THE JUDICIAL ASSAULT ON THE ADMINISTRATIVE STATE

JOEL SELIGMAN[*]

TABLE OF CONTENTS

INTRODUCTION

The most substantial change in the United States Government has been the extraordinary growth and increased complexity of the United States Government itself. George Washington initially was President of a country with a population of about four million, eleven States, and three Cabinet Departments (State, Treasury, and War). Washington's Government had no standing army, no Social Security, Medicare or Medicaid, and no programs addressing the environment, labor, or health. In 1791, the Treasury Department had approximately 500 employees, the War Department had 12, the State Department, 8.[1]

Today, the National Government has twenty-four Cabinet members. In 2023, there are 2.89 million federal employees, with 4.1 million contract

* Dean Emeritus and Professor, Washington University School of Law; President Emeritus, University of Rochester. Let me express my gratitude to the *Washington University Law Review* and the Institute for Law and Economic Policy for sponsoring a conference on January 26–27, 2023, where this paper was presented.

1. JOEL SELIGMAN, MISALIGNMENT: THE NEW FINANCIAL ORDER AND THE FAILURE OF FINANCIAL REGULATION 152 (2020) (federal employees in 1791); ALEXANDER HAMILTON, REPORT RELATIVE TO A PROVISION FOR THE SUPPORT OF PUBLIC CREDIT (Jan. 9, 1790); THOMAS K. MCCRAW, THE FOUNDERS AND FINANCE: HOW HAMILTON, GALLATIN, AND OTHER IMMIGRANTS FORGED A NEW ECONOMY 56–109 (2012); RON CHERNOW, ALEXANDER HAMILTON 288–306, 339 (2004); *Cabinet Members*, GEORGE WASHINGTON PRESIDENTIAL LIBR. MOUNT VERNON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/cabinet-members/ [https://perma.cc/F9V5-RBRW] (three cabinet departments, State, Treasury and War and a fourth cabinet member, Attorney General); U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1957, at B-12 (1949) (1790 population, 3,929,214 persons); *George Washington*, HISTORY.COM (Jan. 5, 2022), https://www.history.com/topics/us-presidents/george-washington [https://perma.cc/A88W-4HGK] (11 states).

employees, 1.2 million grant employees, 1.3 million active-duty military personnel, and more than 500,000 postal service employees—or a total of approximately 10 million workers. The Federal Government is the Nation's largest employer, with approximately 6.3% of total employment in the United States.[2]

Harvard Law Professor Felix Frankfurter in 1932 characterized this transformation in government as "[t]he distinctive development of our era":

> Governmental regulation of banking, insurance, public utilities, industry, finance, immigration, the professions, health and morals, in short, the inevitable response of government to the needs of modern society, is building up a body of enactments not written by legislatures and of adjudications not made by courts, and only to a limited degree subject to their revisions. These powers are lodged in a vast congeries of agencies.[3]

> Frankfurter's approach to the agencies was premised on his skepticism that Congress by legislative enactment could effectively administer the structure or behavior of a modern economy. . . .
>
> The problem of administrative law was to persuade Congress to adopt laws that both particularized substantive legal goals so specifically that these ends could survive hostile or indifferent interpretation by the courts or political appointees and were sufficiently flexible in means that a creative agency could adjust to changed or newly discovered circumstances.[4]

By 1930, this instinct had grown into a theory memorialized in Frankfurter's book, *The Public and Its Government*:

> [T]he staples of contemporary politics—the organization of industry, the control of public utilities, the well-being of agriculture, the mastery of crime and disease—are deeply enmeshed in intricate and

2. Kristin Tate, *The Sheer Size of Our Government Workforce Is an Alarming Problem*, HILL (Apr. 14, 2019, 5:00 PM), https://thehill.com/opinion/finance/438242-the-federal-government-is-the-largest-employer-in-the-nation/ [https://perma.cc/A9NM-KSNQ]; Paul C. Light, *The True Size of Government Is Nearing a Record High*, BROOKINGS (Oct. 7, 2020), https://www.brookings.edu/blog/fixgov/2020/10/07/the-true-size-of-government-is-nearing-a-record-high/ [https://perma.cc/BF6P-424G]; *FRED Economic Data: All Employees, Federal*, ST. LOUIS FED. (Mar. 10, 2023), https://fred.stlouisfed.org/series/CES9091000001 [https://perma.cc/N7D4-XQGK]; *Total Employment and the Unemployment Rate in the United States from 1980 to 2021, with Projections Until 2027*, STATISTA (Oct. 2022), https://www.statista.com/statistics/269959/employment-in-the-united-states/ [https://perma.cc/6BHA-T4L7] (showing in 2019, 157.53 million people were employed in the United States).

3. FELIX FRANKFURTER & J. FORRESTER DAVISON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW vii (1932).

4. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 59–60 (3d ed. 2003).

> technical facts, and must be extricated from presupposition and partisanship. Such matters require systematic effort to contract the area of conflict and passion and widen the area of accredited knowledge as the basis of action.[5]

James Landis, Frankfurter's protégé, would be responsible for the most memorable amplification of Frankfurter's government-by-administrative-agency. In 1938, responding to criticism that the independent administrative agencies had become "a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers," Landis would defend the administrative process as essential because of "the inadequacy of a simple tripartite form of government to deal with modern problems."[6] In Landis's view, the administrative agencies experienced extraordinary growth[7] because of the limitations of the Legislative process and the Judiciary. Legislation was "forced to represent compromise" and often "does so by the use of vague phraseology."[8] The Judiciary had a broad general jurisdiction, depriving it of the ability "to maintain a long-time, uninterrupted interest in a relatively narrow and carefully defined area of economic and social activity."[9] Neither branch could regulate industry as effectively as the administrators of an agency with a specific function.

Disparaging legislation that attempted to prescribe in too great detail "the conditions of administrative action" and administrators who took "the legalistic approach" of reading "a governing statute with the hope of finding limitations upon authority," Landis argued that the appropriate relationship of the democratic legislature to the expert agency was to define the agency's area of expertise and recite the appropriate problems for it to solve, leaving it broad discretion as to means.[10]

The emergence of "vast congeries of agencies" creating the administrative state was the most fundamental transformation to have occurred in 20th century American governance. By the 21st century, it long has been commonplace to assume that most routine Executive Branch decisions in a modern democracy will be made by its Fourth Branch, the administrative agencies.

5. FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 152 (1930).

6. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1, 4 (1938).

7. *Id.* at 5.

8. *Id.* at 51. The greatest experiment in congressional management of the economy had been the Sherman Antitrust Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7), whose grandiloquent generalities—among them, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is hereby declared to be illegal"—had been limited by judicial decisions culminating in the Supreme Court's 1910 "rule of reason" opinion in *Standard Oil Co. v. United States*, 221 U.S. 1 (1910).

9. LANDIS, *supra* note 6, at 30.

10. LANDIS, *supra* note 6, at 51, 70, 75.

Underlying this transformation to government-by-administrative-agencies was a fundamental shift in the Supreme Court's interpretation of the Constitution. In 1905, the Court had decided in *Lochner v. New York*[11] that a state could not adopt a sixty-hour maximum work week because of the doctrine soon known as substantive due process. "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor,"[12] in this case, for the occupation of baker. The Court viewed this substantive due process interpretation of the Constitution to supersede the power of a legislature to enact labor laws. As Justice Peckham memorably wrote: are we "at the mercy of legislative majorities?"[13]

Between 1934 and 1936, the Supreme Court struck down twelve New Deal economic programs including the National Industrial Recovery Act and the initial Agricultural Adjustment Act.[14] The Court's actions came to their culmination just before the 1936 election, when it ruled that there was no power in either States or Nation to enact a minimum wage law.[15] The New Deal appeared stymied by what Roosevelt characterized as a "horse-and-buggy" Supreme Court.[16]

The narrow interpretation of governmental power in these decisions was catastrophic. "We have . . . reached the point as a Nation," President Roosevelt declared, "where we must take action to save the Constitution from the Court."[17] Elimination of manufacturing, mining, and agriculture from the reach of federal power had rendered Congress powerless to deal with problems in those fields, however pressing they might become. From April 1937 on, however, the Supreme Court upheld every New Deal law

11. 198 U.S. 45 (1905).

12. *Id.* at 57.

13. *Id.* at 59.

