." It is instead a significant encroachment into the lives—and health—of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." Alabama Assn. of Realtors v. Department of Health and Human Servs., (slip op., at 6). There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.
>
> The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures. See 29 U.S.C. §655(b) (directing the Secretary to set "*occupational* safety and health standards" (emphasis added)); §655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace). Confirming the point, the Act's provisions typically speak to hazards that employees face at work. See, e.g., §§651, 653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

National Federation of Independent Business v. OSHA, 142 S. Ct. 661 (2022) (per curiam). Justice Gorsuch concurred, specifically invoking the term the per curiam had not:

> [T]o regulate in this area or any other[, the government] must … act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." Alabama Assn. of Realtors v. Department of Health and Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam). We sometimes call this the major questions doctrine. Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

Justice Gorsuch concluded with a defense of the major questions doctrine: it ensured that decisions are made by the people's elected representatives, protects the separation of powers, and ensures

democratic accountability by "guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power." Finally, Justice Gorsuch stated that if the statute *did* give OSHA the authority it claimed, it would have been an unconstitutional delegation.

Justices Breyer, Kagan, and Sotomayor wrote a joint dissent, arguing that the statutory language exactly covered what OSHA had done. (In contrast, Justice Breyer's dissent in *Alabama Realtors* was fairly agnostic on the statutory question, deeming it at least uncertain and urging deference to the agency's position.)

With those two cases[1] as background, we can turn to the Court's two major pronouncements on the "MQD."

West Virginia v. Environmental Protection Agency
142 S. Ct. 2587 (2022)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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

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

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

I

A

The Clean Air Act establishes three main regulatory programs to control air pollution from stationary sources such as power plants. One program is the New Source Performance Standards

[1] On the same day the Court decided *NFIB*, it refused to stay a rule issued by the Department of Health and Human Services adopting COVID-19 vaccination mandate applicable to staff of healthcare facilities participating in Medicare and Medicaid. Biden v. Missouri, 142 S. Ct. 647 (2022) (5-4). The per curiam opinion, for the dissenters in the other two cases as well as the Chief Justice and Justice Kavanaugh, analyzed the relevant statutory provisions without mentioning the major questions doctrine. Most of Justice Gorsuch's dissent did the same, but he concluded with a cite to *Alabama Realtors* and the assertion that: "If Congress had wanted to grant CMS authority to impose a nationwide vaccine mandate, and consequently alter the state-federal balance, it would have said so clearly. It did not."

program of Section 111, at issue here. The other two are the National Ambient Air Quality Standards (NAAQS) program, set out in Sections 108 through 110 of the Act, 42 U. S. C. §§ 7408–7410, and the Hazardous Air Pollutants (HAP) program, set out in Section 112, § 7412. To understand the place and function of Section 111 in the statutory scheme, some background on the other two programs is in order.

The NAAQS program addresses air pollutants that "may reasonably be anticipated to endanger public health or welfare," and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." § 7408(a)(1). After identifying such pollutants, EPA establishes a NAAQS for each. The NAAQS represents "the maximum airborne concentration of [the] pollutant that the public health can tolerate." Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 465 (2001); see § 7409(b). . . .

The second major program governing stationary sources is the HAP program. The HAP program primarily targets pollutants, other than those already covered by a NAAQS, that present "a threat of adverse human health effects," including substances known or anticipated to be "carcinogenic, mutagenic, teratogenic, neurotoxic," or otherwise "acutely or chronically toxic." § 7412(b)(2).

EPA's regulatory role with respect to these toxic pollutants is different in kind from its role in administering the NAAQS program. There, EPA is generally limited to determining the maximum safe amount of covered pollutants in the air. As to each hazardous pollutant, by contrast, the Agency must . . . directly require all covered sources to reduce their emissions to a certain level. And it chooses that level by determining the "maximum degree of reduction" it considers "achievable" in practice by using the best existing technologies and methods. § 7412(d)(3).

Thus, in the parlance of environmental law, Section 112 directs the Agency to impose "*technology-based* standard[s] for hazardous emissions" . . . .

The third air pollution control scheme is the New Source Performance Standards program of Section 111. That section directs EPA to list "categories of stationary sources" that it determines "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Under Section 111(b), the Agency must then promulgate for each category "Federal standards of performance for new sources," A "standard of performance" is one that

> "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." § 7411(a)(1).

Thus, the statute directs EPA to (1) "determine[ ]," taking into account various factors, the "best system of emission reduction which ... has been adequately demonstrated," (2) ascertain the "degree of emission limitation achievable through the application" of that system, and (3) impose an emissions limit on new stationary sources that "reflects" that amount. Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount "achievable through the application of the best system of emission reduction ...

adequately demonstrated," or the BSER. EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category.

Although the thrust of Section 111 focuses on emissions limits for *new* and *modified* sources—as its title indicates—the statute also authorizes regulation of certain pollutants from *existing* sources. Under Section 111(d), once EPA "has set *new* source standards addressing emissions of a particular pollutant under ... section 111(b)," it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or HAP programs. Existing power plants, for example, emit many pollutants covered by a NAAQS or HAP standard. Section 111(d) thus "operates as a gap-filler," empowering EPA to regulate harmful emissions not already controlled under the Agency's other authorities.

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, "the best system of emission reduction ... that has been adequately demonstrated for [existing covered] facilities." 40 CFR § 60.22(b)(5) (2021). The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA. See §§ 60.23, 60.24; 42 U.S.C. § 7411(d)(1).

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. See 80 Fed. Reg. 64703, and n. 275 (past regulations pertained to "four pollutants from five source categories"). . . .

B

Things changed in October 2015, when EPA promulgated two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). Both were premised on the Agency's earlier finding that carbon dioxide is an "air pollutant" that "may reasonably be anticipated to endanger public health or welfare" by causing climate change. Carbon dioxide is not subject to a NAAQS and has not been listed as a hazardous pollutant.

The first rule announced by EPA established federal carbon emissions limits for new power plants of two varieties: fossil-fuel-fired electric steam generating units (mostly coal fired) and natural-gas-fired stationary combustion turbines. Following the statutory process set out above, the Agency determined the BSER for the two categories of sources. For steam generating units, for instance, EPA determined that the BSER was a combination of high-efficiency production processes and carbon capture technology. EPA then set the emissions limit based on the amount of carbon dioxide that a plant would emit with these technologies in place.

The second rule was triggered by the first: Because EPA was now regulating carbon dioxide from *new* coal and gas plants, Section 111(d) required EPA to also address carbon emissions from *existing* coal and gas plants. It did so through what it called the Clean Power Plan rule.

In that rule, EPA established "final emission guidelines for states to follow in developing plans" to regulate existing power plants within their borders. To arrive at the guideline limits, EPA

did the same thing it does when imposing federal regulations on new sources: It identified the BSER.

The BSER that the Agency selected for existing coal-fired power plants, however, was quite different from the BSER it had chosen for new sources. The BSER for existing plants included three types of measures, which the Agency called "building blocks." The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal more efficiently. But such improvements, EPA stated, would "lead to only small emission reductions," because coal-fired power plants were already operating near optimum efficiency. On the Agency's view, "much larger emission reductions [were] needed from [coal-fired plants] to address climate change."

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

The Agency identified three ways in which a regulated plant operator could implement a shift in generation to cleaner sources. First, an operator could simply reduce the regulated plant's own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there. Finally, operators could purchase emission allowances or credits as part of a cap-and-trade regime. . . .

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. Given the integrated nature of the power grid, "adding electricity to the grid from one generator will result in the instantaneous reduction in generation from other generators," and "reductions in generation from one generator lead to the instantaneous increase in generation" by others. So coal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas.

Having decided that the "best system of emission reduction ... adequately demonstrated" was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. . . . EPA developed a series of complex equations to "determine the emission performance rates" that States would be required to implement. The calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation described above. Indeed, the emissions limit the Clean Power Plan established for existing power plants was actually *stricter* than the cap imposed by the simultaneously published standards for *new* plants.

The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar. The White House stated that the Clean Power Plan would "drive a[n] ...

aggressive transformation in the domestic energy industry." EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. . . .

C

[The CPP never went into effect. First the Supreme Court issued a stay and then, in 2019, EPA revoked the rule, which it concluded was invalid under the Clean Air Act, and replaced it with the much more modest "Affordable Clean Energy" (ACE) rule. Multiple parties challenged the ACE Rule in the D.C. Circuit. On the last full day of the Trump presidency, the court set aside the ACE rule. It also vacated EPA's repeal of the Clean Power Plan, holding that EPA had erred in concluding that the CPP was inconsistent with the Clean Air Act. The parties *defending* the repeal of the CPP filed petitions for certiorari, which were granted.]

II

[In Part II, the Court reject the Government's contention that no petitioner had Article III standing.]

III

A

. . . The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the "best system of emission reduction" within the meaning of Section 111.

. . . [O]ur precedent teaches that . . . "extraordinary cases" . . . —cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

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

Our decision in *Utility Air* [*Regulatory Group v. EPA*, 573 U.S. 302 (2014)] addressed another question regarding EPA's authority—namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. Despite its

textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." In *Gonzales v. Oregon*, 546 U.S. 243 (2006), we confronted the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them "inconsistent with the public interest," We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation ... not sustainable." Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration's mandate that "84 million Americans ... either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense." National Federation of Independent Business v. Occupational Safety and Health Administration, 142 S. Ct. 661, 665 (2022) (*per curiam*). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure.

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. . . . We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." United States Telecom Assn. v. FCC, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

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

The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation." But in what the dissent calls the "key case" in this area, *Brown & Williamson*, the Court could not have been clearer: "In extraordinary cases ... there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. . . .

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." It located that newfound power in the vague language of an "ancillary provision[ ]" of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had

conspicuously and repeatedly declined to enact itself. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d).

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

Indeed, EPA nodded to this history in the Clean Power Plan itself, describing the sort of "systems of emission reduction" it had always before selected—"efficiency improvements, fuel-switching," and "add-on controls"—as "more traditional air pollution control measures." The Agency noted that it had "considered" such measures as potential systems of emission reduction for carbon dioxide, including a measure it ultimately adopted as a "component" of the BSER, namely, heat rate improvements.

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

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

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

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal- based generation there should be over the coming decades. The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d).

The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly "raise[s] an eyebrow." We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," even though reducing generation at coal plants would reduce workplace illness and injury from coal dust. . . .

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. . . .

C

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

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction ... adequately demonstrated." As a matter of "definitional possibilities," generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction"—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

The Government, echoed by the other respondents, looks to other provisions of the Clean Air Act for support. It points out that the Act elsewhere uses the word "system" or "similar words" to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution. . . .

But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111. Indeed, the Government's examples demonstrate why it is not.

First, unlike Section 111, the Acid Rain and NAAQS programs contemplate trading systems as a means of *complying* with an *already established emissions limit*, set either directly by Congress (as with Acid Rain) or by reference to the safe concentration of the pollutant in the

ambient air (as with the NAAQS). In Section 111, by contrast, it is EPA's job to come up with the cap itself: the "numerical limit on emissions" that States must apply to each source. We doubt that Congress directed the Agency to set an emissions cap at the level "which reflects the degree of emission limitation achievable through the application of [a cap-and-trade] system," § 7411(a)(1), for that degree is indeterminate. It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, such as the NAAQS. It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit.

Second, Congress added the above authorizations for the use of emissions trading programs in 1990, simultaneous with amending Section 111 to its present form. At the time, cap-and-trade was a novel and highly touted concept. The Acid Rain program was "the nation's first-ever emissions trading program." And Congress went out of its way to amend the NAAQS statute to make absolutely clear that the "measures, means, [and] techniques" States could use to meet the NAAQS included cap-and-trade. § 7410(a)(2)(A). Yet "not a peep was heard from Congress about the possibility that a trading regime could be installed under § 111." . . .

Justice GORSUCH, with whom Justice ALITO joins, concurring.

To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to "'clear congressional authorization'" when they claim the power to make decisions of vast "'economic and political significance.'" Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees. I join the Court's opinion and write to offer some additional observations about the doctrine on which it rests.

One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution." [Examples include presumptions against the retroactive application of statutes or the abrogation of state sovereign immunity.]

Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine. See *Gundy*, 139 S. Ct., at 2141–2142 (Gorsuch, J., dissenting). . . .

The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does "not inadvertently cross constitutional lines." And the constitutional lines at stake here are surely no less important than those this Court has long held sufficient to justify parallel clear-statement rules. At stake is not just a question of retroactive liability or sovereign immunity, but basic questions about self-government, equality, fair notice, federalism, and the separation of powers. The major questions doctrine seeks to protect against "unintentional, oblique, or otherwise unlikely" intrusions on these interests. *NFIB* v. *OSHA*, 142 S. Ct, at 669 (Gorsuch, J., concurring). The doctrine does so by

ensuring that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond" those the people's representatives actually conferred on them. *Ibid.* As the Court aptly summarizes it today, the doctrine addresses "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."

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

First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great "political significance," *NFIB* v. *OSHA*, 142 S. Ct., at 665, or end an "earnest and profound debate across the country," *Gonzales*, 546 U.S. at 267–268. . . .

Second, this Court has said that an agency must point to clear congressional authorization when it seeks to regulate "'a significant portion of the American economy,'" *ante*, at — (quoting *Utility Air*, 573 U.S. at 324), or require "billions of dollars in spending" by private persons or entities, *King v. Burwell*, 576 U.S. 473, 485 (2015). The Court has held that regulating tobacco products, eliminating rate regulation in the telecommunications industry, subjecting private homes to Clean Air Act restrictions, and suspending local housing laws and regulations can sometimes check this box. See *Brown & Williamson*, 529 U.S. at 160; MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 231 (1994) (*MCI*); *Utility Air*, 573 U.S. at 324; *Alabama Assn. of Realtors*, 141 S. Ct. at 2486–2487.

Third, this Court has said that the major questions doctrine may apply when an agency seeks to "intrud[e] into an area that is the particular domain of state law." Of course, another longstanding clear-statement rule—the federalism canon—also applies in these situations. . . . But unsurprisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States.

While this list of triggers may not be exclusive, each of the signs the Court has found significant in the past is present here, making this a relatively easy case for the doctrine's application. The EPA claims the power to force coal and gas-fired power plants "to cease [operating] altogether." Whether these plants should be allowed to operate is a question on which people today may disagree, but it is a question everyone can agree is vitally important. Congress has debated the matter frequently. And so far it has "conspicuously and repeatedly declined" to adopt legislation similar to the Clean Power Plan (CPP). It seems that fact has frustrated the Executive Branch and led it to attempt its own regulatory solution in the CPP.

Other suggestive factors are present too. "The electric power sector is among the largest in the U. S. economy, with links to every other sector." The Executive Branch has acknowledged that its proposed rule would force an "aggressive transformation" of the electricity sector through "transition to zero-carbon renewable energy sources." The Executive Branch has also predicted its rule would force dozens of power plants to close and eliminate thousands of jobs by 2025. And industry analysts have estimated the CPP would cause consumers' electricity costs to rise by over $200 billion. Finally, the CPP unquestionably has an impact on federalism, as "the regulation of

utilities is one of the most important of the functions traditionally associated with the police power of the States." None of this is to say the policy the agency seeks to pursue is unwise or should not be pursued. It is only to say that the agency seeks to resolve for itself the sort of question normally reserved for Congress. As a result, we look for clear evidence that the people's representatives in Congress have actually afforded the agency the power it claims.

At this point, the question becomes what qualifies as a clear congressional statement authorizing an agency's action. Courts have long experience applying clear-statement rules throughout the law, and our cases have identified several telling clues in this context too.

First, courts must look to the legislative provisions on which the agency seeks to rely "'with a view to their place in the overall statutory scheme.'" "[O]blique or elliptical language" will not supply a clear statement. . . .

Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. As the Court puts it today, it is unlikely that Congress will make an "[e]xtraordinary gran[t] of regulatory authority" through "vague language" in "'a long-extant statute.'" Recently, too, this Court found a clear statement lacking when OSHA sought to impose a nationwide COVID–19 vaccine mandate based on a statutory provision that was adopted 40 years before the pandemic and that focused on conditions specific to the workplace rather than a problem faced by society at large. See *NFIB* v. *OSHA*, 142 S. Ct. at 667–668 (Gorsuch, J., concurring). . . .

Third, courts may examine the agency's past interpretations of the relevant statute. A "contemporaneous" and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency. Conversely, in *NFIB* v. *OSHA*, the Court found it "telling that OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation" under the statute that the agency sought to invoke as authority for a nationwide vaccine mandate. . . .

Fourth, skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise. As the Court explains, "[w]hen an agency has no comparative expertise in making certain policy judgments, ... Congress presumably would not task it with doing so." So, for example, in *Alabama Assn. of Realtors*, this Court rejected an attempt by a public health agency to regulate housing. And in *NFIB* v. *OSHA*, the Court rejected an effort by a workplace safety agency to ordain "broad public health measures" that "f[ell] outside [its] sphere of expertise."

Asking these questions again yields a clear answer in our case [as the majority opinion details]. . . .

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

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

Congress charged EPA with addressing [the] potentially catastrophic harms [of climate change], including through regulation of fossil-fuel-fired power plants. Section 111 of the Clean

Air Act directs EPA to regulate stationary sources of any substance that "causes, or contributes significantly to, air pollution" and that "may reasonably be anticipated to endanger public health or welfare." Carbon dioxide and other greenhouse gases fit that description. EPA thus serves as the Nation's "primary regulator of greenhouse gas emissions." And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are responsible for about one quarter of the Nation's greenhouse gas emissions. Curbing that output is a necessary part of any effective approach for addressing climate change.

To carry out its Section 111 responsibility, EPA issued the Clean Power Plan in 2015. The premise of the Plan—which no one really disputes—was that operational improvements at the individual-plant level would either "lead to only small emission reductions" or would cost far more than a readily available regulatory alternative. That alternative—which fossil-fuel-fired plants were "already using to reduce their [carbon dioxide] emissions" in "a cost effective manner"—is called generation shifting. As the Court explains, the term refers to ways of shifting electricity generation from higher emitting sources to lower emitting ones—more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind. A power company (like the many supporting EPA here) might divert its own resources to a cleaner source, or might participate in a cap-and-trade system with other companies to achieve the same emissions-reduction goals. . . .

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

I

The Clean Air Act was major legislation, designed to deal with a major public policy issue. As Congress explained, its goal was to "speed up, expand, and intensify the war against air pollution" in all its forms. . . .

Section 111(d) . . . ensures that EPA regulates existing power plants' emissions of *all* pollutants. When the pollutant at issue falls within the NAAQS or HAP programs, EPA need do no more. But when the pollutant falls outside those programs, Section 111(d) requires EPA to set

an emissions level for currently operating power plants (and other stationary sources). That means no pollutant from such a source can go unregulated: As the Senate Report explained, Section 111(d) guarantees that "there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91–1196, p. 20 (1970). Reflecting that language, the majority calls Section 111(d) a "gap-filler." It might also be thought of as a backstop or catch-all provision, protecting against pollutants that the NAAQS and HAP programs let go by. But the section is *not*, as the majority further claims, an "ancillary provision" or a statutory "backwater." That characterization is a non-sequitur. That something is a backstop does not make it a backwater. Even if they are needed only infrequently, backstops can perform a critical function—and this one surely does. . . .

Section 111 describes the prescribed regulatory effort in expansive terms. . . . It imposes, to be sure, meaningful constraints: Take into account costs and nonair impacts, and make sure the best system has a proven track record. But the core command—go find the best system of emission reduction—gives broad authority to EPA.