14. SELIGMAN, *supra* note 1, at 575–77.

15. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

16. Roosevelt was particularly upset by the United States Supreme Court decision in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which invalidated Roosevelt's key program for economic recovery, the National Industrial Recovery Act, and prompted his critique of the Supreme Court's "horse-and-buggy definition of interstate commerce." A subsequent Supreme Court decision striking down a minimum wage for women and child workers prompted Roosevelt to declaim at a press conference that the Supreme Court had created a "'no-man's land' where no Government—State or Federal—can function." William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/ [https://perma.cc/EZQ2-283Z]. Several key New Deal programs were on the line including Social Security and the National Labor Relations Act. *Id.*

17. Franklin D. Roosevelt, *Fireside Chat 9: On "Court Packing,"* at 13:26 (Mar. 9, 1937), https://millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside-chat-9-court-packing [https://perma.cc/P5T4-P93Z].

presented to it—including some that were similar to those earlier struck down.[18]

The Court's reversal of its strict interpretation of congressional and state powers to regulate the economy was epitomized by decisions such as *United States v. Carolene Products Co.*,[19] which in 1938 declared that the will of the legislature in any instance with "some rational basis" was presumed constitutional, and *Wickard v. Filburn*,[20] which in 1942 held that under the Commerce Clause of the Constitution, Congress had the power even to regulate farm products consumed on the premises because of their potential impact on market prices and market conditions that were interstate.

The enduring consequence of the post-1938 interpretation of federal and state legislative powers was to fortify the New Deal economic programs, including the Social Security Act,[21] enacted in 1935, the Fair Labor Standards Act of 1938,[22] which created federal minimum wage and maximum work hour standards, the National Labor Relations Act,[23] and the new Agricultural Adjustment Act.[24]

Two leading constitutional law scholars, Harvard Law Professor Noah Feldman and former Stanford Law School Dean Kathleen Sullivan, found: "For nearly sixty years after the New Deal, the Court did not strike down a single federal statute as exceeding Congress's power under the Commerce Clause,"[25] a principal basis of regulatory agency authority.

Today, both the judicial basis for government-by-administrative-agency and the existence of the administrative agencies is in question.

This assault recently occurred in the Supreme Court's decision in *West Virginia v. EPA*,[26] which amplified the major questions doctrine[27] —a recent basis to limit the *Chevron* doctrine,[28] with its judicial deference to administrative agency reasonable interpretations of statutes, or kindred cases such as *Auer v. Robbins*, which articulated a similar deference to administrative agency interpretation of regulations.[29]

18. *See generally* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 124–30 (21st ed. 2022); ARTHUR M. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL (1960).
19. 304 U.S. 144, 152 n.4 (1938).
20. 317 U.S. 111 (1942).
21. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.
22. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060.
23. National Labor Relations Act, 29 U.S.C. §§ 151–169 (1935); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
24. Agricultural Adjustment Act, Pub. L. No. 75-137, 50 Stat. 246 (1937); *see also Wickard*, 317 U.S. at 111.
25. FELDMAN & SULLIVAN, *supra* note 17, at 141.
26. 142 S. Ct. 2587 (2022).
27. *See infra* notes 169–85 and accompanying text.
28. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
29. 519 U.S. 452 (1997).

This article urges that the judicial assault on the administrative agencies ultimately seeks not merely to limit agency regulation, but to eviscerate congressional creation of specific administrative agencies or programs in whole or in part. This judicial assault on the administrative agencies began earlier than the Trump Presidency Supreme Court appointments and is based on a wider variety of claims. This article explores the three most likely claims in the near term: (I) the Separation of Powers and presidential removal powers; (II) the Commerce Clause; and (III) the assault on *Chevron* and kindred cases and judicial deference to agency reasonable interpretations of statutes or rules.

I. SEPARATION OF POWERS AND THE REMOVAL POWER

The Constitution in Article II Section 2 specifies presidential appointments power for officers of the United States with the advice and consent of the Senate and authorizes Congress to vest the appointment of inferior officers as Congress thinks proper in the President alone, in the Courts of Law, or in the Heads of Department.[30] The Constitution is silent on the President or Congress's removal powers.

Following debate in 1789 on the President's power to remove the Secretary of Foreign Affairs (now Secretary of State), "it became accepted practice that the President might remove at pleasure all officers appointed by him when neither Constitution nor statute prohibited by prescribing a fixed term or otherwise."[31]

In *Myers v. United States*,[32] after an exhaustive review of presidential removal powers, Chief Justice Taft wrote for the Court majority that the President could remove specified postmasters without the consent of the Senate, and the President alone had the executive power of removing executive officers of the United States whom he appointed with the advice and the consent of the Senate.[33]

This was held by the Court in 1935 to reach too far. In *Humphrey's Executor v. United States*,[34] which involved the Federal Trade Commission, an independent regulatory agency which "cannot in any proper sense be characterized as an arm or an eye of the executive," the Court enforced a

30. U.S. CONST. art. II, § 2.
31. Myers v. United States, 272 U.S. 52, 199–200 (1926).
32. *Id.*
33. *Id.* at 114–16. Before *Myers*, there was no definitive Supreme Court ruling that the President alone had removal power.
34. 295 U.S. 602, 628 (1935). *See generally* Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority over Independent Agencies*, 109 GEO. L.J. 637 (2021).

good cause clause as a limit upon presidential removal power for quasi-legislative and quasi-judicial bodies.[35]

The modern judicial assault on the constitutionality of the administrative agencies under the separation of powers and presidential removal policies effectively began in 2010. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[36] the Supreme Court dodged the question of constitutionality of the Public Company Accounting Oversight Board (PCAOB) created by the Sarbanes-Oxley Act of 2002.[37] The Court in a 5-4 decision held that the novel structure of the Public Company Accounting Oversight Board, the Board that regulates corporate auditing standards, was unconstitutional.[38] In *Free Enterprise*, the President could not directly remove a PCAOB member.[39] Only the SEC Commissioners by whom the PCAOB was overseen could remove officers for-cause, consistent with the Court's earlier decision in *Humphrey's Executor v. United States*.[40] In the Sarbanes-Oxley Act, only PCAOB members could remove inferior officers,[41] seemingly also consistent with earlier decisions in *United States v. Perkins*[42] and *Morrison v. Olson*,[43] which sustained similar restrictions on the power of principal executive officers to remove their inferior officers. The novel two-tiered structure violated the Constitution's Article II vesting of Executive power in the President to "take care that the laws be faithfully executed" and the Constitution's separation of powers.[44]

The Roberts majority took pains not to reexamine earlier Presidential removal cases, including *Humphrey's Executor*, *Perkins*, or *Morrison*,[45] and limited its decision to the novel dual for-cause limitations of the removal of PCAOB members.[46] The Roberts majority rejected the Petitioner's complaint that the "Board's 'freedom from Presidential oversight and control' rendered it 'and all power and authority exercised by it' in violation

35. *Humprhey's Ex'r*, 295 U.S. at 628–29. "[T]he *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers." *Id.* at 631–32.
36. 561 U.S. 477 (2010).
37. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.
38. *Free Enter.*, 561 U.S. at 492.
39. *Id.* at 486.
40. *Id.*; 295 U.S. 602.
41. *Free Enter.*, 561 U.S. at 495–98.
42. 116 U.S. 483 (1886).
43. 487 U.S. 654 (1988).
44. U.S. CONST. art. II, § 3; *Free Enter.*, 561 U.S. at 492–93.
45. *Free Enter.*, 561 U.S. at 483.
46. *Id.* at 483–84.

> This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

Id. at 496–97, 508.

of the Constitution" and held that the unconstitutional tenure provisions were severable from the remainder of the statute.[47] Chief Justice Roberts wrote for the Supreme Court majority: "The Sarbanes-Oxley Act remains 'fully operative as a law' with these tenure restrictions exercised."[48] The full SEC could validly appoint PCAOB members if they were removable at will without Presidential nomination or the Senate's advice and consent.[49]

Why, then, is the *Free Enterprise* case a portent of future limits on the constitutionality of the administrative state? Not because of the Supreme Court decision, but because of future Supreme Court Justice Kavanaugh's dissent in the District of Columbia Court of Appeals decision that was appealed to the Supreme Court.[50]

Judge Kavanaugh characterized the *Free Enterprise* case as "the most important separation-of-powers case regarding the President's appointment and removal powers to reach the courts in the last 20 years."[51] Kavanaugh espoused a unitary executive doctrine,[52] concluding:

> In sum, neither the President of the United States nor a Presidential alter ego possesses any power to remove PCAOB members for cause or otherwise. The unique and apparently unprecedented double for-cause removal statute—an independent agency whose heads are removable for cause only by another independent agency—overruns the boundaries set by Supreme Court precedents in *Humphrey's Executor* and *Morrison* with respect to congressional encroachment on Presidential removal authority. I would hold it unconstitutional as a violation of Article II because it impermissibly restricts the President's power to remove executive officers.[53]

In 2018, the Court decided *Lucia v. SEC*[54] and held that SEC Administrative Law Judges (ALJs) were officers of the United States

---

47. *Id.* at 508–09.

48. *Id.* at 509 (quoting New York v. United States, 505 U.S. 144, 186 (1992)).

49. *Id.* at 510–14.

50. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd in part*, 561 U.S. 477 (2010).

51. *Id.*

52. *Id.* at 689 ("The Framers established a single President by design: A single head of the Executive Branch enhances efficiency and energy in the administration of the Government. And a single head furthers accountability by making one person responsible for *all* decisions made by and in the Executive Branch.").

53. *Id.* at 704. Judge Kavanaugh, in 2016, held that the Consumer Financial Protection Agency also was unconstitutional but followed Supreme Court precedent in *Free Enterprise* and severed the Dodd-Frank Act's unconstitutional for-cause provision from the remainder of the statute. PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 8 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

54. 138 S. Ct. 2044, 2051 n.3, 2055 (2018).

subject to the Appointments Clause and could only be appointed by the full Commission. The Court majority declined to address the broader question—whether the statutory restrictions on removing the Commission's ALJs were constitutional—"No court has addressed that question, and we ordinarily await 'thorough lower court opinions to guide our analysis of the merits.'"[55] By 2023, after further changes in the Court's membership, this issue would be before the Court.[56]

By 2021, Justices Gorsuch, confirmed in 2017, and Kavanaugh, confirmed in 2018, had joined the Court. In *Seila Law LLC v. Consumer Financial Protection Bureau* (CFPB),[57] Chief Justice Roberts wrote for a divided Court that the CFPB's leadership by a single individual, removable only for inefficiency, neglect, or malfeasance, violates the Constitution's separation of powers. Following *Free Enterprise*, the President's general removal power was affirmed with the exception recognized in *Humphrey's Executor*—permitting Congress "to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."[58] But the Court majority declined to extend the *Humphrey's* exception or the *Morrison v. Olson* exception to permit removal of inferior officers to the CFPB:

> The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. . . . Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.[59]

The only Constitutional defect the Court identified in the CFPB's structure was the Director's insulation from removal.[60] Because the CFPB for-cause removal provision was held to be severable, the CFPB could

55. *Id.* at 2050 n.1 (quoting Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012)).
56. *See infra* notes 78–82 and accompanying text.
57. 140 S. Ct. 2183, 2197 (2020).
58. *Id.* at 2198–99.
59. *Id.* at 2203–04.
60. *Id.* at 2209.

continue to operate, but its Director "must be removable by the President at will."[61]

This was not only a begrudging interpretation of *Humphrey's Executor*, but one with dicta that was notably sharp in tone:

> The question instead is whether to extend those precedents to the "new situation" before us, namely an independent agency led by a single Director and vested with significant executive power. *Free Enterprise Fund*, 561 U.S. at 483, 130 S. Ct. 3138. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.[62]

Justices Thomas and Gorsuch, concurring in part and dissenting in part, would have gone further and overruled *Humphrey's Executor*.[63]

Their intent to end independent agencies was crystal clear: "Our tolerance of independent agencies in *Humphrey's Executor* is an unfortunate example of the Court's failure to apply the Constitution as written. That decision has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design."[64]

The momentous significance of the Trump era appointments of Justices Gorsuch, Kavanaugh, and Barrett became increasingly apparent. In its 2021–2022 term, the Court reversed *Roe v. Wade*[65] and ended a woman's right to reproductive freedom in *Dobbs v. Jackson Women's Health*

---

61. *Id.* at 2192, 2209.

62. *Id.* at 2201.

63. *Id.* at 2211–12 (Thomas, J., concurring).

64. *Id.* at 2212.

In *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021), the Supreme Court found the Housing and Economic Recovery Act of 2008's restrictions on Presidential removal authority violated the Constitution's separation of powers, a result on which the prior term's *Seila Law* case was "all but dispositive." The Court concluded that the Recovery Act's good cause removal restriction did not extend to an Acting Director. *Id.*

In *Collins*, the Court reviewed the case to determine what, if any, relief could be granted to the shareholders who brought the case. The Court majority was skeptical that relief could be granted:

> All the officers who headed the FHFA during the time in question were properly *appointed*. Although the statute unconstitutionally limited the President's authority to *remove* the confirmed Directors, there was no constitutional defect in the statutorily prescribed method of appointment to that office. As a result, there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void.
>
> The shareholders argue that our decisions in prior separation-of-powers cases support their position, but most of the cases they cite involved a Government actor's exercise of power that the actor did not lawfully possess. See *Lucia v. SEC*, 585 U.S. ___, ___, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018) (slip op., at 12) (administrative law judge appointed in violation of Appointments Clause).

Id. at 1787–88 (emphasis in original).

65. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

Organization;[66] limited the State's ability to adopt gun control legislation in *New York Rifle & Pistol Ass'n v. Bruen*;[67] and decreased the First Amendment's Establishment Clause limitation of public religious practice by allowing a football coach to pray after a game at midfield in *Kennedy v. Bremerton School District*.[68]

Justice Thomas in his concurrence in *Dobbs*[69] urged the Court to reconsider *Griswold v. Connecticut*[70] with its privacy right protection of the distribution of contraceptive devices, *Lawrence v. Texas*,[71] which protected the right to human sexual relationships, and *Obergefell v. Hodges*,[72] which protected homosexual marriage.

Combine Justice Kavanaugh's dissent in *Free Enterprise* with Justice Gorsuch's and Thomas's dissent in *Seila*—three of the nine Justices have opined that specific regulatory agencies were unconstitutional under the Separation of Powers and removal power doctrine. In *Jarkesy v. SEC*,[73] a divided Fifth Circuit panel held:

> (1) [T]he SEC's in-house adjudication of Petitioners' case violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of "all" legislative power in Congress; and (3) statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II. Because the agency proceedings below were unconstitutional, we GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion.[74]

The *Jarkesy* majority ruled that Congress unconstitutionally delegated legislative power to the SEC to choose whether to bring enforcement actions in Article III courts or within the agency and failed to provide the Commission "with an intelligible principle to guide its use of the delegated power."[75] However, the majority recognized that the Supreme Court has never required Congress to provide an intelligible principle by which an agency such as the SEC chooses whether to exercise its delegated power to

66. 142 S. Ct. 2228 (2022).
67. 142 S. Ct. 2111 (2022).
68. 142 S. Ct. 2407 (2022).
69. *Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring).
70. 381 U.S. 479 (1965).
71. 539 U.S. 558 (2003).
72. 576 U.S. 644 (2015).
73. 34 F.4th 446 (5th Cir. 2022).
74. *Id.* at 449–50.
75. *Id.* at 459.

select whether to proceed in an Article III proceeding or within the Commission.[76]

The *Jarkesy* majority held that the SEC proceeding suffered from another constitutional infirmity: the statutory removal restrictions for SEC administrative law judges are unconstitutional. The *Jarkesy* majority reasoned:

> The Supreme Court decided in *Lucia* that SEC ALJs are "inferior officers" under the Appointments Clause because they have substantial authority within SEC enforcement actions. [Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018)]. And in *Free Enterprise Fund* it explained that the President must have adequate control over officers and how they carry out their functions. 561 U.S. at 492, 496. If principal officers cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed. So, if SEC ALJs are "inferior officers" of an executive agency, as the Supreme Court in *Lucia* indicated was the case at least for the purposes of the Appointments Clause, they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions.[77]

The *Jarkesy* majority opinion is so far reaching that it appears to have been intended to prompt Supreme Court review, which might, given new membership, lead the Court to create new doctrine on this topic.

In 2023, the Court took the opportunity to do so.