If that flexibility is not apparent on the provision's face, consider some dictionary definitions—supposedly a staple of this Court's supposedly textualist method of reading statutes. A "system" is "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." Webster's Third New International Dictionary 2322 (1971). Or again: a "system" is "[a]n organized and coordinated method; a procedure." American Heritage Dictionary 1768 (5th ed. 2018). The majority complains that a similar definition—cited to the Solicitor General's brief but originally from another dictionary—is just too darn broad. "[A]lmost anything" capable of reducing emissions, the majority says, "could constitute such a 'system'" of emission reduction. But that is rather the point. Congress used an obviously broad word (though surrounding it with constraints) to give EPA lots of latitude in deciding how to set emissions limits. . . .

[G]eneration shifting fits comfortably within the conventional meaning of a "system of emission reduction." Consider one of the most common mechanisms of generation shifting: the use of a cap-and-trade scheme. Here is how the majority describes cap and trade: "Under such a scheme, sources that receive a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps." Does that sound like a "system" to you? It does to me too. And it also has to this Court. In the past, we have explained that "[t]his type of 'cap-and-trade' *system* cuts costs while still reducing pollution to target levels." *EPA v. EME Homer City Generation, L. P.*, 572 U.S. 489, 503, n. 10 (2014) (emphasis added). So what does the majority mean when it says that "[a]s a matter of definitional *possibilities*, generation shifting *can* be described as a 'system' "? Rarely has a statutory term so clearly applied.

Statutory history serves only to pile on: It shows that Congress has specifically declined to restrict EPA to technology-based controls in its regulation of existing stationary sources. The key moment came in 1977, when Congress amended Section 111 to distinguish between new sources and existing ones. For new sources, EPA could select only the "best *technological* system of continuous emission reduction." Clean Air Act Amendments, § 109(c)(1)(A), 91 Stat. 700 (emphasis added). But for existing sources, the word "technological" was struck out: EPA could select the "best system of continuous emission reduction." *Ibid.* . . .

"Congress," this Court has said, "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Arlington v. FCC*, 569 U.S. 290, 296 (2013). In Section 111, Congress spoke in capacious terms. It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts*, 549 U.S. at 532. So the provision enables EPA to base emissions limits for existing stationary sources on the "best system." That system may be technological in nature; it may be whatever else the majority has in mind; or, most important here, it may be generation shifting. The statute does not care. And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

II

The majority thinks not, contending that in "certain extraordinary cases"—of which this is one—courts should start off with "skepticism" that a broad delegation authorizes agency action. The majority labels that view the "major questions doctrine," and claims to find support for it in our caselaw. But the relevant decisions do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation's terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly—as I've just shown—with all the Clean Air Act's provisions. . . .

A

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

The majority claims it is just following precedent, but that is not so. The Court has never even used the term "major questions doctrine" before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency's view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience.

In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design.

The key case here is *FDA* v. *Brown & Williamson*. There, the Food and Drug Administration (FDA) asserted that its power to regulate "drugs" and "devices" extended to tobacco products. The claim had something to it: FDA has broad authority over "drugs" and drug-delivery "devices," and the definitions of those terms could be read to encompass nicotine and cigarettes. But the asserted authority "simply [did] not fit" the overall statutory scheme. FDA's governing statute required the agency to ensure that regulated products were "safe" to be marketed—but there was no making tobacco products safe in the usual sense. So FDA would have had to reinterpret what it meant to be "safe," or else ban tobacco products altogether. Both options, the Court thought, were preposterous. Until the agency action at issue, tobacco products hadn't been spoken of in the same breath as pharmaceuticals (FDA's paradigmatic regulated product). And Congress had created in several statutes a "distinct regulatory scheme" for tobacco, not involving FDA. So all the evidence was that Congress had never meant for FDA to have any—let alone total—control over the tobacco industry, with its "unique political history." Again, there was "simply" a lack of "fit" between the regulation at issue, the agency in question, and the broader statutory scheme.

The majority's effort to find support in *Brown & Williamson* for its interpretive approach fails. It may be helpful here to quote the full sentence that the majority quotes half of. "In extraordinary cases," the Court stated, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." For anyone familiar with this Court's *Chevron* doctrine, that language will ring a bell. The Court was saying only—and it was elsewhere explicit on this point—that there was reason to hesitate before giving FDA's position *Chevron* deference. And what was that reason? The Court went on to explain that it would not defer to FDA because it read the relevant statutory provisions as negating the agency's claimed authority. In reaching that conclusion, the Court relied (as I've just explained) not on any special "clear authorization" demand, but on normal principles of statutory interpretation: look at the text, view it in context, and use what the Court called some "common sense" about how Congress delegates. *That* is how courts are to decide, in the majority's language, whether an agency has asserted a "highly consequential power beyond what Congress could reasonably be understood to have granted." . . .

And last Term, the Court concluded that the Centers for Disease Control and Prevention (CDC) lacked the power to impose a nationwide eviction moratorium. *Alabama Assn. of Realtors*. The Court held that other statutory language made it a "stretch" to read the relied-on delegation as covering the CDC's action. And the Court raised an eyebrow at the thought of the CDC "intrud[ing]" into "the landlord-tenant relationship"—a matter outside the CDC's usual "domain."

The eyebrow-raise is indeed a consistent presence in these cases, responding to something the Court found anomalous—looked at from Congress's point of view—in a particular agency's exercise of authority. In each case, the Court thought, the agency had strayed out of its lane, to an area where it had neither expertise nor experience. The Attorney General making healthcare policy, the regulator of pharmaceutical concerns deciding the fate of the tobacco industry, and so on. And in each case, the proof that the agency had roamed too far afield lay in the statutory scheme itself. The agency action collided with other statutory provisions; if the former were allowed, the latter

could not mean what they said or could not work as intended. FDA having to declare tobacco "safe" to avoid shutting down an industry; or EPA having literally to change hard numbers contained in the Clean Air Act. . . .

B

The Court today faces no such singular assertion of agency power. As I have already explained, nothing in the Clean Air Act (or, for that matter, any other statute) conflicts with EPA's reading of Section 111. Notably, the majority does not dispute that point. Of course, it views Section 111 (if for unexplained reasons) as less clear than I do. But nowhere does the majority provide evidence from within the statute itself that the Clean Power Plan conflicts with or undermines Congress's design. That fact alone makes this case different from all the cases described above. As to the other critical matter in those cases—is the agency operating outside its sphere of expertise?—the majority at least tries to say something. It claims EPA has no "comparative expertise" in "balancing the many vital considerations of national policy" implicated in regulating electricity sources. But that is wrong. [Justice Kagan argued that GHG regulation was exactly the sort of project one would expect EPA to undertake.]

Although the majority offers a flurry of complaints, they come down in the end to this: The Clean Power Plan is a big new thing, issued under a minor statutory provision. . . .

As to bigness—well, events have proved the opposite: The Clean Power Plan, we now know, would have had little or no impact. The Trump administration's repeal of the Plan created a kind of controlled experiment: The Plan's "magnitude" could be measured by seeing how far short the industry fell of the Plan's nationwide emissions target. Except that turned out to be the wrong question, because the industry didn't fall short of the Plan's goal; rather, the industry exceeded that target, all on its own. . . .

The majority thus pivots to the massive consequences generation shifting *could* produce—but that claim fares just as poorly. On EPA's view of its own authority, the majority worries, some future rule might "forc[e] coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether." But looking at the text of Section 111(d) might here come in handy. For the statute imposes, as already shown, a set of constraints—particularly involving costs and energy needs—that would preclude so extreme a regulation. . . .

The majority's claim about the Clean Power Plan's novelty . . . is also exaggerated. As EPA explained when it issued the Clean Power Plan, an earlier Section 111(d) regulation had determined that a cap-and-trade program was the "best system of emission reduction" for mercury. . . .

In any event, newness might be perfectly legitimate—even required—from Congress's point of view. I do not dispute that an agency's longstanding practice may inform a court's interpretation of a statute delegating the agency power. But it is equally true, as *Brown & Williamson* recognized, that agency practices are "not carved in stone." Congress makes broad delegations in part so that agencies can "adapt their rules and policies to the demands of changing circumstances." To keep faith with that congressional choice, courts must give agencies "ample latitude" to revisit, rethink, and revise their regulatory approaches. So it is here. Section 111(d) was written, as I've shown, to give EPA plenty of leeway. The enacting Congress told EPA to pick the "best system of emission

reduction" (taking into account various factors). In selecting those words, Congress understood—it had to—that the "best system" would change over time. Congress wanted and instructed EPA to keep up. To ensure the statute's continued effectiveness, the "best system" should evolve as circumstances evolved—in a way Congress knew it couldn't then know. See *Massachusetts*. EPA followed those statutory directions to the letter when it issued the Clean Power Plan. It selected a system (as the regulated parties agree) that achieved greater emissions reductions at lower cost than any technological alternative could have, while maintaining a reliable electricity market. Even if that system was novel, it was in EPA's view better—actually, "best." So it was the system that accorded with the enacting Congress's choice.

And contra the majority, it is that Congress's choice which counts, not any later one's. The majority says it "cannot ignore" that Congress in recent years has "considered and rejected" cap-and-trade schemes. But under normal principles of statutory construction, the majority *should* ignore that fact (just as I should ignore that Congress failed to enact bills barring EPA from implementing the Clean Power Plan). As we have explained time and again, failed legislation "offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress" adopted.

III

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

[Justice Kagan offers a general defense of the constitutionality, historical pedigree, and sensibleness of congressional delegations to agencies such as, in her view, occurred here.] In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest.

Today, the Court is not. Section 111, most naturally read, authorizes EPA to develop the Clean Power Plan—in other words, to decide that generation shifting is the "best system of emission reduction" for power plants churning out carbon dioxide. Evaluating systems of emission reduction is what EPA does. And nothing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean Air Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.

The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about how to address climate

change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

Biden v. Nebraska
143 S. Ct. 2355 (2023)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

[In August 2022, the Secretary of Education reduced or eliminated federal student debts to the tune of $430 billion. Borrowers with eligible federal student loans who had an income below $125,000 in either 2020 or 2021 qualified for a loan balance discharge of up to $10,000. Those who previously received Pell Grants qualified for a discharge of up to $20,000. Six states challenged the Secretary's authority. (A separate suit, brought by individual debtors, was dismissed for lack of standing.)

The basic statute covering federal student loans is Title IV of the Higher Education Act. The Act authorizes the Secretary of Education to cancel or reduce loans in certain limited circumstances. The Secretary may cancel a set amount of loans held by some public servants and may forgive loans of borrowers who have died, become "permanently and totally disabled," are bankrupt, or attend schools falsely that certify them, close down, or fail to pay lenders.

The Secretary did not rely on the HEA, however. Rather, he invoked the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." § 1098bb(a)(1). The Secretary may issue waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." § 1098bb(a)(2)(A). An "affected individual" is defined, in relevant part, as someone who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." §§ 1098ee(2)(C)–(D). And a "national emergency" for the purposes of the Act is "a national emergency declared by the President of the United States." § 1098ee(4). President Trump declared the covid pandemic a national emergency in March 2020.]

[I]n August 2022, a few weeks before President Biden stated that "the pandemic is over," the Department of Education announced that it was once again issuing "waivers and modifications" under the Act . . . To reduce and eliminate student debts directly. During the first year of the pandemic, the Department's Office of General Counsel had issued a memorandum concluding that "the Secretary does not have statutory authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances." After a change in

Presidential administrations and shortly before adoption of the challenged policy, however, the Office of General Counsel "formally rescinded" its earlier legal memorandum and issued a replacement reaching the opposite conclusion. . . .

[In Part II, the Court concludes that at least the State of Missouri had standing. This portion of the opinion is excerpted at page __, *infra.*]

III

. . . .

A

The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." That power has limits. To begin with, statutory permission to "modify" does not authorize "basic and fundamental changes in the scheme" designed by Congress. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994). Instead, that term carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." *Ibid.* That is how the word is ordinarily used. See, *e.g.*, Webster's Third New International Dictionary 1952 (2002) (defining "modify" as "to make more temperate and less extreme," "to limit or restrict the meaning of," or "to make minor changes in the form or structure of [or] alter without transforming"). The legal definition is no different. Black's Law Dictionary 1203 (11th ed. 2019) (giving the first definition of "modify" as "[t]o make somewhat different; to make small changes to," and the second as "[t]o make more moderate or less sweeping"). The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them.

[Unlike prior waivers based on this authority, t]he Secretary's new "modifications" . . . were not "moderate" or "minor." Instead, they created a novel and fundamentally different loan forgiveness program. The new program vests authority in the Department of Education to discharge up to $10,000 for every borrower with income below $125,000 and up to $20,000 for every such borrower who has received a Pell Grant. No prior limitation on loan forgiveness is left standing. Instead, every borrower within the specified income cap automatically qualifies for debt cancellation, no matter their circumstances. The Department of Education estimates that the program will cover 98.5% of all borrowers. From a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country. . . .

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them—and that this additional term "grant[s] broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions. Previously, waiver under the HEROES Act was straightforward: the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary. For instance, on one occasion the Secretary waived the requirement that a student provide a written request for a leave of absence. On another, he waived the regulatory provisions requiring schools and guaranty agencies to attempt collection of defaulted loans for the time period in which students were affected individuals.

Here, the Secretary does not identify any provision that he is actually waiving. No specific provision of the Education Act establishes an obligation on the part of student borrowers to pay back the Government. So as the Government concedes, "waiver"—as used in the HEROES Act—cannot refer to "waiv[ing] loan balances" or "waiving the obligation to repay" on the part of a borrower.. . .

Yet even that expansive conception of waiver cannot justify the Secretary's plan, which does far more than relax existing legal requirements. The plan specifies particular sums to be forgiven and income-based eligibility requirements. The addition of these new and substantially different provisions cannot be said to be a "waiver" of the old in any meaningful sense. Recognizing this, the Secretary acknowledges that waiver alone is not enough; after waiving whatever "inapplicable" law would bar his debt cancellation plan, he says, he then "modif[ied] the provisions to bring [them] in line with this program." *Id.*, at 65. So in the end, the Secretary's plan relies on modifications all the way down. And as we have explained, the word "modify" simply cannot bear that load.

The Secretary and the dissent go on to argue that the power to "waive or modify" is greater than the sum of its parts. Because waiver allows the Secretary "to eliminate legal obligations in their entirety," the argument runs, the combination of "waive or modify" allows him "to reduce them to any extent short of waiver"—even if the power to "modify" ordinarily does not stretch that far. But the Secretary's program cannot be justified by such sleight of hand. The Secretary has not truly waived or modified the provisions in the Education Act authorizing specific and limited forgiveness of student loans. Those provisions remain safely intact in the U. S. Code, where they continue to operate in full force. What the Secretary has actually done is draft a new section of the Education Act from scratch by "waiving" provisions root and branch and then filling the empty space with radically new text. . . .

B

. . . .

The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia v. EPA* involved similar concerns over the exercise of administrative power. . . . [H]ere, . . . the Secretary of Education claims the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans. The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope. The Act has been used only once before to waive or modify a provision related to debt cancellation: In 2003, the Secretary waived the requirement that borrowers seeking loan forgiveness under the Education Act's public service discharge provisions "perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as 5 consecutive years." That waiver simply eased the requirement that service be uninterrupted to qualify for the public service loan forgiveness program. In sum, "[n]o regulation premised on" the HEROES Act "has even begun to approach the size or scope" of the Secretary's program. *Alabama Assn.*

Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effec[t] a 'fundamental revision of the

statute, changing it from [one sort of] scheme of ... regulation' into an entirely different kind," *West Virginia*,—one in which the Secretary may unilaterally define every aspect of federal student financial aid, provided he determines that recipients have "suffered direct economic hardship as a direct result of a ... national emergency."

The " 'economic and political significance' " of the Secretary's action is staggering by any measure. Practically every student borrower benefits, regardless of circumstances. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers "between $469 billion and $519 billion," depending on the total number of borrowers ultimately covered. That is ten times the "economic impact" that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine. It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending. Congressional Budget Office, The Federal Budget in Fiscal Year 2022. There is no serious dispute that the Secretary claims the authority to exercise control over "a significant portion of the American economy."

The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature. The Secretary's assertion of administrative authority has "conveniently enabled [him] to enact a program" that Congress has chosen not to enact itself. . . .

The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act. The dissent asks us to "[i]magine asking the enacting Congress: Can the Secretary use his powers to give borrowers more relief when an emergency has inflicted greater harm?" The dissent "can't believe" the answer would be no. But imagine instead asking the enacting Congress a more pertinent question: "Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?" We can't believe the answer would be yes. Congress did not unanimously pass the HEROES Act with such power in mind. "A decision of such magnitude and consequence" on a matter of " 'earnest and profound debate across the country' " must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."

The Secretary . . . objects that [the MQD applies] only in cases concerning "agency action[s] involv[ing] the power to regulate, not the provision of government benefits." In the Government's view, "there are fewer reasons to be concerned" in cases involving benefits, which do not impose "profound burdens" on individual rights or cause "regulatory effects that might prompt a note of caution in other contexts involving exercises of emergency powers."

This Court has never drawn the line the Secretary suggests—and for good reason. Among Congress's most important authorities is its control of the purse. It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations. As we observed in *West Virginia*, experience shows that major questions cases "have arisen from all corners of the administrative state," and administrative action resulting in the conferral of benefits is no exception to that rule. . . . "The basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." *West Virginia.* In such circumstances, we have required the Secretary to "point to 'clear congressional authorization' " to justify the challenged program. And

as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone "clear congressional authorization" for such a program.

Justice BARRETT, concurring.

I join the Court's opinion in full. I write separately to address the States' argument that, under the "major questions doctrine," we can uphold the Secretary of Education's loan cancellation program only if he points to " 'clear congressional authorization' " for it. *West Virginia v. EPA*. In this case, the Court applies the ordinary tools of statutory interpretation to conclude that the HEROES Act does not authorize the Secretary's plan. The major questions doctrine reinforces that conclusion but is not necessary to it.

Still, the parties have devoted significant attention to the major questions doctrine, and there is an ongoing debate about its source and status. I take seriously the charge that the doctrine is inconsistent with textualism. *West Virginia* (Kagan, J., dissenting) ("When [textualism] would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards"). And I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.

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

I

A

Substantive canons are rules of construction that advance values external to a statute. A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 117 (2010) (Barrett). Some substantive canons, like the rule of lenity, play the modest role of breaking a tie between equally plausible interpretations of a statute. Others are more aggressive—think of them as strong-form substantive canons. Unlike a tie-breaking rule, a strong-form canon counsels a court to *strain* statutory text to advance a particular value. . . . Such rules effectively impose a "clarity tax" on Congress by demanding that it speak unequivocally if it wants to accomplish certain ends. This "clear statement" requirement means that the better interpretation of a statute will not necessarily prevail. Instead, if the better reading leads to a disfavored result (like provoking a serious constitutional question), the court will adopt an inferior-but-tenable reading to avoid it. So to achieve an end protected by a strong-form canon, Congress must close all plausible off ramps.

While many strong-form canons have a long historical pedigree, they are "in significant tension with textualism" insofar as they instruct a court to adopt something other than the statute's most natural meaning. Barrett 123–124.

B

Some have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause. On this view, the Court overprotects the

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

While one could walk away from our major questions cases with this impression, I do not read them this way. No doubt, many of our cases express an expectation of "clear congressional authorization" to support sweeping agency action. But none requires "an 'unequivocal declaration' " from Congress authorizing the *precise* agency action under review, as our clear-statement cases do in their respective domains. And none purports to depart from the best interpretation of the text—the hallmark of a true clear-statement rule.

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

II

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

Context is not found exclusively " 'within the four corners' of a statute." Thus, courts apply a presumption of *mens rea* to criminal statutes, and a presumption of equitable tolling to statutes of limitations. It is also well established that "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." . . .