In *Axon Enterprise, Inc. v. FTC*,[78] the Supreme Court consolidated *Cochran v. SEC*[79] and *Axon Enterprise, Inc. v. FTC*,[80] two cases where parties argued that the agencies' administrative law judges are insufficiently accountable to the President in violation of separation of powers principles. The Supreme Court unanimously reversed lower court judgments that limited constitutional challenges to these regulatory agencies' reviews to the first proceeding within the Commission itself and then by statute appealing to a federal court of appeals. The Supreme Court held that "the review schemes set out in the Exchange Act and the FTC Act do not displace

76. *Id.* at 462–63.
77. *Id.* at 464.
78. 143 S. Ct. 890 (2023).
79. 20 F.4th 194 (5th Cir. 2021), *cert. granted sub nom.*, SEC v. Cochran, 142 S. Ct. 2707 (2022), *aff'd and remanded sub nom.*, Axon Enter., Inc. v. FTC, No. 21-1239, 2023 WL 2938328 (U.S. Apr. 14, 2023).
80. 986 F.3d 1173 (9th Cir. 2021), *cert. granted in part*, 142 S. Ct. 895 (2022), *rev'd and remanded*, 143 S. Ct. 890 (2023).

district court jurisdiction over Axon's and Cochran's far-reaching constitutional claims"[81]:

> A special statutory review scheme, this Court has recognized, may preclude district courts from exercising jurisdiction over challenges to federal agency action. [*See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994)]. District courts may ordinarily hear those challenges by way of 28 U.S.C. § 1331's grant of jurisdiction for claims "arising under" federal law. Congress, though, may substitute for that district court authority an alternative scheme of review. . . .
>
> But a statutory review scheme of that kind does not necessarily extend to every claim concerning agency action. Our decision in *Thunder Basin* made that point clear. After finding that Congress's creation of a "comprehensive review process" like the ones here ousted district courts of jurisdiction, the Court asked another question: whether the particular claims brought were "of the type Congress intended to be reviewed within this statutory structure." 510 U.S., at 208, 212. . . . The Court identified three considerations designed to aid in that inquiry, commonly known now as the *Thunder Basin* factors. First, could precluding district court jurisdiction "foreclose all meaningful judicial review" of the claim? [*Id.* at 212–13]. Next, is the claim "wholly collateral to [the] statute's review provisions"? [*Id.* at 212] (internal quotation marks omitted). And last, is the claim "outside the agency's expertise"? *Ibid*. When the answer to all three questions is yes, "we presume that Congress does not intend to limit jurisdiction." . . .
>
> . . . The challenges here, as in *Free Enterprise Fund*, are not to any specific substantive decision—say, to fining a company (*Thunder Basin*) or firing an employee (*Elgin*). Nor are they to the commonplace procedures agencies use to make such a decision. They are instead challenges, again as in *Free Enterprise Fund*, to the structure or very existence of an agency: They charge that an agency is wielding authority unconstitutionally in all or a broad swath of its work. Given that equivalence, it would be surprising to treat the claims here differently from the one in *Free Enterprise Fund*—which we held belonged in district court.
>
> And when we apply the *Thunder Basin* factors, we indeed come out in the same place as *Free Enterprise Fund*. Our reasoning differs in some particulars, reflecting variations between that case and the

81. *Axon Enter., Inc.*, 143 S. Ct. at 900.

> two here. But the 30,000-foot view of the issue before us ends up a good proxy for the more granular one. Each of the three *Thunder Basin* factors signals that a district court has jurisdiction to adjudicate Axon's and Cochran's (like the accounting firm's) sweeping constitutional claims.[82]

Even more far-reaching is the potential reach of *Community Financial Services Ass'n of America v. CFPB*.[83] In *Community Financial*, the Fifth Circuit held it was unconstitutional for Congress to authorize funding of the CFPB by allowing its Director to requisition a budget from the Federal Reserve System, "as reasonably necessary to carry on the Bureau's functions," which the Federal Reserve must approve if the Bureau's budget does not exceed 12% of the Federal Reserve's "total operating expenses":

> The Bureau thus "receives funding directly from the Federal Reserve, which is itself outside the appropriations process through bank assessments." [Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2194 (2020)]; *see* 12 U.S.C. § 5497(a). So Congress did not merely cede *direct* control over the Bureau's budget by insulating it from annual or other time limited appropriations. It also ceded *indirect control* by providing that the Bureau's self-determined funding be drawn from a source that is itself outside the appropriations process—a double insulation from Congress's purse strings that is "unprecedented" across the government. [CFPB v. All Am. Check Cashing, 33 F.4th 218, 225 (2022) (Jones, J., concurring)]. And where the Federal Reserve at least remains tethered to the Treasury by the requirement that it remit funds above a statutory limit, Congress cut that tether for the Bureau, such that the Treasury will never regain one red cent of the funds unilaterally drawn by the Bureau.[84]

The Fifth Circuit panel concluded:

> Wherever the line between a constitutionally and unconstitutionally funded agency may be, this unprecedented arrangement crosses it. The Bureau's perpetual insulation from Congress's appropriation 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—

82. *Id.* at 900–02.
83. 51 F.4th 616 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023).
84. *Id.* at 638–39.

> Congress ran afoul of the separation of powers embodied in the Appropriations Clause. *See* THE FEDERALIST NO. 58 (J. Madison).[85]

The Fifth Circuit held that the CFPB's funding structure was unconstitutional and vacated the CFPB's Payday Lending program at issue in this case.[86]

The Solicitor General sought and was granted a writ of certiorari on both the questions of whether the Fifth Circuit erred in holding that the funding provision of the Consumer Financial Protection Bureau was in violation of the Appropriations Clause and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.[87]

There is the possibility that the Court will end agency self-funding for all regulatory agencies as funded. This is decidedly contrary to precedent and long historical practice.

The District of Columbia Circuit in *PHH Corp. v. CFPB*[88] and at least six district courts have deemed the CFPB funding structure sound.[89] The Solicitor General and these courts acknowledged that the Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[90]:

> That requirement serves as an important check on the Executive Branch: Even if Congress has authorized a particular activity, and even if money is available in the Treasury to fund it, that money may be spent only if Congress has authorized the expenditure. [*See, e.g.*, OPM v. Richmond, 496 U.S. 414, 424 (1990)]; [Reeside v. Walker], 52 U.S. (11 How.) 272, 291 (1851). The Appropriations Clause thus functions as a "restriction upon the disbursing authority of the Executive Department." [Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937)]. The Clause does not, however, limit the manner in which Congress itself may exercise its authority to make "Appropriations" "by law." . . .[91]

Congressional discretion to spend appropriations up to a specified amount dates back to the First Congress:

85. *Id.* at 639–40.
86. *Id.* at 643.
87. Petition for a Writ of Certiorari at I, CFPB v. Cmty. Fin. Servs. Ass'n of Am., 143 S. Ct. 978 (2023) (mem.) (No. 22-448), 2022 WL 16951308.
88. 881 F.3d 75, 96 (D.C. Cir. 2018), *abrogated on other grounds by* Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020).
89. *See* Petition for a Writ of Certiorari, *supra* note 87, at 9.
90. U.S. CONST. art. I, § 9, cl. 7.
91. Petition for a Writ of Certiorari, *supra* note 87, at 11–12.

> "From 1789-1791, the First Congress made lump-sum appropriations for the entire Government—'sum[s] not exceeding' specified amounts for broad purposes." [Clinton v. City of New York, 524 U.S. 417, 466 (1998)] (Scalia, J., concurring in part and dissenting in part) (citation omitted; brackets in original). . . .
>
> Congress has also often provided federal entities and activities with funding for multiple years—sometimes indefinitely (that is, unless and until Congress acts again). Those standing (sometimes called "permanent") appropriations remain "always available for specified purposes and do[] not require repeated action by Congress to authorize [their] use." Government Accountability Officer (GAO), *Principles of Federal Appropriations Law*, 2–10 (4th ed. Rev. 2016) (*GAO Redbook*). In some cases, Congress has made standing appropriations that are uncapped in amount and provide such "sum[s] sufficient to carry out" a program. 42 U.S.C. 301. That is true, for instance, of appropriations for Social Security payments, 42 U.S.C. 301, 401(b); payments of final judgments against the government, 31 U.S.C. 1304(a); and payments for scholarships for veterans' dependents, 20 U.S.C. 1070h. Thus, for many years, a large portion of the federal budget has consisted of mandatory spending that "does not require annual appropriations." [JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS] 62 (2017). In fiscal year 2021, Congress authorized approximately $4.8 trillion in such mandatory spending (out of approximately $7 trillion in total spending). See Congressional Budget Office, *The Accuracy of CBO's Budget Projections for Fiscal Year 2021*, at 6 (Jan. 2022).[92]

The Solicitor General cited several examples of federal entities partially or exclusively funded through sources other than annual appropriation, including the Post Office (1792), the National Mint (1792), the Patent Office (1836), the Office of the Comptroller of the Currency (1875), the Federal Reserve Board (1913), the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Farm Credit Administration, and the Federal Housing Finance Agency.[93]

If the Supreme Court were to agree with the Fifth Circuit, a further major blow would be struck to the administrative state.