Context also includes common sense, which is another thing that "goes without saying." Case reporters and casebooks brim with illustrations of why literalism—the antithesis of context-driven interpretation—falls short. Consider the classic example of a statute imposing criminal penalties on " 'whoever drew blood in the streets.' " Read literally, the statute would cover a surgeon accessing a vein of a person in the street. But "common sense" counsels otherwise, because in the context of the criminal code, a reasonable observer would "expect the term 'drew blood' to describe a violent act." Common sense similarly bears on judgments like whether a floating home is a "vessel," whether tomatoes are "vegetables," and whether a skin irritant is a "chemical weapon."

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

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

But what if there is more to the story? Perhaps there is obvious contextual evidence that the babysitter's jaunt was permissible—for example, maybe the parent left tickets to the amusement park on the counter. Other clues, though less obvious, can also demonstrate that the babysitter took a reasonable view of the parent's instruction. Perhaps the parent showed the babysitter where the suitcases are, in the event that she took the children somewhere overnight. Or maybe the parent mentioned that she had budgeted $2,000 for weekend entertainment. Indeed, some relevant points of context may not have been communicated by the parent at all. For instance, we might view the parent's statement differently if this babysitter had taken the children on such trips before or if the babysitter were a grandparent.

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

This expectation of clarity is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). Or, as Justice Breyer once observed, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration." S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986). That makes eminent sense in light of our constitutional structure, which is itself part of the legal context framing any delegation. Because

the Constitution vests Congress with "[a]ll legislative Powers," a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch. See *West Virginia* (explaining that the major questions doctrine rests on "both separation of powers principles and a practical understanding of legislative intent").

Crucially, treating the Constitution's structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to overenforce Article I's nondelegation principle (which, again, is the rationale behind the substantive-canon view of the major questions doctrine). My point is simply that in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on "important subjects" while delegating away only "the details." That is different from a normative rule that *discourages* Congress from empowering agencies. To see what I mean, return to the ambitious babysitter. Our expectation of clearer authorization for the amusement-park trip is not about discouraging the parent from giving significant leeway to the babysitter or forcing the parent to think hard before doing so. Instead, it reflects the intuition that the parent is in charge and sets the terms for the babysitter—so if a judgment is significant, we expect the parent to make it. If, by contrast, one parent left the children with the other parent for the weekend, we would view the same trip differently because the parents share authority over the children. In short, the balance of power between those in a relationship inevitably frames our understanding of their communications. And when it comes to the Nation's policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore.

Given these baseline assumptions, an interpreter should "typically greet" an agency's claim to "extravagant statutory power" with at least some "measure of skepticism." . . . [T]his skepticism does not mean that courts have an obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency's authority—and that marks a key difference between my view and the "clear statement" view of the major questions doctrine. . . .In some cases, the court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing. (And because context can suffice, I disagree with Justice KAGAN's critique that "[t]he doctrine forces Congress to delegate in highly specific terms." *Post*, at ——.) If so, the court must adopt the agency's reading despite the "majorness" of the question. In other cases, however, the court might conclude that the agency's expansive reading, even if "plausible," is not the best. In that event, the major questions doctrine plays a role, because it helps explain the court's conclusion that the agency overreached.

. . . Just as an instruction to "pick up dessert" is not permission to buy a four-tier wedding cake, Congress's use of a "subtle device" is not authorization for agency action of "enormous importance." *MCI*; cf. *Whitman v. American Trucking Ass'ns* (Congress does not "hide elephants in mouseholes"). This principle explains why the Centers for Disease Control and Prevention's (CDC's) general authority to " 'prevent the ... spread of communicable diseases' " did not authorize a nationwide eviction moratorium. . . . Likewise, in *West Virginia*, we held that a "little-used backwater" provision in the Clean Air Act could not justify an Environmental Protection Agency (EPA) rule that would "restructur[e] the Nation's overall mix of electricity generation."

Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse. [citing *Alabama Ass'n* and *NFIB v. OSHA*, among other cases.]

. . . The shared intuition behind these cases is that a reasonable speaker would not understand Congress to confer an unusual form of authority without saying more.

We have also pumped the brakes when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.' ". Of course, an agency's post-enactment conduct does not control the meaning of a statute, but "this Court has long said that courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court." The agency's track record can be particularly probative in this context: A longstanding "want of assertion of power by those who presumably would be alert to exercise it" may provide some clue that the power was never conferred. . . .

If the major questions doctrine were a substantive canon, then the common thread in these cases would be that we "exchange[d] the most natural reading of a statute for a bearable one more protective of a judicially specified value." But by my lights, the Court arrived at the most plausible reading of the statute in these cases. . . . In each case, . . . we . . . "view[ed] the statute as a whole" and considered context that would be important to a reasonable observer. With the full picture in view, it became evident in each case that the agency's assertion of "highly consequential power" went "beyond what Congress could reasonably be understood to have granted." *West Virginia*.

III

As for today's case: The Court surely could have "hi[t] the send button," *post*, at —— (KAGAN, J., dissenting), after the routine statutory analysis set out in Part III–A. But it is nothing new for a court to punctuate its conclusion with an additional point, and the major questions doctrine is a good one here. It is obviously true that the Secretary's loan cancellation program has "vast 'economic and political significance.' " That matters not because agencies are incapable of making highly consequential decisions, but rather because an initiative of this scope, cost, and political salience is not the type that Congress lightly delegates to an agency. And for the reasons given by the Court, the HEROES Act provides no indication that Congress empowered the Secretary to do anything of the sort.

Granted, some context clues from past major questions cases are absent here—for example, this is not a case where the agency is operating entirely outside its usual domain. But the doctrine is not an on-off switch that flips when a critical mass of factors is present . . . . Here, enough of those indicators are present to demonstrate that the Secretary has gone far "beyond what Congress could reasonably be understood to have granted" in the HEROES Act. Our decision today does not "trump" the statutory text, nor does it make this Court the "arbiter" of "national policy." *Post*, at ___ (KAGAN, J., dissenting). Instead, it gives Congress's words their best reading.

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

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

In every respect, the Court today exceeds its proper, limited role in our Nation's governance.

Some 20 years ago, Congress enacted legislation, called the HEROES Act, authorizing the Secretary of Education to provide relief to student-loan borrowers when a national emergency struck. The Secretary's authority was bounded: He could do only what was "necessary" to alleviate the emergency's impact on affected borrowers' ability to repay their student loans. 20 U.S.C. § 1098bb(a)(2). But within that bounded area, Congress gave discretion to the Secretary. He could "waive or modify any statutory or regulatory provision" applying to federal student-loan programs, including provisions relating to loan repayment and forgiveness. And in so doing, he could replace the old provisions with new "terms and conditions." §§ 1098bb(a)(1), (b)(2). The Secretary, that is, could give the relief that was needed, in the form he deemed most appropriate, to counteract the effects of a national emergency on borrowers' capacity to repay. That may have been a good idea, or it may have been a bad idea. Either way, it was what Congress said. . . .

[Part I of the opinion, arguing that no challenger had standing, is excerpted at page __, *infra*.]

II

The statute Congress enacted gives the Secretary broad authority to respond to national emergencies. That authority kicks in only under exceptional conditions. But when it kicks in, the Secretary can take exceptional measures. He can "waive or modify any statutory or regulatory provision" applying to the student-loan program. And as part of that power, he can "appl[y]" new "terms and conditions" "in lieu of " the former ones. That means when an emergency strikes, the Secretary can alter, so as to cover more people, pre-existing provisions enabling loan discharges. Which is exactly what the Secretary did in establishing his loan forgiveness plan. The majority's contrary conclusion rests first on stilted textual analysis. The majority picks the statute apart piece by piece in an attempt to escape the meaning of the whole. But the whole—the expansive delegation—is so apparent that the majority has no choice but to justify its holding on extra-statutory grounds. So the majority resorts, as is becoming the norm, to its so-called major-questions doctrine. And the majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts. Thus the Court once again substitutes itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation's most important, as well as most contested, policy decisions.

A

The HEROES Act applies to the COVID loan forgiveness program . . . . Of course, Congress did not know COVID was coming; and maybe it wasn't even thinking about pandemics generally. But that is immaterial, because Congress delegated broadly, for all national emergencies. It is true, too, that the Secretary's use of the HEROES Act delegation has proved politically controversial, in a way that assistance to terrorism victims presumably would not. But again, that fact is irrelevant to the lawfulness of the program. … [T]he statutory preconditions have been met. The President declared the COVID pandemic a "national emergency." The eligible borrowers all fall within the law's definition of "affected individual[s]." And the Secretary "deem[ed]" relief "necessary to ensure" that the pandemic did not put low- and middle-income borrowers "in a worse position" to repay their loans. With those boxes checked, the Secretary's waiver/modification powers kick in. And the Secretary used them just as described in the hypothetical above. For purposes of the COVID program, he scratched the conditions for loan discharge contained in several provisions. He then altered those provisions by specifying different conditions, which opened up loan

forgiveness to more borrowers. So he "waive[d]" and "modif[ied]" pre-existing law and, in so doing, applied new "terms and conditions" "in lieu of " the old. . . .

How does the majority avoid this conclusion? By picking the statute apart, and addressing each segment of Congress's authorization as if it had nothing to do with the others. . . .

The majority's . . . construction makes the Act inconsequential. The Secretary emerges with no ability to respond to large-scale emergencies in commensurate ways. The creation of any "novel and fundamentally different loan forgiveness program" is off the table. . . . And under the majority's analysis, new loan *forbearance* policies are similarly out of bounds. When COVID struck, Secretary DeVos immediately suspended loan repayments and interest accrual for all federally held student loans. The majority claims it is not deciding whether that action was lawful. Which is all well and good, except that under the majority's reasoning, how could it not be? The suspension too offered a significant new benefit, and to an even greater number of borrowers. (Indeed, for many borrowers, it was worth much more than the current plan's $10,000 discharge.) So the suspension could no more meet the majority's pivotal definition of "modify"—as make a "minor change[ ]"—than could the forgiveness plan. On the majority's telling, Congress thought that in the event of a national emergency financially harming borrowers—under a statute gearing potential relief to the measure of that harm, so that affected borrowers end up no less able to repay their loans—the Secretary can do no more than fiddle. . . .

That is not the statute Congress wrote. . . .

B

The tell comes in the last part of the majority's opinion. When a court is confident in its interpretation of a statute's text, it spells out its reading and hits the send button. Not this Court, not today. This Court needs a whole other chapter to explain why it is striking down the Secretary's plan. And that chapter is not about the statute Congress passed and the President signed, in their representation of many millions of citizens. It instead expresses the Court's own "concerns over the exercise of administrative power." Congress may have wanted the Secretary to have wide discretion during emergencies to offer relief to student-loan borrowers. Congress in fact drafted a statute saying as much. And the Secretary acted under that statute in a way that subjects the President he serves to political accountability—the judgment of voters. But none of that is enough. This Court objects to Congress's permitting the Secretary (and other agency officials) to answer so-called major questions. Or at least it objects when the answers given are not to the Court's satisfaction. So the Court puts its own heavyweight thumb on the scales. It insists that "[h]owever broad" Congress's delegation to the Secretary, it (the Court) will not allow him to use that general authorization to resolve important issues. The question, the majority helpfully tells us, is "who has the authority" to make such significant calls. The answer, as is now becoming commonplace, is this Court.

The majority's stance, as I explained last Term, prevents Congress from doing its policy-making job in the way it thinks best. See *West Virginia* (dissenting opinion). The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation. Here is a fact of the matter: Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress

knows that if it had to do everything, many desirable and even necessary things wouldn't get done. In wielding the major-questions sword, last Term and this one, this Court overrules those legislative judgments. The doctrine forces Congress to delegate in highly specific terms—respecting, say, loan forgiveness of certain amounts for borrowers of certain incomes during pandemics of certain magnitudes. Of course Congress sometimes delegates in that way. But also often not. Because if Congress authorizes loan forgiveness, then what of loan forbearance? And what of the other 10 or 20 or 50 knowable and unknowable things the Secretary could do? And should the measure taken—whether forgiveness or forbearance or anything else—always be of the same size? Or go to the same classes of people? Doesn't it depend on the nature and scope of the pandemic, and on a host of other foreseeable and unforeseeable factors? You can see the problem. It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future. So, again, Congress delegates broadly. Except that this Court now won't let it reap the benefits of that choice.

And that is a major problem not just for governance, but for democracy too. Congress is of course a democratic institution; it responds, even if imperfectly, to the preferences of American voters. And agency officials, though not themselves elected, serve a President with the broadest of all political constituencies. But this Court? It is, by design, as detached as possible from the body politic. That is why the Court is supposed to stick to its business—to decide only cases and controversies (but see [Part I of this dissent]), and to stay away from making this Nation's policy about subjects like student-loan relief. The policy judgments, under our separation of powers, are supposed to come from Congress and the President. But they don't when the Court refuses to respect the full scope of the delegations that Congress makes to the Executive Branch. When that happens, the Court becomes the arbiter—indeed, the maker—of national policy. That is no proper role for a court. And it is a danger to a democratic order. . . .

The majority is therefore wrong to say that the "indicators from our previous major questions cases are present here." [Even were *West Virginia* and *Alabama Association* rightly decided, there is] nothing like those circumstances here. . . . In this case, the Secretary responsible for carrying out the student-loan programs forgave student loans in a national emergency under the core provision of a recently enacted statute empowering him to provide student-loan relief in national emergencies. Today's decision thus moves the goalposts for triggering the major-questions doctrine. . . .

To justify *this* use of its heightened-specificity requirement, the majority relies largely on history: "[P]ast waivers and modifications," the majority argues, "have been extremely modest." But first, it depends what you think is "past." One prior action, nowhere counted by the majority, is the suspension of loan payments and interest accrual begun in COVID's first days. That action cost the Federal Government over $100 billion, and benefited many more borrowers than the forgiveness plan at issue. And second, it's all relative. Past actions were more modest because the precipitating emergencies were more modest.. . .

Similarly unavailing is the majority's reliance on the controversy surrounding the program. . . . But that provides yet more reason for the Court to adhere to its properly limited role. There are two paths here. One is to respect the political branches' judgments. On that path, . . . a political controversy [would be] resolved by political means, as our Constitution requires. That is one path. Now here is the other, the one the Court takes. Wielding its judicially manufactured heightened-

specificity requirement, the Court refuses to acknowledge the plain words of the HEROES Act. It declines to respect Congress's decision to give broad emergency powers to the Secretary. It strikes down his lawful use of that authority to provide student-loan assistance. It does not let the political system, with its mechanisms of accountability, operate as normal. It makes itself the decisionmaker on, of all things, federal student-loan policy. And then, perchance, it wonders why it has only compounded the "sharp debates" in the country?

Notes and Questions

1. The major questions doctrine is likely the most important doctrinal development in administrative law in many years. But both its scope and its justifications remain uncertain. Most obviously, what exactly is a "major question"? The lower courts are inundated with challenges to agency action that the challengers insist involve major questions, as litigants respond to the obvious incentive these cases create. Presumably a caselaw will develop. But so far it the boundaries are uncertain. What hints do these opinions give?

2. *West Virginia* and *Biden* both involved, at least on the majority's account, novel applications of relatively longstanding statutory provisions, a fact emphasized by the opinions. Suppose a challenged major question regulation is consistent with an agency's longstanding aggressive reading of a somewhat vague statute. Would or should the Court be as quick to set aside such agency action? Courts are often hesitant to rely on congressional acquiescence, but this might be a setting where doing so makes sense.

3. As with the explicit nondelegation cases, the MQD raises the question whether Congress is capable of responding to the incentives or requirements the Court creates. As has never been more evident, legislative specificity, especially on major questions, is hard to obtain. But it should be easier to clearly *delegate* a decision than to clearly *make* that decision. Thus, the clarity required by these cases is more achievable than the clarity required by, say, the Gorsuch *Gundy* opinion.

4. The dissents in these cases contend that the Court has failed to stay in its lane. Is that correct? As a descriptive point, the courts are often disinclined to upset a resolution that the political branches have accepted. One might say that the dissenters see that as not just a descriptive but a normative proposition. Two MQD enthusiasts point out:

> [J]udges have incentives to accept outcomes that the political branches find satisfactory. And . . . both Congress and the executive branch may be content to allow agencies to take major but controversial policy choices out of their hands. Given the judicial temptation to accept inter-branch arrangements, coupled with the political branches' reluctance to take responsibility for difficult decisions, the major-questions doctrine might well prove to be a speed bump, not a traffic light.

John Yoo & Robert Delahunty, The Major-questions Doctrine and the Administrative State, Nat'l Affairs (Fall 2022). For Yoo and Delahunty, this tendency is a cause for concern. For others, it offers some hope.

5. The two principal cases contain (at least) three separate expositions of the Major Questions Doctrine: The Roberts majority opinion in *West Virginia*, the Gorsuch concurrence in that case, and the Barrett concurrence in *Biden v. Nebraska*. While of course there is considerable overlap between the three, they are not the same. All three justices joined the majority opinions in both

cases. Why did Gorsuch and Barrett feel the need to write separately? Why did neither join the other's concurrence?

6. The variation extends not just to the content or scope of the doctrine but to its justifications. The two opinions by Chief Justice Roberts are remarkably thin on justification, though in *West Virginia* he nods to "both separation of powers principles and a practical understanding of legislative intent" as underlying the MQD. Justice Gorsuch invokes "self-government, equality, fair notice, federalism, and the separation of powers" and bases the doctrine in particular in Article I's vesting clause. For him, the MQD seems a tool for enforcing the nondelegation doctrine. This view makes Justice Barrett nervous. Instead, she defends the doctrine as a contextual guide to statutory meaning. Rather than steering a court away from the most natural reading of a statute (which is what Roberts and Gorsuch seem to acknowledge it does and the three dissenters are convinced, to their dismay, that it does), on Barrett's account the MQD ensures that the court reads the statute correctly. Who's understanding is most coherent and convincing? It is not clear that these disagreements on rationale will have any impact on actual results. See generally Cass R. Sunstein, Two Justifications for the Major Questions Doctrine, https://ssrn.com/abstract=4503583 (distinguishing Gorusch's Lockean justification from Barrett's Wittgensteinian one).

7. Justice Barrett's goal is to square the MQD with a textualist approach to statutory interpretation. As she says, substantive canons pose a challenge for the textualist. They impose a policy preference that is not found within the statute itself, which is exactly what textualists purport to avoid. For Justice Barrett, the MQD does no such thing; it is not a substantive canon but just one aspect of "context," a consideration that everyone—textualists and nontextualists alike—agree is relevant. Were you convinced? Some commenters are not. For some, Justice Barrett fails because her understanding of "context" is so capacious that it becomes a form of purposivism. For others, the defect is that there is no way of distinguishing the "bad" substantive canons that have nothing to do with statutory meaning from the "good" heuristic guides that help identify such meaning. For example:

> [O]n Barrett's view (drawing upon academic work by leading textualists), "context" includes not only "linguistic context" but "historical and governmental context" and "background legal conventions." Along these lines, the list of maxims of contextual inference that Barrett gives includes (1) the presumption of mens rea for criminal statutes, (2) a presumption of equitable tolling for statutes of limitations, (3) legal terms of art, (4) implied requirements of proximate causation for statutory causes of action, and (5) venerable legal principles such as de minimis non curat lex.
>
> . . . [Yet t]he very maxims that Justice Barrett wants to describe as common-sensical "historical and governmental context" or "background legal conventions" are indistinguishable from the ones she wants to describe as problematic substantive "values external to the statute." Barrett, for example, puts the presumption against retroactivity into a fundamentally different category than the presumption of equitable tolling — the former is deemed substantive and external, the latter merely contextual — but this is untenable. The two are, at bottom, exactly the same sort of legal principle, and in both cases may equally be seen either as part of "context" or, alternatively, as promoting basic values of the legal order — or indeed may

> properly be seen as both. The presumption against retroactivity is "historical and governmental context," a "background legal convention," as old as Western law itself . . . . [T]he paradigm case of equitable tolling arises when the court extends the running of the limitations period because one party has deceived or tricked another into filing suit too late. But this equitable intervention, based on the ancient principle that dolus malus or willful bad faith must not be rewarded, could easily be described, using Barrett's categories, as a values-based principle "external" to the statute's linguistic meaning; after all, if there is any candidate for a text that simply says what it says, it is a statute of limitations. . . .
>
> So the principles that Barrett puts into one category straightforwardly fall into the other as well. It is not just that we have here a case of the ordinary difficulty of drawing lines between categories; it is that Barrett's two categories do not describe different things.

Adrian Vermeule, Text and "Context", Notice & Comment Blog (July 13, 2023), https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/.

8. Reflecting the importance of and controversy surrounding the MQD, the outpouring of law review articles has begun. Useful scholarship includes Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262 (2022) (dubious); Daniel Deacon & Leah M. Litman, The New Major Questions Doctrine, 109 Va. L. Rev. ___ (2023) (even more dubious); Ilan Wurman, Importance and Interpretive Questions, 110 Va. L. Rev. __ (2024) (positive); Aaron L. Neilson, The Minor Questions Doctrine, 169 U. Pa. L. Rev. 1181 (2021) (arguing for applying MQD-style review to *minor* questions). A thorough, already lengthy, bibliography can be found in Beau J. Baumann, The Major Questions Doctrine Reading List, Notice and Comment Blog (March 18, 2023), https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/.

Page 89. Add the following after the second full paragraph.

The apparent flat bar on delegation of substantive rulemaking authority to private entities was illustrated and reconfirmed by two recent cases involving the Horseracing Integrity and Safety Act of 2020. 15 U.S.C. §§ 3051-60. The Act created the Horseracing Safety and Health Authority -- a "private, independent, self-regulatory, nonprofit corporation" – and authorized it to write rules to protect the health and safety of racehorses and jockeys. The FTC could advise on and "approve" those rules but could not dictate their content. The Fifth Circuit found those unconstitutional because it gave "a private entity the last word" on the content of federal law. National Horsemen's Benevolent & Protective Association v. Black, 53 F.4th 869 (5th Cir. 2022). In response, Congress amended the statute to give the FTC authority to "abrogate, add to, and modify the rules of the Authority." 15 U.S.C. § 3503(e). The Sixth Circuit then upheld the amended statute. Relying in part on the FTC's ability to oversee and reverse the Authority's enforcement decisions (which had existed under the original statute), it emphasized that the FTC now had full power over the underlying substantive rules. The "amended text gives the FTC ultimate discretion over the content of the rules that govern the horseracing industry and the Horseracing Authority's implementation of those rules. . . . That makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one." This arrangement was consistent with the separation of powers. It also ensured accountability:

> Before the amendment, . . . the Authority, a private entity beyond public control, alone was responsible for the exercise of government power in this area. Not so anymore. With its new ability to have "the final word on the substance of the rules," the FTC bears ultimate responsibility. The People may rightly blame or praise the FTC for how adroitly (or, let's hope not, ineptly) it "ensure[s] the fair administration of the Authority" and advances "the purposes of [the] Act." 15 U.S.C. § 3053(e) (as amended).

Page 101. Add the following before section c.

On June 14, 2023, the House of Representatives passed the REINS Act, H.R. 277, by a vote of 221-210. One Democrat (Jared Golden of Maine) voted for the bill; no Republican voted against it; one member of each party did not vote. The bill's chances in the Senate seem, as in years past, negligible.

Page 102, 3rd line after the indented material.

Erratum: substitute "*Seila Law*" for "*Lucia*"

Pages 101-102. Add the following to the paragraph following the indented material.

In October 2022, a panel of the Fifth Circuit held that the CFPB's funding arrangement violates the Appropriations Clause. Frequently invoking the general principle of separation of powers, and placing great stress on Congress's power of the purse as a core constitutional principle, the court found that although Congress had made a *law*, it had not made an *appropriation*:

> The Bureau's perpetual insulation from Congress's appropriations power, including the express exemption from congressional review of its funding, renders the Bureau "no longer dependent and, as a result, no longer accountable" to Congress and, ultimately, to the people. By abandoning its "most complete and effectual" check on "the overgrown prerogatives of the other branches of the government"—indeed, by enabling them in the Bureau's case—Congress ran afoul of the separation of powers embodied in the Appropriations Clause. See The Federalist No. 58 (J. Madison).
>
> The constitutional problem is more acute because of the Bureau's capacious portfolio of authority. "It acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." Seila Law. And the "Director's newfound presidential subservience exacerbates the constitutional problem[] arising from the [Bureau's] budgetary independence." An expansive executive agency insulated (no, double-insulated) from Congress's purse strings, expressly exempt from budgetary review, and headed by a single Director

> removable at the President's pleasure is the epitome of the unification of the purse and the sword in the executive—an abomination the Framers warned "would destroy that division of powers on which political liberty is founded." 2 The Works of Alexander Hamilton 61 (Henry Cabot Lodge ed., 1904). . . .
>
> "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." U.S. Const. art I, § 9, cl. 7 (emphasis added). A law alone does not suffice—an appropriation is required. Otherwise, why not simply travel under the general procedures for enacting legislation provided elsewhere in Article I? The answer is that spending only "in Consequence of Appropriations made by law" is additive to mere enabling legislation; appropriations are required to meet the Framers' salutary aims of separating and checking powers and preserving accountability to the people.

Community Financial Servs. Ass'n of Am. v. CFPB, 51 F.4th 616 (5th Cir. 2022).

The Solicitor General petitioned for certiorari, arguing that the decision was flatly wrong and that, because it "calls into question virtually every action the CFPB has taken in the 12 years since it was created," it "threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector." The petition asked the Court to schedule the case for argument during the 2022-23 term. The Court granted certiorari but did not speed up the ordinary schedule. CFPB v. Consumer Financial Services Ass'n, 143 S. Ct. 978 (2023). The case will be argued in the fall of 2023.

While hardly unheard of, it is unusual for the Court to grant certiorari on an issue that has received such scant attention in the lower courts and as to which there is no circuit split. Its doing so is an indication of the importance of the issue, as stressed in the petition. But not long after the grant, a circuit split arose. In March 2023, a unanimous panel of the Second Circuit held that the CFPB's funding arrangement was constitutional and explicitly considered and rejected the Fifth Circuit's reasoning. A portion of that opinion follows:

> In enacting the CFPA, Congress provided that "[f]unds obtained by, transferred to, or credited to the [CFPB] ... shall remain available until expended[ ] to pay the expenses of the [CFPB] in carrying out its duties and responsibilities." 12 U.S.C. § 5497(c)(1). Congress also limited the amount of funding the CFPB can draw from the Federal Reserve System to – at most – twelve percent of the Federal Reserve System's 2009 Operating Expenses with adjustments for increases in labor costs. Id. § 5497(a)(2)(A)–(B). To receive funding in addition to the twelve-percent limit, the CFPB must seek Congressional appropriations through the annual appropriations process. Id. § 5497(e). Because the CFPB's funding structure was authorized by Congress and bound by specific statutory provisions, we find that the CFPB's funding structure does not offend the Appropriations Clause.
>
> . . . [The Supreme] Court has consistently interpreted the Appropriations Clause to mean simply that "the payment of money from the Treasury must be authorized by a statute." [OPM v.] Richmond, 496 U.S. 414, 424 (1990) (emphasis added). We are not aware of any Supreme Court decision holding (or even suggesting) that the Appropriations Clause requires more than this "straightforward and explicit

command." Richmond, 496 U.S. at 424. Here, Congress expressly appropriated the CFPB's funding by enacting the CFPA, see 124 Stat. at 1955–2113 . . . .

We likewise find no support for the Fifth Circuit's reasoning in the Constitution's text. . . . Nothing in the Constitution . . . requires that agency appropriations be "time limited" or that appropriated funds be drawn from a particular "source." CFSA, 51 F.4th at 639. Certainly, "if the Framers of the Constitution had thought it necessary to" impose these limits, "they would have" done so. Indeed, in the section preceding the Appropriations Clause, the Constitution expressly provides that "no Appropriation of Money" to raise and support an army "shall be for a longer Term than two Years." U.S. Const. art. I, § 8, cl. 12 (emphasis added). By "negative implication," the absence of any restrictions in the Appropriations Clause other than that Congress must authorize government funding in a prior statute "precludes the sort of implicit ... limit[s]" that the Fifth Circuit chose to impose in CFSA.

Nor do we find support for the Fifth Circuit's reasoning in the history of the Appropriations Clause. . . "The design of the Constitution in [the Appropriations Clause] was ... to secure ... that the purpose, the limit, and the fund of every expenditure should be ascertained by a previous law." 7 Alexander Hamilton, The Works of Alexander Hamilton 532 (John C. Hamilton ed. 1851) (hereinafter "Hamilton") (third emphasis added); see also id. ("[N]o money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed").

Here, Congress prescribed the "purpose" (or "object"), "limit," and "fund" of its appropriation for the CFPB in the CFPA. Hamilton, at 532. As to the purpose, Congress specified five "objectives" for the CFPB, including that "(1) consumers are provided with timely and understandable information ... about financial transactions; (2) consumers are protected from unfair, deceptive, or abusive acts ... and from discrimination; (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed ... ; (4) Federal consumer financial law is enforced consistently ... ; and (5) markets for consumer financial products and services operate transparently and efficiently." 12 U.S.C. § 5511(b)(1)–(5). With respect to the fund and limit of the appropriation, Congress directed the Board of Governors to "transfer to the [CFPB] from the combined earnings of the Federal Reserve System [an] amount determined by the [CFPB's] Director to be reasonably necessary to carry out [its] authorities," 12 U.S.C. § 5497(a)(1) (emphasis added), but which amount "shall not exceed [twelve percent] of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors," id. § 5497(a)(2)(A) (emphasis added). Although such funding does not fall under the annual appropriations process typical of most Congressional spending, we cannot conclude that Congress "abdicate[d] [its appropriation] obligation entirely" in establishing the CFPB's funding structure. CFSA, 51 F.4th at 642 (quoting CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 241 (5th Cir. 2022) (Jones, J., concurring)). Consistent with the historical practices of English, colonial, and state governments that formed the basis of the Founders' understanding of the appropriations process at the time

> of the Constitution's enactment, Congress specified "the purpose, the limit, and the fund" of its appropriation for the CFPB in "a previous law," Hamilton, at 532 (emphasis added).

CFPB v. Law Offices of Crystal Moroney, 63 F.4th 174 (2d Cir. 2023).

Page 102. Add at the end of the penultimate paragraph.

After being included for several multiple appropriations measures, the bar on SEC rulemaking disappeared from the FY2022 bill, with both Houses of Congress and the Presidency in Democratic hands. But the next year it was back, notwithstanding Democratic control. See Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, Division E, § 633.

Page 123, last bullet point.

The casebook gives the example of legislation specifically to allow the reappointment of Robert Mueller as head of the FBI even though he was statutorily disqualified. A more recent example occurred in 2021. President Biden's choice for Secretary of Defense, Lloyd Austin, was ineligible for the post because of a statutory prohibition on serving as Secretary of Defense within 7 years of relief from active duty in the armed forces. Congress obligingly passed a law (the very first law of the 117th Congress) making a very narrow exception to allow Austin's appointment.

Page 142. Add the following to Note 4.

The 5th and 9th Circuits have reached conflicting conclusions on this question. See the entry below for page 678.

Page 144. Add the following to the carryover paragraph.

In a recent decision, a D.C. Circuit panel was wholly unmoved by the argument that a statute providing that "the term of each member" of the ACUS Council "is 3 years" implicitly limited the president's removal power. See Severino v. Biden, 71 F.4th 1038 (D.C. Cir. 2023). Relying on a strong presumption of at-will removal, the need for a clear congressional command to the contrary, dicta in *Myers*, and an explicit if ancient Supreme Court precedent, Parsons v. U.S., 167 U.S. 213 (1897), it read "term" to impose a ceiling, not a floor. "A defined term of office, standing alone, does not curtail the President's removal power during the office-holder's service."

Page 167. Replace subsection (f) with the following, as per Executive Order 14094, Modernizing Regulatory Review, 88 Fed. Reg. 21879 (2023).

(f) ''Significant regulatory action'' means any regulatory action that is likely to result in a rule that may:

(1) have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

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

Page 175. Add the following to the last paragraph of Note 2.

As directed by Executive Order 14094, Modernizing Regulatory Review (2023), OIRA is currently working on revisions to Circular A-4. Though not required by law, it has sought public comment on proposed changes. Under the EO, revisions are to be published by April 6, 2024. You can read the comments at https://www.regulations.gov/docket/OMB-2022-0014/comments.

Page 183. Add the following to the second full paragraph.

Senator Portman reintroduced his bill in June of 2021. See The Independent Agency Regulatory Analysis Act, S. 2279 (117th Congress). It died in committee.

Page 185. Add the following to note 23.

The need for attention to distributional impacts was re-emphasized by President Biden's EO on Modernizing Regulatory Review:

> Sec. 3. Improving Regulatory Analysis. (a) Regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with Executive Order 12866, Executive Order 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.
>
> (b) Within 1 year of the date of this order, the Director of the Office of Management and Budget, through the Administrator of OIRA and in consultation with the Chair of the Council of Economic Advisers and representatives of relevant agencies, shall issue revisions to the Office of Management and Budget's Circular

> A-4 of September 17, 2003 (Regulatory Analysis), in order to implement the policy set forth in subsection (a) of this section.

We discuss some of the brass tacks in the update attached to page 189, immediately below.

Page 189. Add the following to Note 4.

OIRA has offered the following general guidance about distributional analysis:

> Circular A-4 currently defines "distributional effect" as "the impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography)."23 As directed by the Modernizing E.O., proposed revisions to Circular A-4 address how agencies can better analyze the distributional effects of regulatory actions under consideration and potential alternatives, as consistent with applicable law. As part of their effort to account for equity in regulatory actions, agencies should consider which populations, including underserved communities, might be affected by regulatory actions, and what barriers those communities face to benefitting from those regulatory actions. As defined in E.O. 14091, equity means "the consistent and systematic treatment of all individuals in a fair, just, and impartial manner, including individuals who belong to communities that have often been denied such treatment."

Memorandum for Regulatory Policy Officers at Executive Departments and Agencies from Richard Revesz, OIRA Administrator, Regarding Implementation of Modernizing Regulatory Review Executive Order at 11 (April 6, 2023).

In April 2023, OIRA released a proposed revised version of Circular A-4, https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf, and solicited public comment, see 88 Fed. Reg. 20915 (2023). The proposal would revise the Circular in a number of important ways, many of which are quite technical. And for now it is only a proposal. But among the most significant changes under consideration are those involving distributional impacts. The current Circular devotes only two paragraphs to distributional effects. The basic admonition is this: "Your regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency." The proposed revision devotes 5 single-spaced pages to distributional effects and would make two key changes.

First, it supplies extensive guidance on the preparation of a "distributional analysis." The purpose is "to estimate the likely effects of the regulation on those in the groups being analyzed. This analysis involves estimation of the benefits, costs, and net benefits expected for each of these groups, if such data are available." OIRA emphasizes the desirability of quantitative rather than qualitative measures in such an analysis. A distributional analysis is not mandatory for every action, but there is a strong indication that it should be performed whenever it "is practical, appropriate, permitted by law, and will produce relevant and useful information in a specific context."

Second, the proposal endorses the idea of "distributional weights" mentioned in the casebook:

> In traditional benefit-cost analysis, the sum of the net benefits across society equals the aggregate net benefits of the regulation. Any approach to estimating aggregate net benefits uses distributional weights. An analysis that sums dollar-denominated net benefits across all individuals to measure aggregate net benefits—as the traditional approach generally does—adopts weights such that a dollar is equal in value for each person, regardless of income (or other economic status).
>
> Agencies may choose to conduct a benefit-cost analysis that applies weights to the benefits and costs accruing to different groups in order to account for the diminishing marginal utility of goods when aggregating those benefits and costs. Diminishing marginal utility means that an additional unit of a good is more valuable to a person if they have less of it than if they have more of it. Weights of this type are most commonly applied in the context of variation in net benefits by income, consumption, or other measures of economic status. If you decide to produce an estimate of net benefits utilizing such weights, you may treat it as your primary estimate of net benefits, or as a supplemental estimate. The same weights should be applied to benefits and costs consistently in each analysis, and the weights that you used in each analysis should be communicated clearly. . . . [Y]ou should also present traditionally-weighted estimates (sometimes, albeit inaccurately, referred to as "unweighted" estimates) when conducting an analysis using weights that account for diminishing marginal utility.

Commenters have divided over this proposal. Compare, e.g., Comment of Mary Sullivan, Visiting Scholar, GW Regulatory Studies Center, https://regulatorystudies.columbian.gwu.edu/-sites/g/files/zaxdzs4751/files/2023-6/pic_msullivan_omb_circular_a4_may2023_final2.pdf (opposed), with Comment of Professor Matthew Adler, Duke Law School, https://www.regulations.gov/comment/OMB-2022-0014-0082 (in favor).

Page 195. Regarding the 1st paragraph after the Klain memorandum.

We must qualify the statement in text that the standard practice of a new administration withdrawing all rules that have been sent to the OFR but not yet published in the Federal Register is "legally uncontroversial." In Humane Society of the U.S. v. Dep't of Agriculture, 41 F.4th 564 (D.C. Cir. 2022), a divided panel held that a final rule is final, so cannot be withdrawn without a new round of notice and comment, when the OFR makes it available for public inspection. (By statute, this occurs prior to publication; in practice, there is usually a lag of a few days.) The court left open the possibility that if the agency posts the final rule to its own website before the OFR makes it publicly available, then that is the moment the rule is final. The dissenting judge endorsed the traditional practice, arguing that the rule is not final until actually published in the Federal Register.

The *Humane Society* case involved a Department of Agriculture rule designed to protect show horses from abuse. The Department published a Notice of Proposed Rulemaking in July of 2016.

With the unusual speed that the last year of an administration can induce, it had a final rule ready to go by January 2017. On January 11, it posted the final rule on its website along with a press release announcing that it had "announced a final rule" that "will be publish[ed] in the Federal Register in the coming days." It then sent the final rule to the OFR, which made it available for public inspection on January 19. It was planning to publish the rule in the January 24 Federal Register. On January 20, immediately after the inauguration of Donald Trump, Chief of Staff Reince Priebus issued the standard "regulatory freeze" memo. On January 23, the Department duly withdrew the rule from publication; it thereafter took no further action on the rulemaking.

The Humane Society challenged the withdrawal. The District Court dismissed the complaint, holding that a rule only becomes final upon publication in the Federal Register. In an opinion by Judge Tatel, joined by Judge Millet, the D.C. Circuit reversed, holding that the "regulatory point of no return" is when OFR makes the rule available for public inspection. In large measure, the court relied on the specifics of the Federal Register Act. Under that Act, making a rule available for public inspection is "sufficient to give notice of the contents" and makes the document valid against a person even without actual knowledge. 44 U.S.C. § 1507. The Federal Register Act also distinguishes between the "promulgation" of a rule and its "publication," indicating that the first can precede the second. suggesting issuance can come before publication. And it is the "day and hour" of public inspection that must be recorded by OFR. Id. § 1503. Judge Tatel also relied on Attorney General opinions concluding that a regulation is valid as soon as it has been made available for public inspection. And, he noted, the government has enforced unpublished rules against individuals who had actual notice, which could only have occurred if the rule had legal effect before publication.

Judge Rao, in dissent, relied on the APA rather than the Federal Register Act. Several provisions of the APA seem to make publication the decisive event. A "person may not in any manner be required to resort to, or adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1). The APA also requires publication at least 30 days before a substantive rule's effective date (subject to certain exceptions). Id. § 553(d). Moreover, publication is understood to be the date that a rule is "final agency action" and the judicial review clock starts running.