92. *Id.* at 13–14.
93. *Id.* at 14–15.

II. THE COMMERCE CLAUSE

From 1937 until 1995, no federal agency or program was held unconstitutional under the Commerce Clause rational basis test established in *United States v. Carolene Products Co.*[94] and *Wickard v. Filburn*.[95] *Heart of Atlanta Motel, Inc. v. United States*[96] and *Katzenbach v. McClung*[97] are illustrative cases. In each, the Court ruled unanimously that Title II of the Civil Rights Act of 1964[98] did not exceed Congress's powers under the Commerce Clause when applied to a 216-room motel in downtown Atlanta which refused to rent rooms to African-Americans,[99] or to Ollie's Barbeque, a family owned restaurant in Birmingham, Alabama, with a seating capacity of 220 customers which also refused to serve African-Americans.[100]

In *Heart of Atlanta Motel*, the Court stated of congressional authority under the Commerce Clause: "While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce."[101]

Echoing *Wickard v. Filburn*, the Court in *Heart of Atlanta Motel* held: "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."[102]

In the ensuing seventeen years from 1995 until the 2012 Supreme Court decision in *National Federation of Independent Business v. Sebelius*,[103] there were rare and limited exceptions to the use of the Commerce Clause as a basis for a federal program. In *United States v. Lopez*,[104] Chief Justice Rehnquist wrote for a 5-4 majority of the Court and held that Congress exceeded the "outer limits" of the Commerce Clause with the enactment of the Gun-Free School Zones Act of 1990[105]:

> The Government's essential contention [is] that we may determine here that §922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate

94. *See* discussion *supra* note 19 and accompanying text.
95. *See* discussion *supra* note 20 and accompanying text.
96. 379 U.S. 241 (1964).
97. 379 U.S. 294 (1964).
98. Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified as amended at 42 U.S.C. § 2000a).
99. *Heart of Atlanta Motel*, 379 U.S. at 261.
100. *Katzenbach*, 379 U.S. at 298–99, 305.
101. 379 U.S. at 252.
102. *Id.* at 258.
103. 567 U.S. 519 (2012).
104. 514 U.S. 549, 563–66 (1995).
105. Pub. L. No. 101-647, 104 Stat. 4844 (codified at 18 U.S.C. §§ 921–22).

> commerce. . . . The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways.[106]

Chief Justice Rehnquist declined to uphold these contentions: "[W]e would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power."[107]

Five years later in *United States v. Morrison*,[108] the Chief Justice sharpened this area of exception in a 5-4 decision by holding that the Violence Against Women Act of 1994,[109] which sanctioned crimes of violence motivated by gender, could not apply to a private act of violence. Following *Lopez*, the Court ruled:

> We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.[110]

These were significant decisions setting new outer limits to the Commerce Clause in cases involving what was considered state jurisdiction to address crimes. They did not result in a major cutback on Congress's Commerce Clause powers. In *Gonzales v. Raich*,[111] a five Justice majority of the Court, with a sixth Justice voting with the majority but only concurring in the judgment, relied upon *Wickard v. Filburn* to uphold an exemption on California's Compassionate Use Act of 1996[112] "for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician"[113]:

> [The] case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the

106. *Lopez*, 514 U.S. at 563.
107. *Id.* at 567.
108. 529 U.S. 598 (2000).
109. Pub. L. No. 103-322, 108 Stat. 1941 (codified at 42 U.S.C. § 13981).
110. *Morrison*, 529 U.S. at 617.
111. 545 U.S. 1 (2005).
112. CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).
113. 545 U.S. at 6 (footnotes omitted). Justice Scalia concurred separately, relying upon the Constitution's Necessary and Proper Clause. *Id.* at 34 (Scalia, J., concurring).

> open market is not subject to federal regulation. Given the findings in the [Controlled Substances Act] and the undisputed magnitude of the commercial market for marijuana, our decisions in [*Wickard*] and the later cases endorsing its reasoning foreclose that claim.[114]

Then in 2012, the Court signaled a new, more begrudging approach to interpretation of congressional powers under the Commerce Clause in *National Federation of Independent Business v. Sebelius*.[115]

The Roberts majority held that Congress did not have the power under the Commerce Clause to adopt the Affordable Care Act[116] individual mandate, which required those individuals who do not have health insurance provided by an employer or program such as Medicare or Medicaid to make a "shared responsibility payment" to the Federal Government.[117] Chief Justice Roberts wrote on this issue for a 5-4 majority that the individual mandate was unconstitutional under the Commerce Clause, sharply distinguishing the power to regulate activities—which he and his majority on this issue did not question—from the power to create an obligation to act in the first place. "Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem."[118]

Notably, however, Roberts did not question *Wickard v. Filburn*, which "has long been regarded as 'perhaps the most far reaching example of Commerce Clause authority over intrastate activity.'"[119]

---

114. *Id.* at 32–33 (majority opinion). Of the nine Justices who signed opinions in *Gonzales*, only Thomas remains on the Court. Thomas wrote in an individual dissent:

> If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers. . . . This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite." The Federalist No. 45, at 313.

Id. at 57–58, 69 (Thomas, J., dissenting).

115. 567 U.S. 519 (2012).

116. Pub. L. No. 111-148, 124 Stat. 119 (2010).

117. *Sebelius*, 567 U.S. at 555. Chief Justice Roberts pulled a proverbial rabbit out of the hat and held that the taxing power of Article I Section 8 could support the individual mandate. *See id.* at 563–74. Justices Scalia, Kennedy, Thomas, and Alito would have held the mandate unconstitutional both under the Commerce and Taxing Clauses. *See id.* at 649–61 (joint dissent).

Chief Justice Roberts also wrote that the Medicaid expansion was impermissible because Congress had tied acceptance of federal funds to the threat to withhold all existing Medicaid funds if a state declined to do so, which would be a "gun to the head." *Id.* at 581 (majority opinion) ("Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs.").

Finally, the Roberts majority ruled that the impermissibility of Medicaid expansion could be severed from the Affordable Care Act. *See id.* at 575–88. The same four Justices who dissented on the constitutionality of the taxing provisions also would not have permitted severance. *See id.* at 691–97 (joint dissent).

118. *Id.* at 553 (majority opinion).

119. *See id.* at 552 (quoting United States v. Lopez, 514 U.S. 549, 560 (1995)).

This new limit on congressional power to adopt seemingly any affirmative obligation for an individual under the Commerce Clause was substantial. To date, the Court has not gone further to narrow the Commerce Clause as the basis of administrative agencies. The Supreme Court in 2023 concluded that the California law prohibiting the sale of pork in California, regardless of whether it was produced in-state or out-of-state, when the business owner or operator knowingly engaged in "extreme forms of farm animal confinement" does not violate the Commerce Clause.[120]

III. THE ASSAULT ON *CHEVRON* AND STATUTORY INTERPRETATION DEFERENCE TO ADMINISTRATIVE INTERPRETATION

For decades following its 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[121] the Supreme Court held that when Congress has not expressly spoken,[122] the courts should defer to administrative interpretation "[i]f this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute."[123] This approach was considered consistent with the recognition of the vital role of administrative agencies and the limits of the courts and Congress.[124]

In 2017, Congress nullified the tax penalty under the Patient Protection and Affordable Care Act by setting its amount at $0. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

In 2021, the United States Supreme Court rejected the effort of Texas and seventeen other States, as well as two individuals, to hold that the Patient Protection Act was unconstitutional without the penalty. California v. Texas, 141 S. Ct. 2104, 2112 (2021). The Supreme Court rejected this challenge on standing grounds without reaching the merits of their claim. *Id.* at 2112–13. Justice Breyer wrote for a unanimous Court: "Neither the individual nor the state plaintiffs have shown that the injury they will suffer or have suffered is 'fairly traceable' to the 'alleged unlawful conduct' of which they complain." *Id.*

120. Nat'l Pork Producers Council v. Ross, No. 21-468, 2023 WL 3356528 (U.S. May 11, 2023).

121. 467 U.S. 837 (1984).