The Humane Society contended that the rule was final once the Department of Agriculture had posted it on its own website. The majority declined to address this argument. Does it have merit?

Page 213. Add the following to Note 3.

In 2022 a panel of the Fifth Circuit upheld a Seventh Amendment challenge to an SEC administrative enforcement action. In Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), cert. granted, __ S. Ct. __ (2023), the SEC charged a hedge fund operator and an investment advisor with fraud. An ALJ held an evidentiary hearing and concluded that the defendants had committed fraud. The full Commission reach the same conclusion, ordered Jarkesy to cease and desist and pay a fine, and barred him from various security industry activities. Jarkesy challenged the decision in the Court of Appeals. In a striking ruling, a divided panel held that the SEC decision violated three distinct constitutional protections: the right to a jury trial, the nondelegation doctrine (because the statute contained no intelligible principle instructing the SEC how to choose between

administrative and judicial enforcement), and the president's removal power because of the double for cause protection enjoyed by the ALJ, which is impermissible under *Free Enterprise*.

With regard to the Seventh Amendment issue, the court emphasized that fraud is a classic common-law cause of action and involved harm to private parties. The fact that the government was a party to the action did not mean it involved public rights; the right being vindicated was private. "[I]f the right being vindicated is a private one, it is not enough that the government is doing the suing. That means we must consider whether the form of the action—whether brought by the government or by a private entity—is historically judicial, or if it reflects the sorts of issues which courts of law did not traditionally decide."

The Supreme Court granted cert in *Jarkesy* in June 2023 on the last day it was sitting for the 2022-23 term.

Page 242. Add the following to Note 3.

A recent example of the same judicial move is Bittner v. United States, 143 S. Ct. 713 (2023). The case is not especially notable except for its unusual lineup: a 5-4 decision with an opinion for the Court by Justice Gorsuch joined in full only by Justice Jackson and in part by Roberts, Alito, and Kavanaugh, and a dissent by Justice Barrett joined by Justices Thomas, Sotomayor, and Kagan. Justice Gorsuch invokes *Skidmore* in rejecting the government's reading of a provision of the Bank Secrecy Act. "Doubtless, the government's guidance documents do not control our analysis and cannot displace our independent obligation to interpret the law. But this Court has long said that courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court. Skidmore. Here, the government has repeatedly issued guidance to the public at odds with the interpretation it now asks us to adopt. And surely that counts as one more reason yet to question whether its current position represents the best view of the law." In a footnote, he added: "Our point is not that the administrative guidance is controlling. Nor is it that the government's guidance documents have consistently endorsed Mr. Bittner's reading of the law. It is simply that, when the government (or any litigant) speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing one. This is no new principle in the law any more than it is in life. In *Skidmore*, this Court noted that the persuasiveness of an agency's interpretation of the law may be undermined by its inconsistency 'with earlier [agency] pronouncements.'"

Note that although the Court cites *Skidmore*, it does so, as in *Young*, to justify not deference but its absence.

Page 265. Add the following to Note 1.

As discussed in the opening pages of this Supplement, the Supreme Court has relied on two distinct "major questions doctrines." What the Court did in *King v. Burwell* is quite different from what it did in *West Virginia v. EPA*.

> [T]he major questions doctrine has been understood in two radically different ways—weak and strong—and that the two have radically different implications. The weak version suggests a kind of "carve-out" from *Chevron* deference when a

> major question is involved. Because *Chevron* does not apply, courts are required to resolve the relevant question of law independently, and without deference to agency interpretations.
>
> The strong version, by contrast, operates as a clear statement principle, in the form of a firm barrier to certain agency interpretations. The idea is not merely that courts will decide questions of statutory meaning on their own. It is that such questions will be resolved unfavorably to the agency. When an agency is seeking to assert very broad power, it will lose, because Congress has not clearly granted it that power.
>
> The two versions have different justifications. The weak version is rooted in the prevailing theory behind *Chevron*, which is that Congress has implicitly delegated law-interpreting power to the agency. The weak version qualifies that idea by adding that Congress has not implicitly delegated agencies the power to decide major questions. By contrast, the strong version is rooted in the nondelegation doctrine, which requires Congress to offer an "intelligible principle" by which to limit agency discretion. Drawing from the nondelegation doctrine, the strong version of the major questions doctrine states that if agencies are to exercise certain kinds of power, they must be able to show clear congressional authorization. As then-Judge Brett M. Kavanaugh put it when sitting on the United States Court of Appeals for the District of Columbia Circuit, the strong version of the "doctrine helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority." [U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).]

Cass R. Sunstein, There Are Two "Major Questions" Doctrines, 73 Admin. L. Rev. 475, 477-78 (2021).

All that said, the strong version has the potential to swamp the weak one, and seems to have done so. Recall the opinions in *West Virginia*. *Chevron* is not mentioned by the majority and gets only a passing reference in the dissent. The Court does not say that because the challenged regulation involved a major question the meaning of the statute was for the courts to resolve, as in *King.* Rather, because the regulation involved a major question, the absence of a clear statement dictated the outcome on the merits. Because the strong version of the major questions doctrine resolves the merits, there is no role for the weak version, which goes to the antecedent question of *who* decides, to play.

Page 271. Add the following before the last paragraph.

Without analysis or discussion, but also without objection from any colleagues, Justice Gorsuch followed his own prescription in his opinion for the Court in HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association, 141 S. Ct. 2172 (2021). This was a challenge to EPA's grant of hardship exemptions to certain refineries from requirements regarding renewable fuels. The exemptions were granted during the Trump administration; by the time the Supreme Court heard the case President Biden was in office. Justice Gorsuch set *Chevron* aside, explaining:

> Before the Tenth Circuit, the Agency [relied on a regulation supporting its authority.] Indeed, EPA asked the court of appeals to defer to its understanding under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Although the refineries repeat that ask here, the government does not. With the recent change in administrations, "the government is not invoking *Chevron*." Brief for Federal Respondent 46–47. We therefore decline to consider whether any deference might be due its regulation.

Page 314. Add the following before the last paragraph.

The list of cases in which the Supreme Court might have been expected to cite *Chevron* and did not do so continues to lengthen. One prominent example is *West Virginia v. EPA*, supra p. 5. But there are many more where that came from.

In American Hospital Ass'n v. Becerra, 142 S. Ct. 1896 (2022), the Court unanimously rejected the agency's interpretation of its statute without mentioning *Chevron*, even though the Question Presented by the cert petition cited *Chevron* and the parties' and amicus briefs dwelled on it (many urging the Court to overrule *Chevron* outright). Justice Kavanaugh's opinion concludes: "after employing the traditional tools of statutory interpretation, we do not agree with HHS's interpretation of the statute." The reference to "the traditional tools of statutory interpretation" is practically a quotation of perhaps the most famous phrase from *Chevron*.[2] Arguably, then, this was an implicit cite to *Chevron* and all that was going on is that the Court resolved the case at step one; the agency was just wrong. On the other hand, why not say that? Moreover, "disagreement" seems a softer standard than the traditional understanding of the clarity *Chevron* requires for a court to set aside an agency interpretation in step one.

At bottom, though, it seems a mistake to infer anything substantive about *Chevron* from an opinion that does not mention it other than to note that ignoring *Chevron* has become the Court's standard operating procedure. And when it cites *Chevron* it is either to say it does not apply or to resolve the case in step one, where the fact that it applies does not matter. Indeed, the last time the Supreme Court actually deferred to an agency in step two was in 2016. See Cuozzo Speed Technologies, LLC v. Lee, 579 U.S. 261 (2016).

In May 2023, the Court signaled some interest in overruling or at least restricting *Chevron* when it granted cert in *Loper Bright Enterprises v. Raimondo*, No. 22-451, limited to this question presented: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

Page 382. Add a new note 8.

8. In 2022, prompted by a memorandum from President Biden instructing the Secretary of Homeland Security to "take all actions he deems appropriate, consistent with applicable law, to

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[2] "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."

preserve and fortify DACA," DHS completed a rulemaking encoding DACA in a substantive regulation rather than a policy statement.

The preamble to the final rule states:

> This rule embraces the consistent judgment that has been maintained by the Department—and by three presidential administrations since the policy first was announced—that DACA recipients should not be a priority for removal. It is informed by the Department's experience with the policy over the past 10 years and the ongoing litigation concerning the policy's continued viability. It reflects the reality that DACA supports the Department's efforts to more efficiently allocate enforcement resources, by allowing DHS to focus its limited enforcement resources on higher-priority noncitizens. It also is meant to preserve legitimate reliance interests that have been engendered through the continued implementation of the decade-long policy under which deferred action requests will be considered, while emphasizing that individual grants of deferred action are an act of enforcement discretion to which recipients do not have a substantive right. . . .
>
> DHS recognizes that this rule comes in the wake of prior attempts to wind down and terminate the DACA policy. In rescission memoranda issued, respectively, by then-Secretary Kirstjen Nielsen and then-Acting Secretary Elaine Duke, DHS cited potential litigation risk as one reason that winding down and terminating DACA was warranted. But upon further consideration, it is DHS's view that those prior statements failed fully to account for all the beneficial aspects of the DACA policy for DHS as well as for many other persons and entities, which in DHS's view outweigh the costs. The position taken in the Duke and Nielsen Memoranda placed undue weight on litigation risk, failing to account for all the positive tangible and intangible benefits of the DACA policy, the economic and dignitary gains from that policy, the length of time that DACA opponents waited to challenge the policy, and the risk that rescinding DACA would itself expose DHS to legal challenge—a risk that indeed materialized in the Regents litigation. In short, proper consideration of all pertinent factors on balance establishes that the DACA policy is well worth the agency resources required to implement it and to defend it against subsequent legal challenges.

DHS, Deferred Action for Childhood Arrivals, 87 Fed. Reg. 531152 (2022) (promulgating new 8 CFR §§ 236.21-235.25).

Much of that explanation reads as if it was written with arbitrary-and-capricious review in mind, does it not?

Nine Republican-led states have challenged the rule in federal District Court for the Southern District of Texas as part of the ongoing litigation challenging the policy statement. Texas v. United States, No. 1:18-cv-00068. The states' motion for summary judgment, filed January 31, 2023, argues that the regulation violates the statute, is unconstitutional under the Take Care Clause, and is arbitrary and capricious. See also the Chapter 5 Update tied to casebook page 519.

Page 469. Add the following after note 5.

6. As this Supplement is being prepared, a new battle involving the FTC's rulemaking authority is brewing. Though as yet unresolved, litigation seems certain, and it usefully illustrates the fundamental issues.

As you saw in *National Petroleum Refiners,* § 5 of the FTCA outlaws "unfair methods of competition" (a prohibition that dates to passage of the Act in 1914) and also "unfair or deceptive acts or practices" (a prohibition that was added in 1938). These two provisions are distinct and have given rise to two distinct regulatory projects. The agency organization chart on casebook page 662 illustrates; these roles are assigned, respectively, to the Bureau of Consumer Protection and the Bureau of Competition. (The latter office also has an important role in enforcing provisions of the antitrust laws.) Prior to the octane-posting rulemaking, the FTC exercised both functions through the adjudication of individual enforcement actions. Section 5 itself empowers the Commission to file complaints, hold hearings, and issue cease and desist orders when it finds that someone has engaged in unfair methods of competition or unfair and deceptive acts or practices. To enforce such an order, the FTC originally had to bring an action in the court of appeals. A later amendment provides that such an order is "final" if not appealed or upheld on appeal.

The FTC's shift to rulemaking for consumer protection is described in the casebook and was upheld in *National Petroleum Refiners*. The court relied on § 6(g), which authorizes the Commission "[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act." While many read that provision as authorizing procedural or internal housekeeping rules, the D.C. Circuit read it for all it was worth, strongly influenced by its powerful preference for rulemaking over adjudication, as you can see in the casebook excerpt.

No such shift from adjudication to rulemaking occurred in the antitrust arena, and the FTC has never issued a regulation seeking to define particular practices as "unfair competition." While in the legal academy, current FTC Chair Lina Khan co-authored an article arguing that the FTC should, and can, adopt legislative rules to define unfair methods of competition just as it issues trade regulation rules to define unfair or deceptive practices. Rohit Chopra & Lina M. Khan, The Case for "Unfair Methods of Competition" Rulemaking, 87 U. Chi. L. Rev. 357 (2020). Her policy arguments will sound familiar: Reliance on adjudication "generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process." Khan was confirmed as Chair of the FTC in June 2021. A year and half later, the FTC issued a Notice of Proposed Rulemaking that would prohibit non-compete clauses in employment clauses across the board.

The agency's assertion that it has the authority to issue such a regulation has been controversial. The relevant statutory provisions are set out in *National Petroleum Refiners* (cb p. 466) and Appendix G (see in particular 15 U.S.C. §57a(a)(2), cb p. 929).

The NPRM says little about the FTC's authority to issue such a regulation. The one dissenting commissioner, Christine Wilson, argued that it did not:

> [N]umerous, and meritorious, legal challenges . . . undoubtedly will be launched against the Non-Compete Clause Rule. Defending these challenges will entail

lengthy litigation that will consume substantial staff resources. I anticipate that the Rule will not withstand these challenges, so the Commission majority essentially is directing staff to embark on a demanding and futile effort. In the face of finite and scarce resources, this NPRM is hardly the best use of FTC bandwidth.

There are numerous paths for opponents to challenge the Commission's authority to promulgate the Non-Compete Clause Rule. First, I question whether the FTC Act provides authority for competition rulemaking. The NPRM states that the Commission proposes the Non-Compete Clause Rule pursuant to Sections 5 and 6(g) of the FTC Act. Section 6(g) of the FTC Act authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of the subchapter" where Section 6(g) otherwise provides that the Commission may "from time to time classify corporations." Section 6(g) was believed to provide authority only for the Commission to adopt the Commission's procedural rules. For decades, consistent with the statements in the FTC Act's legislative history, Commission leadership testified before Congress that the Commission lacked substantive competition rulemaking authority.

Ignoring this history, the Commission embarked on a substantive rulemaking binge in the 1960s and 1970s. The vast majority of these substantive rules pertained to consumer protection issues. Only one substantive rule was grounded solely in competition; that rule was not enforced and subsequently was withdrawn. Another substantive rule was grounded in both competition and consumer protection principles, and prompted a federal court challenge. There, the D.C. Circuit in 1973 held in *National Petroleum Refiners* that the FTC did have the power to promulgate substantive rules.

Two years later, however, Congress enacted the Magnuson-Moss Act, which required substantive consumer protection rules to be promulgated with heightened procedural safeguards under a new Section 18 of the FTC Act. Notably, the Magnuson-Moss Act expressly excluded rulemaking for unfair methods of competition from Section 18. FTC Chairman Miles Kirkpatrick (1970-73) explained that it was not clear whether Congress in the Magnuson-Moss Act sought to clarify existing rulemaking authority or to grant substantive rulemaking authority to the FTC for the first time. If the latter, then the FTC only has substantive consumer protection rulemaking power, and lacks the authority to engage in substantive competition rulemaking. This uncertainty about the language of the statute will be a starting point for challenges of the Non-Compete Clause Rule.

Second, the Commission's authority for the Rule likely will be challenged under the major questions doctrine . . . .

Third, the authority for the Non-Compete Clause Rule may be challenged under the non-delegation doctrine. . . .

Federal Trade Commission, Notice of Proposed Rulemaking, Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3543-45 (Jan. 19, 2023) (Dissenting Statement of Commissioner Christine S. Wilson).

The NPRM says little about legal authority, but the Chair, joined by the other two Commissioners, did offer this response in a separate statement:

> The rulemaking authority we are exercising today is firmly rooted in the text and structure of the FTC Act and supported both by judicial precedent interpreting the scope of the law as well as further statutory language from the 1970s.[3] Commissioner Wilson also suggests that the Commission's authority for the NPRM will be challenged under the major questions doctrine, which the Supreme Court recently applied in *West Virginia v. EPA*. Here, however, the FTC is operating under clear statutory authority. Identifying and addressing unfair methods of competition is central to the mandate that Congress gave the Commission in the text of our authorizing statute. Indeed, a greater threat to the "vesting of federal legislative power in Congress" would be for this Commission to repudiate or ignore Congress's clear direction to the Commission to consider rules to address unfair methods of competition.

Who has the better of this argument? Is the major questions doctrine applicable? Here is one possible argument: the MQD goes to agency *jurisdiction*, not *regulatory tools*. There is no question that Congress has given the FTC authority to regulate unfair methods of competition generally. Accordingly, the concerns that motivate the MQD are satisfied, and the question of what tools the agency has should be resolved without a thumb on the scale. Might this argument fare any better than the unsuccessful effort in *Biden v. Nebraska* to carve out funding questions from the MQD?

Almost certainly, the FTC will issue some sort of rule in this proceeding (though it may not be as sweeping as its proposal). There have been press reports that it will make its decision in April 2024. And almost certainly it will be challenged. It is likely to be the most important litigation about agency rulemaking authority in some time. For useful descriptions and analysis, in addition to the Choprah and Khan article cited above, see Thomas W. Merrill, Antitrust Rulemaking: The FTC's Delegation Deficit, 75 Admin. L. Rev. 277 (2023) (concluding that the agency lacks the authority to issue unfair methods of competition rules); Richard J. Pierce, Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?, GWU Law School Public Law Research Paper No. 2021-42 (2021) (concluding that the FTC probably lacks the authority and that even if it did using it would be a strategic error); Blake Emerson, The Progress of FTC Rulemaking, Notice & Comment Blog (March 21, 2023), https://www.yalejreg.com/nc/the-progress-of-ftc-rulemaking-by-blake-emerson/ (supporting the FTC's move toward rulemaking).

[3] The plain text of the FTC Act clearly authorizes the Commission to issue rules. Specifically, Section 6(g) enables the agency to "make rules and regulations for the purpose of carrying out the provisions" of the law. Several other provisions support the conclusion that Section 6(g) confers substantive rulemaking authority. For instance, Section 18 explicitly preserves "any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce." The D.C. Circuit endorsed this plain reading of 6(g) in Petroleum Refiners, 482 F.2d at 698, when it considered and rejected an argument that Section 6(g) only authorized the FTC to promulgate procedural or interpretive rules. Petroleum Refiners is the only case that directly addresses the FTC's Section 6(g) rulemaking authority. This holding—that the FTC may "promulgate rules defining the meaning of the statutory standards of the illegality [the agency was] empowered to prevent," id. at 698—represents the current state of the law.

Page 519. Add the following to Note 1.

The Federal Supplement citation for the 2021 *Texas v. United States* decision enjoining the DACA program is 549 F. Supp.3d 572.

In October 2022, the Fifth Circuit affirmed. 50 F.4th 498 (5th Cir. 2022). In rejecting the argument that DACA was a general statement of policy, the court found that the program conferred extremely significant rights on the beneficiaries. It was true that agents implementing the program did have some discretion and in that sense it was not "binding." But that did not turn DACA into a statement of policy; discretion is a necessary but not sufficient characteristic of a policy statement. "Here, little else suggests that DACA would be a policy statement. DACA created a detailed, streamlined process for granting enormously significant, predefined benefits to over 800,000 people. This constitutes a substantive rule."

On his first day in office, President Biden signed a memorandum instructing the Secretary of Homeland Security to "take all actions he deems appropriate, consistent with applicable law, to preserve and fortify DACA." Thus nudged, in September 2021 DHS issued a proposed rule that essentially tracked the 2012 program. 86 Fed. Reg. 53,736. After received over 16,000 comments and making modest adjustments, DHS promulgated a final rule rule in August 2022. 87 Fed. Reg. 53,152. The notice-and-comment process presumably cures any procedural defect with DACA. Substantive concerns remain, however.