122. *Id.* at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

123. *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 382–83 (1961)).

124. As the *Chevron* decision stated:

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843–44 (footnotes omitted) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

The Court further stated:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized,

The simplification of judicial review involved a two-step process: (1) Was the statute ambiguous? and (2) was the agency interpretation reasonable?[125] The *Chevron* approach dramatically simplified judicial review as compared to the Court's earlier standard in *Skidmore v. Swift & Co.*,[126] which emphasized an active role for the courts in judicial review of an administrative agency's or administrator's interpretation.[127]

Chevron's impact was immense. By 2017, roughly 15,000 judicial decisions and 18,000 books and law review articles had cited *Chevron*.[128] The Supreme Court repeatedly affirmed *Chevron* deference[129] until the last decade.

> really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Id. at 866 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

125. On the two-step process, see, for example, Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Kenneth A. Bamberger & Peter L. Strauss, Chevron's *Two Steps*, 95 VA. L. REV. 611 (2009); Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 OHIO ST. L.J. 565, 575–84 (2021).

126. 323 U.S. 134 (1944). *Skidmore* was not overruled. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court majority declined to extend *Chevron* deference to an individualized customs letter ruling only binding between itself and the importer to whom it was issued. The Court majority, however, ruled that *Skidmore* could still apply. *Id.* at 238.

> 127. We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140.

128. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 2 (2017).

129. *See, e.g.*, Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238 (2004) (sustaining *Chevron* deference when Congress has expressly delegated authority to an agency to prescribe regulations to effectuate the purposes of the statute); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980, 997 (2005) (applying the *Chevron* framework to the Federal Communications Commission's interpretation of information services to include broadband cable modem service under the Telecommunications Act and concluding it was reasonable); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 58 (2011) (applying *Chevron* two-step analysis to an ambiguous provision of the Internal Revenue Code).

Chevron deference has been rejected when the procedures employed by the agency are defective, but agencies are "free to change their existing policies as long as they provide a reasoned explanation for the change." *See, e.g.*, Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016) (citations omitted).

A. The Erosion of Chevron

Beginning with President Obama's reelection in 2012, a number of Justices questioned the constitutionality of *Chevron*. In a 2013 decision, *City of Arlington v. FCC*,[130] Justice Scalia, writing for the majority, echoed "now canonical formulations":

> *Chevron* is rooted in a background presumption of congressional intent: namely, "that Congress, when it left ambiguity in a statute" administered by an agency, "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.[131]

Scalia dismissed as illusory any distinction between "jurisdictional" and "non-jurisdictional" agency interpretation: "The label is an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction."[132]

Scalia presciently warned: "The false dichotomy between 'jurisdictional' and 'non-jurisdictional' agency interpretations may be no more than a bogeyman, but it is dangerous all the same. Like the Hound of the Baskervilles, it is conjured by those with greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself."[133]

Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented. Their "disagreement with the Court is fundamental. . . . A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference."[134] At the very least, this view added a new step to the *Chevron* two-step process.

Administrative agencies can be subject to challenges that their decisions or interpretations are arbitrary and capricious or vague. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

130. 569 U.S. 290 (2013).

131. *Id.* at 296 (first quoting *Smiley*, 517 U.S. at 740–41, and then citing AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999)).

132. *Id.* at 300.

133. *Id.* at 304.

134. *Id.* at 312 (Roberts, C.J., dissenting).

In 2015, Justice Thomas, concurring in *Perez v. Mortgage Bankers Ass'n*,[135] without citing *Chevron*, "call[ed] into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations," citing precedent beginning with *Bowles v. Seminole Rock & Sand Co.*,[136] a precursor to *Auer v. Robbins*.[137] Justice Thomas was blunt: "Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent."[138] That same year, Thomas, concurring in *Michigan v. EPA*, wrote separately to raise "serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes,"[139] citing *Chevron*. Specifically, "[*Chevron*] raises serious separation-of-powers concerns."[140]

The following year, Judge Gorsuch, concurring in *Gutierrez-Brizuela v. Lynch*,[141] directly confronted "[the] elephant in the room with us today":

> [T]he fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.[142]

Judge Gorsuch continued:

> [W]hatever the *agency* may be doing under *Chevron*, the problem remains that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them. A duty expressly assigned to them by the APA and one often likely compelled by the Constitution itself.[143]

135. 575 U.S. 92, 112 (2015) (Thomas, J., concurring). In *Perez*, the Supreme Court majority written by Justice Sotomayor reaffirmed that an administrative agency issuing an interpretation of a rule is not required to follow the APA notice and comment procedure applicable to an agency rule. *Id.* at 96 (majority opinion).

136. 325 U.S. 410 (1945).

137. 519 U.S. 452 (1997).

138. *Perez*, 575 U.S. at 112–13 (Thomas, J., concurring).

139. 576 U.S. 743, 760 (2015) (Thomas, J., concurring).

140. *Id.* at 761.

141. 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

142. *Id.*

143. *Id.* at 1152–53 (emphasis in original).

Chevron's purpose, Justice Gorsuch concluded, is "seemingly at odds with the separation of legislative and executive functions."[144]

In *Pereira v. Sessions*,[145] a case in which the majority opined that the "Court need not resort to *Chevron* deference,"[146] Justice Kennedy wrote, "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[147] Kennedy pointedly criticized "[t]he type of reflexive deference exhibited" in some earlier applications of *Chevron* deference:

> Given the concerns raised by some Members of this Court, see, *e.g.*, [City of Arlington v. FCC, 569 U.S. 290, 312–28 (2013)]; [Michigan v. EPA, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring)]; [Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring)], it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary. See, *e.g.*, *Arlington*, *supra*, at 312–316, 133 S. Ct. 1863 (ROBERTS, C.J., dissenting).[148]

Justice Kennedy's valedictory words opened the floodgates. *Chevron*, while not yet formally overruled, is on a veritable death watch.[149] The Supreme Court's assault on deference to administrative agencies challenges the constitutionality of *Chevron* and related cases and narrows its efficacy through recent emphasis on cost-benefit analysis and the major questions doctrine.

---

144. *Id.* at 1154.
145. 138 S. Ct. 2105 (2018).
146. *Id.* at 2113.
147. *Id.* at 2121 (Kennedy, J., concurring).
148. *Id.* at 2120–21.
149. *See, e.g.*, THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Kristin E. Hickman & Aaron L. Nielson, *Foreword: The Future of* Chevron *Deference*, 70 DUKE L.J. 1015 (2021); Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619 (2021); Cass R. Sunstein, Chevron *As Law*, 107 GEO. L.J. 1613, 1613 (2019) ("*Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc*., the foundation for much of contemporary administrative law, is under siege."); Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91 (2021); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded* (Wash. Univ. Sch. L. Legal Stud. Rsch. Paper Series, Paper No. 22-10-02, 2022).

In *BNSF Railway Co. v. Loos*,[150] Justices Gorsuch and Thomas dissented from a majority decision that did not mention *Chevron*, with Gorsuch writing: *Chevron* "[is] no more than a last resort," expressing gratitude to

> the Court [for buckling] down to its job of saying what the law is in light of its text, its context, and our precedent. Though I may disagree with the result the Court reaches, my colleagues rightly afford the parties before us an independent judicial interpretation of the law. They deserve no less.[151]

In 2019, in *Kisor v. Wilkie*,[152] the Court majority declined to overrule deference to administrative agency reasonable readings of genuinely ambiguous regulations as authorized by *Auer v. Robbins*[153] and *Bowles v. Seminole Rock & Sand Co.*[154] The Court majority stressed: "*Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits."[155]

"First and foremost," Justice Kagan stated for the majority, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. . . . And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction."[156] She emphasized: "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'"[157]

Second, "[i]f genuine ambiguity remains, moreover, the agency's reading must still be 'reasonable.' . . . And let there be no mistake: That is a requirement an agency can fail."[158] Here Justice Kagan cut away at *Auer*:

> Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.[159]

150. 139 S. Ct. 893 (2019).
151. *Id.* at 908–09 (Gorsuch, J., dissenting).
152. 139 S. Ct. 2400 (2019).
153. 519 U.S. 452 (1997).
154. 325 U.S. 410 (1945).
155. *Kisor*, 139 S. Ct. at 2408.
156. *Id.* at 2415.
157. *Id.* (citation omitted).
158. *Id.*
159. *Id.* at 2416.