The new regulation was issued before, but was not at issue in, the Fifth Circuit's decision. However, that opinion concluded that the 2012 policy was substantively invalid under the Immigration and Naturalization Act, and its reasoning and conclusion would seem applicable to the 2022 regulation. The Court of Appeals remanded the case to the District Court with instructions to consider issues arising from the new regulation. On October 14, 2022, the District Court issued an order extending its injunction and partial stay to the DACA regulation. (The partial stay allows DHS to continue to recognize, and to renew, previously granted deferrals but prohibits DHS from considering new, initial DACA requests.) On remand, the plaintiffs have moved for summary judgment, arguing that the regulation violates the statute, is unconstitutional under the Take Care Clause, and is arbitrary and capricious.

Page 546. Add the following to Note 3.

A middle approach is found in the statute that authorizes OSHA to promulgate Emergency Temporary Standards that was in play in the *NFIB* case described at supra pages 3-5. Here is the relevant provision:

> **(c) Emergency temporary standards**
>
> (1) The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or

> physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.
>
> (2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.
>
> (3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b), and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

29 U.S.C. §655. The provision explicitly authorizes an interim final rule, issued without notice and comment; that rule also serves as a proposed rule for public comment. (The cross-reference to subsection (b) found in subsection (c)(3) is to the particular provisions for OSHA rulemaking.) In theory, a final final rule then must be issued within six months of the interim final rule. Note, however, that the interim final rule is effective not just for six months but until it is replaced by a final final rule. So there is plenty of room for slippage.

Page 633. Add the following before the final paragraph on this page.

Traditionally, the Attorney General issues a "FOIA Memorandum" early in each presidential administration. These memoranda describe the conditions under which the Justice Department will defend an agency's decision to withhold, and they have varied in tone, emphasis, and to some extent substance from administration to administration. AG Merrick Garland issued such a memorandum in March 2022. See Memorandum for Heads of Executive Departments and Agencies Re. Freedom of Information Act Guidelines (Mar. 15, 2022). The most striking feature of the Garland memorandum is its emphasis on the presumption of openness contained in the 2016 amendments. The memo quotes the statute's foreseeable harm standard and states that "in case of doubt" regarding whether an "agency can identify a foreseeable harm or legal bar to disclosure," "openness should prevail." Further, in an apparent effort to ensure that agencies really do take the foreseeable harm requirement seriously, the memo directs agencies to confirm "that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions" in letters responding to FOIA requesters.

Page 678. Add the following to Note 7.

Two Courts of Appeals have now reached opposite conclusions on this question. In Decker Coal Co. v. Pehringer, 8 F.4th 1123 (9th Cir. 2021), the court upheld the Department of Labor's use of ALJs in adjudicating claims for black lung benefits. It stressed the ALJ's adjudicatory function, the fact that its decision was reviewable by members of the Benefits Review Board (who could be fired by the Secretary of Labor who in turn serves at the president's pleasure), and the long historic pedigree of for-cause protections for ALJs.

In Jarkesy v. SEC, discussed supra p. 44, a divided panel of the Fifth Circuit held that ALJs' double or triple for-cause protection was unconstitutional. Noting that in *Myers* the Supreme Court

"said that 'quasi[-]judicial' executive officers must nonetheless be removable by the President 'on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised,'" the majority concluded that "even if ALJs' functions are more adjudicative than PCAOB members, the fact remains that two layers of insulation impedes the President's power to remove ALJs based on their exercise of the discretion granted to them." Because ALJs are inferior officers, *Lucia*, "they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions." The dissent stressed ALJs' purely adjudicative functions and the fact that ultimate decisionmaking authority lies with the Commission.

The opinions in the two cases are at odds, but the results could conceivably be distinguished on the grounds that (a) the Department of Labor chose, but was not required by statute, to assign cases to ALJs and/or (b) the Department of Labor is an executive agency and the SEC an independent one.

In Fleming v. Department of Agriculture, 987 F.3d 1093 (D.C. Cir. 2021), the D.C. Circuit declined to rule on the double-for-cause issue because the petitioners had not exhausted administrative remedies. Dissenting, Judge Rao would have struck down the dual for-cause protections. "When the two for-cause removal restrictions are combined, neither the President nor the Secretary has any meaningful power to remove ALJs from office," even if the president disagrees with the ALJ's use of executive power. And ALJs are not "categorically different from other Executive Branch officers."

As noted above, the Supreme Court has granted cert in *Jarkesy*.

Page 689. Replace note 2 with the following.

2. The FTC rejected Facebook's 2021 petition. It did so, without addressing the merits, on the ground that no proceeding involving Facebook was pending before the Commission when the petition was filed.

Page 690. Add the following after Note 3.

Federal Trade Commission v. Facebook
581 F. Supp.3d 34 (D.D.C. 2022)

BOASBERG, U.S. District Judge. [This is an action under the Sherman Act alleging that Facebook maintained an illegal monopoly in the market for personal social networking services. The FTC filed its initial complaint in 2020, before Lina Khan became Chair. The Court dismissed the complaint with permission to refile. In August 2021, the agency filed an amended complaint. The vote to bring the suit was 3-2; Chair Khan was in the majority. The Court concluded that this time the complaint was legally sufficient. It then turned to Facebook's assertion that Khan had been required to recuse herself.]

Khan served as counsel to the [House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law] and "led the congressional investigation into digital

markets and the publication of [a] final report." Among the report's conclusions were that Facebook had "monopoly power" in the "social networking market" and had acquired both Instagram and WhatsApp to further that market dominance. Khan's academic and other writing prior to joining the FTC also addressed at length the question of whether certain platforms, including Facebook, are anticompetitive. These include tweets about the initial filing of this case. . . .

The Court . . . notes the unique circumstances in which the FTC operates as an agency that may bring suit, conduct rulemaking, and act as an adjudicator. In selecting a chair for a Commission with these diverse responsibilities — as with choosing the head of any agency — it is natural that the President will select a candidate based on her past experiences and views, including on topics that are likely to come before the Commission during her tenure, and how that administrator will implement the Administration's priorities. Courts must tread carefully when reviewing cases in this area lest we "eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency's future action."

1. *Chair Khan's Role*

Turning to the specific legal arguments, Facebook gets off on the wrong foot by asserting that "[b]inding D.C. Circuit precedent requires an FTC Commissioner's recusal where 'a disinterested observer' would 'conclude that [she] has in some measure adjudged the facts as well as the law of a particular case in advance.'" Motion to Dismiss (quoting Cinderella Career Coll. & Finishing Schs., Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970)). What Defendant fails to note is that both *Cinderella Career Colleges* and a similar out-of-Circuit case, American Cyanamid Co. v. FTC, 363 F.2d 757, 763 (6th Cir. 1966), deal with an agency official adjudicating the merits of a case, not authorizing the filing of one.

In American Cyanamid Co., then-FTC Chair Paul Rand Dixon had conducted work similar to Khan's because he had "played an 'active role' in an investigation by [a Senate] Subcommittee of many of the same facts and issues and of the same parties as are involved in this [FTC] proceeding, and participated in the preparation of the report of the Subcommittee on the same facts, issues and parties." That case — unlike this one — involved "[t]he question of when a *judicial officer* is disqualified to sit in judgment in a particular case," (emphasis added), not whether Dixon could have voted to authorize a suit filed in district court. Similarly, in Cinderella Career Colleges, then-Chair Dixon took part in the Commission's review and reversal of the decision of a hearing examiner. Adjudication has its own unique ethical requirements; as a result, our Circuit has held that "the *Cinderella* standard is not applicable" to non-adjudicatory proceedings, and that courts "must not impose judicial roles upon administrators when they perform functions very different from those of judges." . . .

To be sure, even when not acting as an adjudicator, an FTC Commissioner is not absolved of all ethical constraints. For instance, when a Commissioner is engaged in the rulemaking process, she should be disqualified when "there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." When considering potential prejudgment in the context of a rulemaking, however, courts have not generally objected to statements made "prior to the initiation of agency action" and have recognized that "[a]dministrators, and even judges, may hold policy views on questions of law

prior to participating in a proceeding." Although Khan has expressed views on Facebook's monopoly status and even on this specific case before she joined the FTC, she "remained free, both in theory and in reality, to change h[er] mind upon consideration of" the suit given her new role and other factors. In any event, it is not clear that the same rulemaking standard would necessarily apply to an administrator's vote to authorize the filing of a lawsuit in federal court.

So what role does provide the best analogy for analyzing Chair Khan's actions in voting to file this case? The Court concludes it is that of a prosecutor. . . .

Although Khan has undoubtedly expressed views about Facebook's monopoly power, these views do not suggest the type of "axe to grind" based on personal animosity or financial conflict of interest that has disqualified prosecutors in the past. Here, there is no allegation that Khan has a personal animosity against Facebook beyond her own views about antitrust law, nor does she have a financial conflict of interest. Rather, her situation is more analogous — although not a perfect fit — to one in which an individual has "simultaneous involvement in investigative and prosecutorial aspects of federal enforcement proceedings." This has not been found "to present the kind of conflict of interest" from which prosecutors are barred.

The very caselaw on which Defendant relies makes clear that, "[o]f course, a prosecutor need not be disinterested on the issue [of] whether a prospective defendant has committed the crime with which he is charged.... True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury — not the prosecutor." There is no indication that Chair Khan's decision to seek reinstatement of the FTC's suit against Facebook was based on anything other than her belief in the validity of the allegations. Such behavior does not necessitate recusal.

2. *Other Ethical Issues*

Facebook also contends that Khan's behavior independently violated federal ethics rules — namely, 5 C.F.R. § 2635.501(a), which instructs a federal employee "to avoid an appearance of loss of impartiality in the performance of [her] official duties" by not participating in "a particular matter involving specific parties which [s]he knows is likely to affect the financial interests of a member of h[er] household, or in which [s]he knows a person with whom [s]he has a covered relationship is or represents a party, if [s]he determines that a reasonable person with knowledge of the relevant facts would question [her] impartiality in the matter." Id.; see also 5 C.F.R. § 2635.101(b)(14) ("Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.")

Here, there is no indication that this case would affect "the financial interests of a member of [Khan's] household" or that an individual with whom she has a covered relationship is involved in the case. To the extent that Facebook is making an appearance-of-impropriety argument, the Court believes that its above discussion lays that to rest. Although Khan has worked extensively on matters relating to antitrust and technology, including expressing views about Facebook's market dominance, nothing the company presents suggests that her views on these matters stemmed from impermissible factors. Indeed, she was presumably chosen to lead the FTC in no small part because of her published views. The Court thus concludes that Khan's participating in the FTC's vote did not violate ethical rules; as a result, the Amended Complaint was properly authorized.

Notes

1. As of this writing, the Facebook litigation remains pending before Judge Boasberg—now designated FTC v. Meta Platforms, Inc.--as the parties skirmish over discovery battles.

2. In July 2022 Facebook's successor, Meta Platforms, filed a motion with the FTC seeking the recusal of Chair Khan from the consideration of a proposed merger between Meta and Within Unlimited, a virtual reality studio that markets Supernatural, a leading VR fitness app. The petition distinguished the District Court's decision on the ground that approval of a merger was an adjudication and relied on the Due Process Clause and ethics rules applicable to federal employees generally. The key rule provides: "Unless [she] receives prior authorization, an employee should not participate in a particular matter involving specific parties which [she] knows is likely to affect the financial interests of a member of [her] household, or in which [she] knows a person with whom [she] has a covered relationship is or represents a party, if [she] determines that a reasonable person with knowledge of the relevant facts would question [her] impartiality in the matter." 5 C.F.R. § 2635.501(a).

As described by the FTC:

> The Petition attaches and incorporates the arguments from the July 2021 Petition. It also specifically highlights four pieces of evidence discussed in the July 2021 Petition which allegedly demonstrate Chair Khan's prejudgment of this case: (1) a press release issued by OMI concerning an op-ed that called for the FTC to, among other things, prohibit future acquisitions by Facebook for at least five years, where Chair Khan's name does not appear on either the press release or the related op-ed, (2) a video of Ms. Khan's appearance as OMI's Legal Policy Director on The Bernie Sanders Show in which she stated that she hoped that if Facebook announced it was acquiring another company, the FTC would look at that very closely and block it, (3) a transcript from an October 2020 interview for the New York Times in which Ms. Khan discussed Facebook and emails released by the House Judiciary Committee "from high-level Facebook executives talking about how Facebook's acquisition strategy was basically a land grab to buy up as many assets and kind of lock up the market," and (4) posts on Twitter in which she praised the FTC's federal monopolization complaint against Facebook (discussed above) and similar state enforcer complaints, and, commenting on an article discussing Facebook's alleged "copy-acquire-kill" efforts in the virtual reality space, stated that enforcers should prevent a repeat.

The following month, the FTC's Designated Ethics Official produced a 14-page advisory memorandum concluding that Khan's participation in reviewing the Meta-Within merger "would not constitute a *per se* federal ethics violation." Nonetheless:

> From a federal ethics perspective, I have strong reservations with Chair Khan participating as an adjudicator in this proceeding where — fairly recently, before joining the Commission — she repeatedly called for the FTC to block *any* future acquisition by Facebook. In my view, such statements would raise a question in the mind of a reasonable person about Chair Khan's impartiality as an adjudicator in the Commission's Meta/Within merger review. Accordingly, I recommend Chair Khan recuse to avoid an appearance of partiality concern . . . .

Khan declined to recuse herself. See Internal Statement of Chair Lina M. Khan Regarding Petition for Recusal, https://www.ftc.gov/system/files/ftc_gov/pdf/d09411_khan_statement_re_meta-within_11-18-2022.pdf (Nov. 18, 2022). Pursuant to FTC procedural rules, the petition was then heard by the full Commission without her participation. By a vote of 2-1, over the dissent of Christine Wilson, the Commission denied the petition. In the Matter of Meta Platforms, Inc., 2023 WL 1861224 (FTC Feb. 1, 2023). Khan had made general statements of law and policy, she is presumed to be neutral, she was in a different capacity when relevant statements were made, she made no comment about any pending case, and nothing establishes that her mind was irrevocably closed to new facts or arguments. "So long as the administrator has not adjudged *the particular case* in advance of hearing it—and the case here centers on the question of whether Meta's acquisition of a V/R app developer is anticompetitive—due process does not require administrative adjudicators to be blank slates. Instead, depriving the Commission of Chair Khan's expertise on the intersection of antitrust law and technology would undermine both the interests of the agency as an expert body and the intent of the President who nominated her and the Senate that confirmed her."

3. As of this writing, the FTC has not taken any action on the Amazon recusal petition.

Page 750. Add the following before Note 2.

The Ninth Circuit in *Regents* had stated that the *Chaney* presumption does not apply if "[a]n agency's nonenforcement decision . . . is based *solely* on a belief that the agency lacked the lawful authority to do otherwise." CB page 749 (emphasis added). That implies that if an agency declines to enforce both because of a legal conclusion and as an exercise of prosecutorial discretion that the *Chaney* presumption would apply and the decision be unreviewable (again, depending on the challenger's theory). The D.C. Circuit so held in Citizens for Responsibility and Ethics in Washington v. FEC, 993 F.3d 880 (D.C. Cir. 2021). The FEC had split 2-2 as to whether to pursue an enforcement action for violation of the campaign finance laws. The two commissioners who voted against pursuing the matter stated that (a) the alleged violator was not covered by the statute and (b) "proceeding further would not be an appropriate use of Commission resources." In short, they relied on a legal conclusion and on prosecutorial discretion. The relevant statute allows challenges to FEC nonenforcement decisions that are "contrary to law." In a 2-1 decision, the court concluded that "we lack authority to second guess a dismissal based even in part on enforcement discretion." In dissent, Judge Millett objected that this ruling meant that "a federal agency can immunize its conclusive legal determinations and evidentiary analyses from judicial review simply by tacking a cursory reference to prosecutorial discretion onto the end of a lengthy and substantive merits discussion."

Page 794. Add the following before subsection 6.

Biden v. Nebraska, excerpted above in the material on major questions, was one of two separate challenges to the Biden administration's student debt relief program to reach the Supreme Court. While standing was a matter of serious debate in both cases, the Court found it existed only in

Nebraska. The other suit, *Department of Education v. Brown*, No. 22-535 (June 30, 2023), was brought by two borrowers. One qualified for $10,000 in forgiveness but not for the $20,000 in forgiveness that some others received; the other held a private loan and therefore did not receive any benefit under the program. They argued that the Secretary was required to conduct a negotiated rulemaking followed by notice and comment before adopting this plan. By a vote of 9-0, the Court held the plaintiffs lacked standing.

The obvious injury the plaintiffs might have alleged would be being left out of the program or not getting the maximum benefit under it. That economic harm would be an injury in fact. But the relief they sought was to have the program held unlawful, which would do nothing to redress that injury. The injury they did allege was that had the Secretary gone through the proper procedures he might have ended up adopting a debt relief program under the Higher Education Act, which was the plaintiffs' preference and which they believed would be legal. The alleged injury, then, was the Secretary's not adopting a debt relief plan under the HEA. *This* injury, concluded the Court in an opinion by Justice Alito, could not be traced to the action being challenged.

> The Plan [being challenged] is independent of any student-loan relief the Department might craft under the HEA (or any other statute). A decision by this Court that the Plan is lawful would have no effect on the Department's ability to forgive respondents' loans under the HEA. Thus, the Plan poses no legal obstacle to the Department's choosing to find other ways to remedy the harm respondents experience from not having their loans forgiven.
>
> Put differently, the Department's decision to give *other* people relief under a *different* statutory scheme did not *cause* respondents not to obtain the benefits they want.

Of course, that ruling did not prevent the Court from considering the legality of the plan, because it found that at least one of the plaintiffs in the *Nebraska* case had standing. The relevant portion of the opinion follows.

Biden v. Nebraska
143 S. Ct. 2355 (2023)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

[The background of this case is set out at page 22, *supra*.]

. . . . If at least one plaintiff has standing, the suit may proceed. Because we conclude that the Secretary's plan harms [the Missouri Higher Education Loan Authority] MOHELA and thereby directly injures Missouri—conferring standing on that State—we need not consider the other theories of standing raised by the States.

Missouri created MOHELA as a nonprofit government corporation to participate in the student loan market. The Authority owns over $1 billion in [Federal Family Education Loans, or FFELs—loans made by private lenders and guaranteed by the Federal Government]. It also services nearly $150 billion worth of federal loans, having been hired by the Department of Education to collect

payments and provide customer service to borrowers. MOHELA receives an administrative fee for each of the five million federal accounts it services, totaling $88.9 million in revenue last year alone.

Under the Secretary's plan, roughly half of all federal borrowers would have their loans completely discharged. MOHELA could no longer service those closed accounts, costing it, by Missouri's estimate, $44 million a year in fees that it otherwise would have earned under its contract with the Department of Education. This financial harm is an injury in fact directly traceable to the Secretary's plan, as both the Government and the dissent concede.

The plan's harm to MOHELA is also a harm to Missouri. MOHELA is a "public instrumentality" of the State. Mo. Rev. Stat. § 173.360. Missouri established the Authority to perform the "essential public function" of helping Missourians access student loans needed to pay for college. Ibid. To fulfill this public purpose, the Authority is empowered by the State to invest in or finance student loans, including by issuing bonds. It may also service loans and collect "reasonable fees" for doing so. Its profits help fund education in Missouri: MOHELA has provided $230 million for development projects at Missouri colleges and universities and almost $300 million in grants and scholarships for Missouri students.

The Authority is subject to the State's supervision and control. Its board consists of two state officials and five members appointed by the Governor and approved by the Senate. The Governor can remove any board member for cause. MOHELA must provide annual financial reports to the Missouri Department of Education, detailing its income, expenditures, and assets. The Authority is therefore "directly answerable" to the State. Casualty Reciprocal Exchange v. Missouri Employers Mut. Ins. Co., 956 S.W.2d 249, 254 (Mo. 1997). The State "set[s] the terms of its existence," and only the State "can abolish [MOHELA] and set the terms of its dissolution." Id., at 254–255.