Kagan then spelled out some important markers for identifying when *Auer* deference is and is not appropriate:

"[T]he regulatory interpretation must be one actually made by the agency. . . . [I]t must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views."[160]

"Next, the agency's interpretation must in some way implicate its substantive expertise."[161]

"Finally, an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference."[162]

Justices Gorsuch and Thomas concurred in the judgment with Justices Kavanaugh and Alito joining in part:

> It should have been easy for the Court to say goodbye to *Auer v. Robbins*. In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else." Nor is *Auer*'s biased rule the product of some congressional mandate we are powerless to correct: This Court invented it, almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution. A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.[163]

The Gorsuch concurrence's bottom line: "Overruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and 'follow [the] agency's [view] only to the extent it is persuasive.'"[164]

---

160. *Id.*
161. *Id.* at 2417.
162. *Id.* Kagan explained, "[w]e have therefore only rarely given *Auer* deference to an agency construction 'conflict[ing] with a prior' one." *Id.* at 2418 (citation omitted).
163. *Id.* at 2425 (Gorsuch, J., concurring in the judgment) (footnotes omitted).

> Still, today's decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that THE CHIEF JUSTICE claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.

Id. Or "a paper tiger." *Id.* at 2426.

164. *Id.* at 2447 (footnote omitted).

In a third 2019 case, *Gundy v. United States*,[165] Justice Kagan wrote for a 5-3 majority composed of Justices Ginsburg and Breyer, now no longer on the Court, and Justice Sotomayor. Justice Alito concurred in the judgment because of his reluctance to reinstate the nondelegation doctrine on a 4-4 vote.[166] The very recently confirmed Justice Kavanaugh took no part in the consideration or decision in *Gundy*.

Justice Gorsuch, writing for Chief Justice Roberts and Justice Thomas, was less patient:

> The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. . . .
>
> Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But Justice ALITO supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.[167]

Paralleling the impending likely constitutional demise of *Chevron* and related cases were cases that further limited their scope by employing statutory interpretation.

The Supreme Court, beginning in 2015, and earlier lower courts in appropriate cases, required an administrative agency to take into account the costs of its regulation when construing the standard set out in *Chevron* of a reasonable resolution of an ambiguous statute.[168]

Justices Kavanaugh and Alito wrote separately to "agree with Justice GORSUCH'S conclusion that the *Auer* deference doctrine should be formally retired." *Id.* at 2448–49 (Kavanaugh, J., concurring in the judgment).

165. 139 S. Ct. 2116 (2019).

166. *Id.* at 2130–31 (Alito, J., concurring in the judgment). Alito criticized the nondelegation doctrine as upholding "provisions that authorized agencies to adopt important rules pursuant to extraordinarily capricious standards." *Id.*

167. *Id.* at 2131 (Gorsuch, J., dissenting).

168. Michigan v. EPA, 576 U.S. 743 (2015).

President Reagan required regulatory agencies to engage in cost-benefit analyses in 1981. Exec. Order No. 12,291, 3 C.F.R. § 127 (1981). The order remains in force, but exerted less deregulatory

When applied, cost-benefit analysis shifts decision-making authority to the courts. The courts determine how costs or benefits should be determined and how persuasive to consider the calculations of the government and respondents. Deference to administrative agencies in cases such as *Michigan v. EPA* largely can end.

B. The Major Questions Doctrine

The major questions doctrine[169] articulated in the 2022 *West Virginia* case[170] represents the heavy artillery of the judicial assault. It is not available for routine agency interpretations of ambiguous statutory or regulatory language. But in cases involving major policy initiatives, it can be dispositive.

In 2000, the Court, with Justice O'Connor writing for a 5-4 majority, held in *FDA v. Brown & Williamson Tobacco Corp.*[171]:

> [A]lthough agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the

---

pressure for a period after Reagan's term ended. *See* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 120, 122 (2006).

Cost impact, or economic effects analysis, has had a major impact on court of appeals decisions. See, for example, Business Roundtable v. SEC, 647 F.3d 1144, 1146 (D.C. Cir. 2011), where the Court of Appeals for the District of Columbia vacated SEC Proxy Rule 14a-11. Judge Douglas Ginsburg wrote in part for a unanimous court:

> We . . . hold the Commission acted arbitrarily and capriciously for having failed . . . adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.

Id. at 1148–49.

On cost-benefit analysis generally, see Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV'T L. REV. 1 (2017); Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935 (2018).

169. *See supra* note 27 and accompanying text.

170. *See supra* note 26 and accompanying text.

171. 529 U.S. 120 (2000). Justice Breyer for the four Justices in dissent urged that tobacco regulation was authorized by the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 321(g)(1)(C), which specified that the FDA could regulate "articles (other than food) intended to affect the structure or any function of the body." *Id.* at 161 (Breyer, J., dissenting).

> tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.[172]

In 2014, in *Utility Air Regulatory Group v. EPA*,[173] the Court held that the EPA's motor vehicle greenhouse gas emission standard as authorized by the general definition of *air pollutants* in the Clean Air Act was not permissible. Writing within the *Chevron* rubric, the Court's majority held:

> 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*, 529 U.S., at 159, 120 S. Ct. 1291, 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."[174]

In the Court's 2015 case *King v. Burwell*,[175] Chief Justice Roberts also proceeded within the *Chevron* two-step framework but quoted *Brown & Williamson*: "'In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.' This is one of those cases."[176] The Court majority declined to defer to the IRS interpretation that tax credits were available on federal exchanges given language in § 368 of the Internal Revenue Code specifying "'an exchange established by the State.' . . . It is implausible that Congress meant the Act to operate in this manner."[177]

By 2021, a six Justice per curiam decision in *Alabama Ass'n of Realtors v. Department of Health & Human Services*[178] held: "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."'"[179]

The definitive articulation came in the 2022 *West Virginia* case.[180] Chief Justice Roberts writing for the majority relied on the major questions doctrine to deny the EPA the power to adopt emissions controls to substantially reduce carbon dioxide on a system-wide basis, rather than

---

172. *Id.* at 125–26.
173. 573 U.S. 302 (2014).
174. *Id.* at 324.
175. 576 U.S. 473 (2015).
176. *Id.* at 485 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).
177. *Id.* at 492–94.
178. 141 S. Ct. 2485 (2021) (per curiam).
179. *Id.* at 2489 (citations omitted).
180. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

continuing to limit its approach to single sources of pollution.[181] Best systems of energy reduction could be achieved by industrial plants reducing their own production of electricity; building new power plants using gas, wind, or solar; or by purchasing emission allowances through a cap and trade regime.[182] "Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national energy generation, down from 38% in 2014."[183]

Chief Justice Roberts rejected the EPA's argument that it could imply such power from § 111(d) of the Clean Air Act, which he characterized as an ancillary provision:

> 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. . . . 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.[184]

Neither Gorsuch and Alito concurring nor Kagan, Breyer, and Sotomayor in dissent mentioned *Chevron*. *Chevron* appeared to be dead.[185]

In May 2023, the Supreme Court appeared to take what would be the decisive step towards removing all doubt about the viability of *Chevron*. In

181. *Id.* at 2610, 2615–16.

182. *Id.* at 2636–41 (Kagan, J., dissenting).

183. *Id.* at 2604 (majority opinion).

184. *Id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). In *Sackett v. EPA*, 598 U.S. ___ (2023), the Supreme Court cut back on the reach of the EPA's powers under the Clean Water Act by excluding its power to regulate wetlands to "wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" *Sackett*, slip op. at 22. The Court did not expressly rely on the Major Questions Doctrine, but did state: "[T]his Court 'require[s] 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." *Id.* at 23 (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 590 U.S. ___, slip op. at 15–16 (2020)). The Court also relied on "vagueness concerns in light of the CWA's criminal penalties." *Id.* at 24.