By law and function, MOHELA is an instrumentality of Missouri: It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State. The Secretary's plan will cut MOHELA's revenues, impairing its efforts to aid Missouri college students. This acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself. . . .

The Secretary and the dissent assert that MOHELA's injuries should not count as Missouri's because MOHELA, as a public corporation, has a legal personality separate from the State. Every government corporation has such a distinct personality; it is a corporation, after all, "with the powers to hold and sell property and to sue and be sued." Yet such an instrumentality—created and operated to fulfill a public function—nonetheless remains "(for many purposes at least) part of the Government itself." Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 397 (1995).

In *Lebron*, Amtrak was sued for refusing to display a political advertisement on a billboard at one of its stations. Amtrak argued that it was not subject to the First Amendment because it was a corporation separate from the Federal Government. Congress had even specified in its authorizing statute that Amtrak was not "an agency or establishment of the United States Government." Despite this disclaimer, we held that Amtrak remained subject to the First Amendment because it functioned as an instrumentality of the Federal Government, "created by a special statute,

explicitly for the furtherance of federal governmental goals" of ensuring that the American public had access to passenger trains. Its board was appointed by the President, and it had to submit annual reports to the President and Congress. Having been "established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees," Amtrak could not disclaim that it was "part of the Government." . . .

That principle holds true here. The Secretary and the dissent contend that because MOHELA can sue on its own behalf, it—not Missouri—must be the one to sue. But . . . [w]here a State has been harmed in carrying out its responsibilities, the fact that it chose to exercise its authority through a public corporation it created and controls does not bar the State from suing to remedy that harm itself.

The Secretary's plan harms MOHELA in the performance of its public function and so directly harms the State that created and controls MOHELA. Missouri thus has suffered an injury in fact sufficient to give it standing to challenge the Secretary's plan. . . .

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

. . . . The plaintiffs here are six States: Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina. They oppose the Secretary's loan cancellation plan on varied policy and legal grounds. But as everyone agrees, those objections are just general grievances; they do not show the particularized injury needed to bring suit. And the States have no straightforward way of making that showing—of explaining how they are harmed by a plan that reduces individual borrowers' federal student-loan debt. So the States have thrown no fewer than four different theories of injury against the wall, hoping that a court anxious to get to the merits will say that one of them sticks. The most that can be said of the theory the majority selects, proffered solely by Missouri, is that it is less risible than the others. It still contravenes a bedrock principle of standing law—that a plaintiff cannot ride on someone else's injury. . . .

A

. . . . Financial harm is a classic injury in fact. MOHELA plausibly alleges that it will suffer that harm as a result of the Secretary's plan. So MOHELA can sue the Secretary, as the Government readily concedes. But not even Missouri, and not even the majority, claims that MOHELA's revenue loss gets passed through to the State. As further discussed below, MOHELA is financially independent from Missouri—as corporations typically are, the better to insulate their creators from financial loss. So MOHELA's revenue decline—the injury in fact claimed to justify this suit—is not in fact Missouri's. The State's treasury will not be out one penny because of the Secretary's plan. The revenue loss allegedly grounding this case is MOHELA's alone.

Which leads to an obvious question: Where's MOHELA? The answer is: As far from this suit as it can manage. MOHELA could have brought this suit. It possesses the power under Missouri law to "sue and be sued" in its own name. But MOHELA is not a party here. Nor is it an amicus. Nor is it even a rooting bystander. MOHELA was "not involved with the decision of the Missouri Attorney General's Office" to file this suit. And MOHELA did not cooperate with the Attorney General's efforts. When the AG wanted documents relating to MOHELA's loan-servicing

contract, to aid him in putting forward the State's standing theory, he had to file formal "sunshine law" demands on the entity. MOHELA had no interest in assisting voluntarily.

If all that makes you suspect that MOHELA is distinct from the State, you would be right. And that is so as a matter of law and financing alike. Yes, MOHELA is a creature of state statute, a public instrumentality established to serve a public function. But the law sets up MOHELA as a corporation—a so-called "body corporate"—with a "[s]eparate legal personality." . . . MOHELA, for example, has the power to contract with other entities, which is how it entered into a loan-servicing contract with the Department of Education. MOHELA's assets, including the fees gained from that contract, are not "part of the revenue of the [S]tate" and cannot be "used for the payment of debt incurred by the [S]tate." On the other side of the ledger, MOHELA's debts are MOHELA's alone; Missouri cannot be liable for them. And as noted earlier, MOHELA has the power to "sue and be sued" independent of Missouri, so it can both "prosecute and defend" all its varied interests. Indeed, before this case, Missouri had never tried to appear in court on MOHELA's behalf. That is no surprise. In the statutory scheme, independence is everywhere: State law created MOHELA, but in so doing set it apart. . . .

Under our usual standing rules, that separation would matter—indeed, would decide this case. A plaintiff, this Court has held time and again, cannot rest its claim to judicial relief on the "legal rights and interests" of third parties. And MOHELA qualifies as such a party, for all the reasons just given. . . .

And those normal rules are more than just rules: They are, as this case shows, guarantors of our constitutional order. The requirement that the proper party—the party actually affected—challenge an action ensures that courts do not overstep their proper bounds. See Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408–409 (2013) ("Relaxation of standing [rules] is directly related to the expansion of judicial power"). Without that requirement, courts become "forums for the ventilation of public grievances"—for settlement of ideological and political disputes. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982). The kind of forum this Court has become today. Is there a person in America who thinks Missouri is here because it is worried about MOHELA's loss of loan-servicing fees? I would like to meet him. Missouri is here because it thinks the Secretary's loan cancellation plan makes for terrible, inequitable, wasteful policy. And so too for Arkansas, Iowa, Kansas, Nebraska, and South Carolina. And maybe all of them are right. But that question is not what this Court sits to decide. . . .

B

The majority does not over-expend itself in defending that action.. . .

Lebron is . . . [far] afield. The issue there was whether Amtrak, a public corporation similar to MOHELA, had to comply with the First Amendment. The Court held that it did, labeling Amtrak a state actor for that purpose. On the opposite view, we reasoned, a government could "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." But that did not mean Amtrak was equivalent to the Government for all purposes. Over and over, we cabined our holding that Amtrak was a state actor by adding a phrase like "for purposes of the First Amendment" or other constitutional rights. But for other purposes, a different rule might, or would, obtain. . . . So what *Lebron* tells us about MOHELA is that it must comply with the

Constitution. *Lebron* offers no support (more like the opposite) for the different view that MOHELA and Missouri are interchangeable parties in litigation.

Remaining is the majority's unsupported—and insupportable—idea that the Secretary's plan "necessarily" hurts Missouri because it "impair[s]" MOHELA's "efforts to aid [the State's] college students." To begin with, it seems unlikely that the reduction in MOHELA's revenues resulting from the discharge would make it harder for students to "access student loans," as the majority contends. MOHELA is not a lender; it services loans others have made. Which is probably why even Missouri has never tried to show that the Secretary's plan will so detrimentally affect the State's borrowers. In any event—and more important—such a harm to citizens cannot provide an escape hatch out of MOHELA's legal and financial independence. That is because of another canonical limit on a State's ability to ride on third parties: A State may never sue the Federal Government based on its citizens' rights and interests. So Missouri cannot get standing by asserting that a harm to MOHELA will harm the State's citizens. . . .

The author of today's opinion once wrote that a 1970s-era standing decision "became emblematic" of "how utterly manipulable" this Court's standing law is "if not taken seriously as a matter of judicial self-restraint." *Massachusetts* [*v. EPA*] (ROBERTS, C. J., dissenting). After today, no one will have to go back 50 years for the classic case of the Court manipulating standing doctrine, rather than obeying the edict to stay in its lane. The majority and I differ, as I'll soon address, on whether the Executive Branch exceeded its authority in issuing the loan cancellation plan. But assuming the Executive Branch did so, that does not license this Court to exceed its own role. Courts must still "function as courts," this one no less than others. *Ibid*. And in our system, that means refusing to decide cases that are not really cases because the plaintiffs have not suffered concrete injuries. The Court ignores that principle in allowing Missouri to piggy-back on the "legal rights and interests" of an independent entity. If MOHELA wanted to, it could have brought this suit. It declined to do so. Under the non-manipulable, serious version of standing law, that would have been the end of the matter—regardless how much Missouri, or this Court, objects to the Secretary's plan.

Notes and Questions

1. The question of state standing to challenge federal regulations and policies has become increasingly salient in recent years as such lawsuits proliferate. When he was Texas Attorney General, now-Governor Greg Abbot famously described his job this way: "I go to the office. I sue the federal government. Then I go home." We have already seen such suits, including U.S. v. Texas (DACA) and Massachusetts v. EPA (EPA authority to regulate greenhouse gasses). Examples just from the Court's most recent Term include, in addition to *Biden v. Nebraska*, the next entry in this supplement, United States v. Texas, 143 S. Ct. 1964 (2023) (Texas and Louisiana lack standing to challenge Department of Homeland Security deportation enforcement policies) and Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (Texas lacks standing to pursue equal protection challenge adoption preference policies under the Indian Child Welfare Act).

Professor Ernest Young provides a useful overview:

> The general issue divides naturally into three distinct questions. First, when will states have standing to sue the national government under "ordinary" principles of standing law—that is, without any thumb on the scale, one way or the other, arising

> from their status as state governments? . . . [E]ven under ordinary standing principles, the responsibilities and prerogatives of state governments give them a broad range of interests that may be invaded or harmed by national action. In particular, the structure of modern cooperative federalism regimes—in which state governments typically work hand in glove with federal officials administering statutes like Medicaid or the Clean Air Act—mean that changes in federal policy will almost always meaningfully affect state interests. And even where federal regulation is not formally cooperative—as in immigration policy—the role of the states in policing and ensuring the well-being of persons within their jurisdictions will often cause federal policy changes to significantly impact states' responsibilities. States are thus likely to enjoy broad standing even under ordinary Article III analysis.
>
> The second question is whether states should have special disadvantages, unique to them, when they seek to establish standing to sue. . . . The best case for such disabilities rests on the notion that state litigation is inherently political and, therefore, should be nonjusticiable. But the political question doctrine has generally turned on the nature of the substantive claims being advanced, not the identity of the parties. And in any event, state litigation must be compared to its alternatives, not evaluated in a vacuum. I argue that hot-button political issues will be litigated by private organizations, class actions, and other mechanisms if not by states, and that states may compare favorably to private suits in important respects. The other alternative is to resolve these high-profile disputes outside the courts through political remedies. But recent experience suggests that such remedies—which include government shutdowns, refusals to confirm executive appointments, and even impeachment—are not necessarily preferable to litigation. In our polarized contemporary circumstances, it is time to reexamine our customary aversion to settling political questions in courts of law, as long as those questions are in fact governed by positive law.
>
> The last question points in the opposite direction: Should states have special advantages in establishing standing? . . . [S]tate-based litigation provides a means of aggregating the interests of large numbers of individual persons and as such should be viewed as a potential alternative to class actions, multidistrict litigation, or broad organizational standing for nongovernmental entities like the Sierra Club. Viewed in this framework, state litigation has much to recommend it. Like any legal mechanism, state litigation can be—and perhaps has been—abused in particular cases. But the institutional and political checks and balances built into state litigation give reason to hope that it can be a positive component of our constitutional structure.

Ernest A. Young, State Standing and Cooperative Federalism, 94 Notre Dame Law Review 1893 (2019) (abstract).

2. Setting MOHELA aside, think for a moment about whether the state plaintiffs in *Biden v. Nebraska* had standing themselves. The Court does not tell us; Justice Kagan plainly thinks they did not ("risible"). The Court of Appeals had, like the Supreme Court, relied on the harm to

MOHELA; the District Court had held there was no standing. Thus no judge has concluded that the state plaintiffs did have standing. Can you think of a plausible theory? Here is an excerpt from the Respondents' brief:

> Nebraska, Iowa, Kansas, and South Carolina have standing because they will suffer a "direct injury in the form of a loss of specific tax revenues." Those States use federal adjusted gross income (AGI) to calculate state taxable income. Normally, federal AGI includes student-loan discharge. But the American Rescue Plan Act of 2021 (ARPA) temporarily excludes those discharges from federal AGI until January 1, 2026. The Program harms the States by immediately causing $430 billion in non-taxable loan discharges that will reduce the amount of future discharges for the States to tax.

Convincing? Are there other possible theories?

3. One might think the states could sue because they have citizens who are injured. That theory will not fly. First, one would need to identify a relevant injury in fact within the citizenry. *Cf. Department of Education v. Brown*. Second, as Justice Kagan correctly points out, it is longstanding rule that states cannot sue the federal government on behalf of their citizens. States can and do sue private parties, or other states, as *parens patriae*. But the Supreme Court has long held that when it comes to challenges to *federal* programs, the courthouse doors are closed. The standard cite is Massachusetts v. Mellon, 262 US 447 (1923) (9-0).

> It cannot be conceded that a State, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

4. How exactly is Missouri injured?

5. It is important to understand that *Biden v. Nebraska* did not involve "third party" or *jus tertii* standing. See casebook p. 765. The prudential bar on such suits is not about injury in fact; rather, the principle is that a plaintiff who has suffered an injury still cannot sue if relying on, or seeking to vindicate, someone else's legal rights. Classic examples involve doctors suing to challenge restrictions on birth control or abortion. The plaintiff doctor has suffered an injury (loss of business at a minimum, arguably also interference with the ability to practice medicine as the doctor sees fit). But the theory of the lawsuit is that the *patient's* legal rights have been violated. Courts have held that these cases can proceed, but because they fall within an exception to the bar on third-party standing, not because they are not an instance of third-party standing. In *Biden v. Nebraska*, in contrast, the fundamental issue was whether any state has suffered a cognizable injury. For the majority, injury to MOHELA *was* injury to Missouri.

5. For several generations, as illustrated by virtually all the cases in the casebook, there has been a pronounced ideological split with regard to standing: liberals are generally in favor of letting

lawsuits go forward, conservatives generally articulate stricter standing rules. That gets flipped in *Nebraska*. Rhetorically, Justice Kagan sounds an awful lot like any number of conservative opinions stressing the limited role of the judiciary, the necessity to defer to the political branches, and the necessity of respecting standing limitations as a central feature, and protector, of the separation of powers. What happened?

Page 798. Add the following before subsection 7.

d. Associational Standing

On page 776, the casebook describes the famous case of *Sierra Club v. Morton*, holding that the Sierra Club lacked standing to challenge federal approval of a ski area in a national forest. Yet the Sierra Club and similar organizations bring lawsuits of that sort all the time. *Lujan* (cb p. 777) is an example; how did Defenders of Wildlife get into court (at least initially) when it was not injured by the action complained of any more than the Sierra Club was?

The answer is implicit in the focus on the individual affidavits in *Lujan*. The wretched, plane-ticketless individuals were not parties to the lawsuit; they were members of Defenders of Wildlife, which (along with two other environmental organizations) was the plaintiff. The foundational decision establishing such "associational standing" (sometimes "organizational standing" or "representational standing") is Hunt v. Washington State Apple Advertising Comm'n, 432 U. S. 333 (1977). There, the Court allowed a state agency created to advance the interests of apple growers to sue because (a) the members would have had standing to sue in their own right, (b) the interest it sought to protect was germane to the Commission's purpose, and (c) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." In practice, the fights are almost always about the first of these three requirements, as was the case in *Lujan.* The second just does not arise; membership organizations do not bring non-germane lawsuits. And the third will rarely matter if the relief sought is injunctive (as it necessarily is in all APA suits), which obviates the need for any individualized determination of damages.

Associational standing is not especially controversial. Should it be? If Article III really requires that *the plaintiff* have suffered an injury in fact, so the Sierra Club cannot challenge a project destroying a pristine forest, how is the defect cured because it has members who are injured? Any relief my benefit the member, but it is awarded to the organization and it is the organization that can enforce it. That formal argument may be overwhelmed by practical consideration that the individual member could just sue on her own behalf, though the suit is initiated, directed, and lawyered by the organization.

Some worry that the tool might get out of hand. The Association of American Retired Persons (AARP) has 38 million members and its stated mission is "empower people to choose how they live as they age." What lawsuit could it not bring?

The Supreme Court has never seriously revisited *Hunt*, which is now almost half a century old. However, it did discuss a challenge to associational standing in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 143 S. Ct. 2141 (2023), which set aside affirmative action programs at Harvard and the University of North Carolina:

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." . . .

UNC argues that SFFA lacks standing to bring its claims because it is not a "genuine" membership organization. . . .

Respondents do not contest that SFFA satisfies the three-part test for organizational standing articulated in *Hunt*, and like the courts below, we find no basis in the record to conclude otherwise. Respondents instead argue that SFFA was not a "genuine 'membership organization'" when it filed suit, and thus that it could not invoke the doctrine of organizational standing in the first place. According to respondents, our decision in *Hunt* established that groups qualify as genuine membership organizations only if they are controlled and funded by their members. And because SFFA's members did neither at the time this litigation commenced, respondents' argument goes, SFFA could not represent its members for purposes of Article III standing.

Hunt involved the Washington State Apple Advertising Commission, a state agency whose purpose was to protect the local apple industry. The Commission brought suit challenging a North Carolina statute that imposed a labeling requirement on containers of apples sold in that State. The Commission argued that it had standing to challenge the requirement on behalf of Washington's apple industry. We recognized, however, that as a state agency, "the Commission [wa]s not a traditional voluntary membership organization ..., for it ha[d] no members at all." As a result, we could not easily apply the three-part test for organizational standing, which asks whether an organization's members have standing. We nevertheless concluded that the Commission had standing because the apple growers and dealers it represented were effectively members of the Commission. The growers and dealers "alone elect[ed] the members of the Commission," "alone ... serve[d] on the Commission," and "alone finance[d] its activities"—they possessed, in other words, "all of the indicia of membership." The Commission was therefore a genuine membership organization in substance, if not in form. . . .

Here, SFFA is indisputably a voluntary membership organization with identifiable members—it is not, as in *Hunt*, a state agency that concededly has no members. As the First Circuit in the Harvard litigation observed, at the time SFFA filed suit, it was "a validly incorporated 501(c)(3) nonprofit with forty-seven members who joined voluntarily to support its mission." Meanwhile in the UNC litigation, SFFA represented four members in particular—high school graduates who were denied admission to UNC. Those members filed declarations with the District Court stating "that they have voluntarily joined SFFA; they support its mission; they receive updates about the status of the case from SFFA's President; and they have had the opportunity to have input and direction on SFFA's case." Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization

operates. Because SFFA complies with the standing requirements demanded of organizational plaintiffs in Hunt, its obligations under Article III are satisfied.

Page 810. Add the following before subsection 8.

United States v. Texas
143 S. Ct. 1964 (2023)

Justice KAVANAUGH delivered the opinion of the Court.

. . . .

In 2021, Secretary of Homeland Security Mayorkas promulgated new "Guidelines for the Enforcement of Civil Immigration Law." The Guidelines prioritize the arrest and removal from the United States of noncitizens who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently, for example.

Texas and Louisiana sued the Department of Homeland Security, as well as other federal officials and agencies. According to those States, the Guidelines contravene two federal statutes that purportedly require the Department to arrest more criminal noncitizens pending their removal. First, the States contend that for certain noncitizens, such as those who are removable due to a state criminal conviction, § 1226(c) of Title 8 says that the Department "shall" arrest those noncitizens and take them into custody when they are released from state prison. Second, **§** 1231(a)(2), as the States see it, provides that the Department "shall" arrest and detain certain noncitizens for 90 days after entry of a final order of removal.

In the States' view, the Department's failure to comply with those statutory mandates imposes costs on the States. The States assert, for example, that they must continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government.

According to Texas and Louisiana, the arrest policy spelled out in the Department of Homeland Security's 2021 Guidelines does not comply with the statutory arrest mandates in § 1226(c) and § 1231(a)(2). The States want the Federal Judiciary to order the Department to alter its arrest policy so that the Department arrests *more* noncitizens.

The threshold question is whether the States have standing under Article III to maintain this suit. The answer is no.

To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. The District Court found that the States would incur additional costs because the Federal Government is not arresting more noncitizens. Monetary costs are of course an injury. But this Court has "also stressed that the alleged injury must be legally and judicially cognizable." That "requires, among other things," that the "dispute is traditionally thought to be capable of resolution through the judicial process"—in other words, that the asserted injury is traditionally redressable in federal court. In adhering to that core principle, the Court has examined

"history and tradition," among other things, as "a meaningful guide to the types of cases that Article III empowers federal courts to consider."

The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions. On the contrary, this Court has previously ruled that a plaintiff lacks standing to bring such a suit.

The leading precedent is *Linda R. S. v. Richard D.*, 410 U. S. 614 (1973). The plaintiff in that case contested a State's policy of declining to prosecute certain child-support violations. This Court decided that the plaintiff lacked standing to challenge the State's policy, reasoning that in "American jurisprudence at least," a party "lacks a judicially cognizable interest in the prosecution ... of another." The Court concluded that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."

The Court's Article III holding in *Linda R. S.* applies to challenges to the Executive Branch's exercise of enforcement discretion over whether to arrest or prosecute. And importantly, that Article III standing principle remains the law today; the States have pointed to no case or historical practice holding otherwise.

In short, this Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court.

Several good reasons explain why, as *Linda R. S.* held, federal courts have not traditionally entertained lawsuits of this kind.

To begin with, when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property, and thus does not infringe upon interests that courts often are called upon to protect. See *Lujan*. And for standing purposes, the absence of coercive power over the plaintiff makes a difference: When "a plaintiff 's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" to establish standing.

Moreover, lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law. Article II of the Constitution assigns the "executive Power" to the President and provides that the President "shall take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 1, cl. 1; § 3. Under Article II, the Executive Branch possesses authority to decide "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." . . .

In addition to the Article II problems raised by judicial review of the Executive Branch's arrest and prosecution policies, courts generally lack meaningful standards for assessing the propriety of enforcement choices in this area. After all, the Executive Branch must prioritize its enforcement efforts. That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.

This case illustrates the point. As the District Court found, the Executive Branch does not possess the resources necessary to arrest or remove all of the noncitizens covered by § 1226(c) and § 1231(a)(2). That reality is not an anomaly—it is a constant. For the last 27 years since § 1226(c) and § 1231(a)(2) were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests.

In light of inevitable resource constraints and regularly changing public-safety and public-welfare needs, the Executive Branch must balance many factors when devising arrest and prosecution policies. That complicated balancing process in turn leaves courts without meaningful standards for assessing those policies. Cf. *Heckler v. Chaney*. Therefore, in both Article III cases and Administrative Procedure Act cases, this Court has consistently recognized that federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests or bring more prosecutions.

All of those considerations help explain why federal courts have not traditionally entertained lawsuits of this kind. By concluding that Texas and Louisiana lack standing here, we abide by and reinforce the proper role of the Federal Judiciary under Article III. The States' novel standing argument, if accepted, would entail expansive judicial direction of the Department's arrest policies. If the Court green-lighted this suit, we could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws—whether they be drug laws, gun laws, obstruction of justice laws, or the like. We decline to start the Federal Judiciary down that uncharted path. Our constitutional system of separation of powers "contemplates a more restricted role for Article III courts."

C

In holding that Texas and Louisiana lack standing, we do not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions.

First, the Court has adjudicated selective-prosecution claims under the Equal Protection Clause.. . .

Second, as the Solicitor General points out, the standing analysis might differ when Congress elevates *de facto* injuries to the status of legally cognizable injuries redressable by a federal court. For example, Congress might (i) specifically authorize suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement and (ii) specifically authorize the Judiciary to enter appropriate orders requiring additional arrests or prosecutions by the Executive Branch. . . .

Third, the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions. Under the Administrative Procedure Act, a plaintiff arguably could obtain review of agency non-enforcement if an agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler;* cf. 5 U.S.C. § 706(1). So too, an extreme case of non-enforcement arguably could exceed the bounds of enforcement discretion and support Article III standing.. . .

Fourth, a challenge to an Executive Branch policy that involves both the Executive Branch's arrest or prosecution priorities *and* the Executive Branch's provision of legal benefits or legal status could lead to a different standing analysis. That is because the challenged policy might implicate more than simply the Executive's traditional enforcement discretion. Cf. *Department of Homeland Security* v. *Regents of Univ. of Cal.* (benefits such as work authorization and Medicare eligibility accompanied by non-enforcement meant that the policy was "more than simply a non-enforcement policy"); Texas *v. United States*, 809 F.3d 134, 154 (CA5 2015) (*Linda R. S.* "concerned only nonprosecution," which is distinct from "both nonprosecution and the conferral of benefits"), aff'd by an equally divided Court, 579 U.S. 547 (2016). . . .

Fifth, policies governing the continued detention of noncitizens who have already been arrested arguably might raise a different standing question than arrest or prosecution policies. . . .

[This case involves none of these five situations.]

To be clear, our Article III decision today should in no way be read to suggest or imply that the Executive possesses some freestanding or general constitutional authority to disregard statutes requiring or prohibiting executive action. Moreover, the Federal Judiciary of course routinely and appropriately decides justiciable cases involving statutory requirements or prohibitions on the Executive.

This case is categorically different, however, because it implicates only one discrete aspect of the executive power—namely, the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law. And this case raises only the narrow Article III standing question of whether the Federal Judiciary may in effect order the Executive Branch to take enforcement actions against violators of federal law—here, by making more arrests. Under this Court's Article III precedents and the historical practice, the answer is no.

It bears emphasis that the question of whether the federal courts have jurisdiction under Article III is distinct from the question of whether the Executive Branch is complying with the relevant statutes—here, § 1226(c) and § 1231(a)(2). In other words, the question of reviewability is different from the question of legality. We take no position on whether the Executive Branch here is complying with its legal obligations under § 1226(c) and § 1231(a)(2). We hold only that the federal courts are not the proper forum to resolve this dispute. . . .

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

The Court holds that Texas and Louisiana lack Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law. I agree. But respectfully, I diagnose the jurisdictional defect differently. The problem here is redressability.

[Justice Gorsuch expresses several "doubts" about the Court's argument that the plaintiffs lacked a "cognizable" injury. Among them are majority's observation] that, "when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property." . . . But if an exercise of coercive power matters so much to the Article III standing inquiry, how to explain decisions like *Massachusetts v. EPA*? There the Court held that Massachusetts had standing to challenge the federal government's decision not to regulate greenhouse gas emissions from new motor vehicles. And what could be less coercive than a

decision not to regulate? In *Massachusetts v. EPA*, the Court chose to overlook this difficulty in part because it thought the State's claim of standing deserved "special solicitude." I have doubts about that move. Before *Massachusetts v. EPA*, the notion that States enjoy relaxed standing rules "ha[d] no basis in our jurisprudence." Nor has "special solicitude" played a meaningful role in this Court's decisions in the years since. Even so, it's hard not to wonder why the Court says nothing about "special solicitude" in this case. And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones. . . .

As I see it, the jurisdictional problem the States face in this case isn't the lack of a "judicially cognizable" interest or injury. The States proved that the Guidelines increase the number of aliens with criminal convictions and final orders of removal released into the States. They also proved that, as a result, they spend more money on everything from law enforcement to healthcare. The problem the States face concerns something else altogether—a lack of redressability.

To establish redressability, a plaintiff must show from the outset of its suit that its injuries are capable of being remedied "'by a favorable decision.'" Ordinarily, to remedy harms like those the States demonstrated in this suit, they would seek an injunction. The injunction would direct federal officials to detain aliens consistent with what the States say the immigration laws demand. But even assuming an injunction like that would redress the States' injuries, that form of relief is not available to them.

It is not available because of 8 U.S.C. § 1252(f)(1). There, Congress provided that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" certain immigration laws, including the very laws the States seek to have enforced in this case. If there were any doubt about how to construe this command, we resolved it in *Garland* v. *Aleman Gonzalez*, 142 S. Ct. 2057 (2022). In that case, we held that § 1252(f)(1) "prohibits lower courts from ... order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." Put simply, the remedy that would ordinarily have the best chance of redressing the States' harms is a forbidden one in this case.

[In a final Part of the concurrence, Justice Gorsuch considers whether, as the government had urged, a federal district court has authority under the APA to vacate agency action. The discussion is ultimately inconclusive, but the strong impression is that Justice Gorsuch does not think district courts have the power to issue nationwide injunctions setting aside agency action.]

[A concurring opinion by Justice Barrett, joined by Justice Gorsuch, is omitted.]

Justice ALITO, dissenting.

The Court holds Texas lacks standing to challenge a federal policy that inflicts substantial harm on the State and its residents by releasing illegal aliens with criminal convictions for serious crimes. In order to reach this conclusion, the Court brushes aside a major precedent that directly controls the standing question, refuses to apply our established test for standing, disregards factual findings made by the District Court after a trial, and holds that the only limit on the power of a President to disobey a law like the important provision at issue is Congress's power to employ the weapons of inter-branch warfare—withholding funds, impeachment and removal, etc. I would not

blaze this unfortunate trail. I would simply apply settled law, which leads ineluctably to the conclusion that Texas has standing.

. . . [N]othing in our precedents even remotely supports [the majority's] grossly inflated conception of "executive Power," U. S. Const., Art. II, § 1, which seriously infringes the "legislative Powers" that the Constitution grants to Congress, Art. I, § 1. At issue here is Congress's authority to control immigration, and "[t]his Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." In the exercise of that power, Congress passed and President Clinton signed a law that commands the detention and removal of aliens who have been convicted of certain particularly dangerous crimes. The Secretary of Homeland Security, however, has instructed his agents to disobey this legislative command and instead follow a different policy that is more to his liking. And the Court now says that no party injured by this policy is allowed to challenge it in court.

That holding not only violates the Constitution's allocation of authority among the three branches of the Federal Government; it also undermines federalism. This Court has held that the Federal Government's authority in the field of immigration severely restricts the ability of States to enact laws or follow practices that address harms resulting from illegal immigration. If States are also barred from bringing suit even when they satisfy our established test for Article III standing, they are powerless to defend their vital interests. If a President fails or refuses to enforce the immigration laws, the States must simply bear the consequences. That interpretation of executive authority and Article III's case or controversy requirement is deeply and dangerously flawed. . . .

Injury in fact. The District Court's factual findings, which must be accepted unless clearly erroneous, quantified the cost of criminal supervision of aliens who should have been held in DHS custody and also identified other burdens that Texas had borne and would continue to bear going forward. These findings sufficed to establish a concrete injury that was specific to Texas.

Traceability. The District Court found that each category of cost would increase "*because of* the Final Memorandum," rather than decisions that DHS personnel would make irrespective of the directions that memorandum contains.

. . . When the Federal Government refuses or fails to comply with §§ 1226(a) and (c) as to criminal aliens, the *direct* result in many cases is that the State must continue its supervision. As noted, the District Court made specific findings about the financial cost that Texas incurred as a result of DHS's failure to assume custody of aliens covered by §§ 1226(a) and (c). And the costs that a State must bear when it is required to assume the supervision of criminal aliens who should be kept in federal custody are not only financial. Criminal aliens whom DHS unlawfully refuses to detain may be placed on state probation, parole, or supervised release, and some will commit new crimes and end up in a state jail or prison. Probation, parole, and corrections officers are engaged in dangerous work that can put their lives on the line.

Redressability. A court order that forecloses reliance on the memorandum would likely redress the States' injuries. If, as the District Court found, DHS personnel rescind detainers "because of" the Final Memorandum, then vacating that memorandum would likely lead to those detainers' remaining in place. [Justice Alito contested Justice Gorsuch's reading of §1252(f)(1) and also

argued that even if injunctive relief was unavailable a declaratory judgment that the policy was unlawful would provide constitutionally sufficient redress.]

Prior to today's decision, it was established law that plaintiffs who suffer a traditional injury resulting from an agency "decision not to proceed" with an enforcement action have Article III standing. *Federal Election Comm'n v. Akins*. The obvious parallel to the case before us is *Massachusetts v. EPA*. . . .

The reasoning in that case applies with at least equal force in the case at hand. In *Massachusetts v. EPA*, the Court suggested that allowing Massachusetts to protect its sovereign interests through litigation compensated for its inability to protect those interests by the means that would have been available had it not entered the Union. In the present case, Texas's entry into the Union stripped it of the power that it undoubtedly enjoyed as a sovereign nation to police its borders and regulate the entry of aliens. The Constitution and federal immigration laws have taken away most of that power, but the statutory provisions at issue in this case afford the State at least *some* protection—in particular by preventing the State and its residents from bearing the costs, financial and non-financial, inflicted by the release of certain dangerous criminal aliens. Our law on standing should not deprive the State of even that modest protection. We should not treat Texas less favorably than Massachusetts. And even if we do not view Texas's standing argument with any "special solicitude," we should at least refrain from treating it with special hostility by failing to apply our standard test for Article III standing. . . .

The majority lists five categories of cases in which a court would—or at least might—have Article III jurisdiction to entertain a challenge to arrest or prosecution policies, but this list does nothing to allay concern about the Court's new path. The Court does not identify any characteristics that are shared by all these categories and that distinguish them from cases in which it would not find standing. . . . With the exception of cases in the first (very small) category (civil cases involving selective-prosecution claims), the majority does not identify any category of cases that it would definitely except from its general rule. In addition, category two conflates the question of constitutional standing with the question whether the plaintiff has a cause of action; category three is hopelessly vague; category four is incomprehensible; and category five actually encompasses the case before us. . . .

The Court declares that its decision upholds "[o]ur constitutional system of separation of powers," but as I said at the outset, the decision actually damages that system by improperly inflating the power of the Executive and cutting back the power of Congress and the authority of the Judiciary. And it renders States already laboring under the effects of massive illegal immigration even more helpless.

Our Constitution gives the President important powers, and the precise extent of some of them has long been the subject of contention, but it has been widely accepted that "the President's power reaches 'its lowest ebb' when he contravenes the express will of Congress, 'for what is at stake is the equilibrium established by our constitutional system.' " *Zivotofsky v. Kerry*, 576 U. S. 1, 61 (2015) (Roberts, C. J., dissenting) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637–638 (1952) (Jackson, J., concurring)).

That is the situation here. To put the point simply, Congress enacted a law that requires the apprehension and detention of certain illegal aliens whose release, it thought, would endanger public safety. The Secretary of DHS does not agree with that categorical requirement. He prefers a more flexible policy. And the Court's answer today is that the Executive's policy choice prevails unless Congress, by withholding funds, refusing to confirm Presidential nominees, threatening impeachment and removal, etc., can win a test of strength. Relegating Congress to these disruptive measures radically alters the balance of power between Congress and the Executive, as well as the allocation of authority between the Congress that enacts a law and a later Congress that must go to war with the Executive if it wants that law to be enforced.

What the majority has done is to apply Oliver Wendell Holmes's bad-man theory of the law to the separation of powers. Under Holmes's theory, as popularly understood, the law consists of those things that a bad man cannot get away with. Similarly, the majority's understanding of the "executive Power" seems to be that a President can disobey statutory commands unless Congress, by flexing its muscles, forces capitulation. That is not the Constitution's conception of "the executive Power." Art. II, § 1. The Constitution, instead, requires a President to "take Care that the Laws be *faithfully* executed." § 3 (emphasis added).

Notes and Questions

1. The demands of the form, and practicalities, require casebook editors to place a case in a particular section of the book. That decision is not always easy. Is *Biden v. Texas* in the right section? The holding is that the plaintiffs lack standing, but the opinion is quite an amalgam of principles we have seen elsewhere, including presidential power, judicial review of inaction, and judicial review of actions committed to agency discretion by law. Do you agree with Justice Alito that if the Court simply applied the usual rules of standing—injury, causation, redressability—this lawsuit can proceed? Does the majority say that, at least implicitly?

2. Even if the case belongs in the standing section, is it in the right subpart? Justice Kavanaugh identifies the problem as being the absence of a "judicially cognizable" injury. What does that mean? One thing it does not mean is that there is no injury *in fact*. Is cognizability about the injury? Causation? Redressability? Something else?

3. Only Justice Alito focuses on the question, but have the plaintiff states suffered an injury in fact? The lower courts held they had. In the words of the Fifth Circuit, when the federal government decides not to arrest and deport a person who in theory could/should/must be removed, the states "must continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government." Sufficiently concrete, nonattenuated, particular, and likely?

4. For Justice Gorsuch, and to some degree for the majority, this is a redressability case. But the redressability problem is different than in other cases we have read. In those cases, the holding was that the injury would not be redressed by the relief requested. Here, in contrast, the problem is that the relief requested is beyond the Court's power to provide. Justices Kavanaugh and Gorsuch reach that conclusion for different reasons, but they agree on the bottom line. This is not the only case to find a lack of standing for that reason. One other example that has been in the news is Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020), a substantive due process and public trust suit seeking a court order requiring the federal government to regulate emissions

contributing to climate change. The plaintiffs had an uphill battle; the general rule is that the government does not have an obligation to protect its citizens from private harm. See Castle Rock v. Gonzalez, cb p. 628. The court summarized the case thus:

> The plaintiffs claim that the government has violated their constitutional rights, including a claimed right under the Due Process Clause of the Fifth Amendment to a "climate system capable of sustaining human life." The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek—an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2." Reluctantly, we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government.

That sounds not unlike Justice Kavanaugh. And, like Justice Kavanaugh, the *Juliana* court characterized the problem as one of standing. Because a court could not grant the sort of order requested, the injury in fact, though traceable to the defendants' inaction, was not redressable.

Is this characterization correct? It seems the long way round. Once a court has decided it cannot grant the relief requested, the case is decided. Plaintiffs lose. Is there some benefit to taking the additional step of say "and therefore there is not standing"? After all, when a plaintiff's action is barred by the statute of limitations, the court does not say "the complaint is not timely, therefore the court lacks authority to grant the relief requested, therefore plaintiffs lack standing."

The point may be simply academic. On the other hand, given the frequent bleeding of merits considerations into standing controversies, there may be a value in keeping the two separate.

5. Courts sometimes hold that certain types of cases are nonjusticiable "political questions." That topic is too far afield for us, but if you have run into that category in Federal Courts or Constitutional Law you might ask yourself whether this entire opinion could have cast in terms of the political question doctrine—perhaps in the "textually demonstrable commitment" or the "no manageable standards" category.

6. Justice Kavanaugh's list of types of cases that can be brought may sound familiar. It has a striking overlap with parts of *Heckler v. Chaney* and the notes thereafter (cb p. 739). Justice Kavanaugh cites *Heckler* a few times; in addition to the cite preserved in the excerpt above it also gets a few "cf"s. Should he have relied on it more heavily? Justice Barrett criticized the majority for relying on *Heckler* at all:

> The Court leans, too, on principles set forth in Heckler v. Chaney. But, again, *Heckler* was not about standing. It addressed a different question: "the extent to which a decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions is subject to judicial review under the Administrative Procedure Act." *Heckler* held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under" the APA. But such a decision "is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Whatever *Heckler*'s

relevance to cases like this one, it does not establish a principle of Article III standing. And elevating it to the status of a constitutional rule would transform it from a case about statutory provisions (that Congress is free to amend) to one about a constitutional principle (that lies beyond Congress's domain). Although the Court notes that *Heckler* involved the APA, its conflation of Heckler with standing doctrine is likely to cause confusion.