185. Was *Chevron* dead or, to paraphrase the film *The Princess Bride*, really dead? The lower courts were less sure.

In *Nasdaq Stock Market LLC v. SEC*, 38 F.4th 1126 (D.C. Cir. 2022), decided after *West Virginia*, the D.C. Circuit panel addressed the NMS collection, consolidation, and dissemination of market data from three SRO-administered NMS plans, known as the Equity Data Plans, respectively for NYSE, Nasdaq, and on exchanges other than NYSE and Nasdaq. *Id.* at 1133.

The Court concluded that the SEC's new proposed governance plan was not reasonable under the second step in *Chevron* analysis because the Commission's interpretation was arbitrary and capricious:

> In short, even assuming the Commission is correct that section 11A is ambiguous or silent on the issue of non-SRO representation in NMS plan governance, it nevertheless fails to anchor its interpretation to any reasonable reading of section 11A. As a result, the Commission's decision to include representatives of non-SROs on the CT Plan operating committee is unreasonable and therefore invalid under *Chevron* step two.

Id. at 1139.

Loper Bright Enterprises v. Raimondo,[186] the Court granted certiorari to address the question: "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."[187]

C. The Implications of The Major Questions Doctrine

Just over the horizon are several other cases and rules or pending rules, however, which may prompt the Court to further limit Commerce Clause authority for administrative agencies or their programs under the major questions doctrine.

In 2022, for example, the Securities and Exchange Commission (SEC) issued detailed proposed Rules to require registrants to provide climate-related information and use specified financial metrics in audited financial statements, focusing on a topic similar to the EPA generation shifting initiative in the *West Virginia* case.[188]

The SEC proposals built on the Task Force on Climate-Related Financial Disclosure, a climate-related reporting framework supported as of October 2021 by more than 2,600 organizations globally with $25 trillion in total market capitalization and 1,069 financial institutions managing assets of $194 trillion,[189] and the Greenhouse Gas Protocol, which provides uniform methods to measure and report the seven greenhouse gases covered by the Kyoto Protocol—carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and nitrogen trifluoride.[190]

Almost instantly, there was criticism of the SEC's proposed climate-related disclosure rules. The immediate past SEC Chair, Jay Clayton, cowriting with Patrick McHenry, ranking Minority member of the House Financial Services Committee, called it an overreach. "Setting climate

186. 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, No. 22-451, 2023 WL 3158352 (U.S. May 1, 2023) (mem.).

187. Petition for a Writ of Certiorari at i–ii, *Loper Bright Enters.*, 2023 WL 3158352 (No. 22-451), 2022 WL 17821109. Even before taking up *Raimondo*, a 6-3 majority on the Court in *Biden v. Nebraska*, No. 22-506, 600 U.S. ___ (2023), relied in significant part on *West Virginia* to hold that the Secretary of Education lacks the authority to cancel $430 billion of student loan principal. "We hold today that the Act allows the Secretary to 'waive or modify' existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up." *Biden*, slip op. at 12. "'A decision of such magnitude and consequence' . . . must 'res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.'" *Id.* at 22 (quoting *West Virginia*).

188. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

189. *See* 87 Fed. Reg. at 21343 nn.96–102, 21344 nn.103–08.

190. 87 Fed. Reg. at 21344 nn.109–17, 21345 nn.118–20, 21345 nn.127–34.

policy is the job of lawmakers, not the SEC."[191] The SEC's "new[] activist approach to climate policy [is] far outside the SEC's authority, jurisdiction and expertise."[192]

There also was a vehement defense of the rule proposal.[193]

Is the Commission climate change rule proposal a major question that only can be resolved by Congress? The history of Federal Securities laws suggests otherwise.[194] The Securities Act of 1933[195] and Securities Exchange Act of 1934[196] emphasize disclosure of material facts as the heart of the federal securities law mission—long interpreted to include environmental disclosure—which is codified today in the repository of textual disclosure in Regulation S-K Item 101(c)(2)(i), which requires disclosure of:

> (i) The material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries, including the estimated capital expenditures for environmental control facilities for the current fiscal year and any other material subsequent period[.][197]

191. Jay Clayton & Patrick McHenry, *The SEC's Climate-Change Overreach*, WALL ST. J. (Mar. 20, 2022, 3:37 PM), https://www.wsj.com/articles/the-secs-climate-change-overreach-global-warming-risks-lawmakers-invertors-market-data-11647801469 [https://perma.cc/3AUP-G3RM].

192. *Id. See* Editorial, *Gary Gensler Stages a Climate Coup*, WALL ST. J. (Mar. 21, 2022, 6:10 PM), https://www.wsj.com/articles/gary-gensler-stages-a-climate-coup-securities-and-exchange-commission-blackrock-11647899043 [https://perma.cc/P9BM-3ATZ]; Paul Kiernan, *SEC Floats Mandatory Disclosure of Climate-Change Risks, Emissions*, WALL ST. J. (Mar. 21, 2022, 2:58 PM), https://www.wsj.com/articles/sec-to-float-mandatory-disclosure-of-climate-change-risks-emissions-11647874814 [https://perma.cc/5KCH-M9TJ] (predicting initial approval of the Rule would precipitate pushback from Republicans and some industry groups); *cf.* David Gelles & Hiroko Tabuchi, *How an Organized Republican Effort Punishes Companies for Climate Action*, N.Y. TIMES (May 27, 2022), https://www.nytimes.com/2022/05/27/climate/republicans-blackrock-climate.html [https://perma.cc/4DEA-2Q9E] (cutting off businesses such as Blackrock from state funds because the manager identified climate change as an economic risk); Jean Eaglesham & Paul Kiernan, *Fight Brews Over Cost of SEC Climate-Change Rules*, WALL ST. J. (May 17, 2022, 4:30 AM), https://www.wsj.com/articles/fight-brews-over-cost-of-sec-climate-change-rules-11652779802 [https://perma.cc/MVJ8-WH5A]; Barnali Choudhury, *Climate Change as Systemic Risk*, 18 BERKELEY BUS. L.J. 52 (2021).

193. *See* Jill E. Fisch, George S. Georgiev, Donna M. Nagy & Cynthia A. Williams, Comment Letter on Proposed Rule for Enhancement and Standardization of Climate-Related Disclosures for Investors (June 6, 2022) [hereinafter Professor Comment Letter], https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf [https://perma.cc/RT5Q-7DA2] (urging unanimously with thirty securities law professors that the SEC climate-related investor disclosure Rule was within the SEC's rulemaking authority).

194. 2 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 3–513 (6th ed. 2019); *see id.* at 241–54 (discussing the first mandatory disclosure item, description of business, which since 1973 has included environmental disclosure).

195. 15 U.S.C. §§ 77a–77g.

196. 15 U.S.C. §§ 78a–78qq.

197. 17 C.F.R. § 229.101(c)(2)(i) (2020).

The Commission and the Financial Accounting Standards Board have required disclosure of specified contingent environmental events.[198]

In 2010, the Commission expressly reminded companies "to consider climate change and its consequences as they prepare disclosure documents to be filed [with the Commission] and provided to investors."[199]

There is nothing vague or ancillary about the mandatory disclosure requirements in the 1933 Act which are specified in Schedule A,[200] which specifies in paragraph 8: "The general character of the business actually transacted or to be transacted by the issuer." Section 19 of the Securities Act gives the Securities and Exchange Commission seemingly an unconditional authority:

> The Commission shall have authority . . . to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical and trade terms used in this subchapter.[201]

Similarly, § 12 of the Securities Exchange Act of 1934 conditions trading on exchanges on disclosing "[s]uch information, in such detail, as to the [company] . . . as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect of the following: . . . the organization, financial structure, and nature of the business."[202]

Section 13(a) of the Exchange Act, which establishes the periodic reporting framework for public companies, requires companies to disclose information under rules the Commission "may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security . . . such annual reports . . . and such quarterly reports . . . as the Commission may prescribe."[203] Section 3(b) of the Exchange Act adds Commission authority to "define technical, trade, accounting, and other terms used [in the statute]."[204]

Unlike the EPA rule held unconstitutional in *West Virginia*, the SEC climate change rule proposal solely involves disclosure.

198. ACCT. FOR CONTINGENCIES, Statement of Fin. Acct. Standards No. 5, (FIN. ACCT. STANDARDS BD. 1975); SEC Staff Accounting Bulletin No. 92, 58 Fed. Reg. 32843 (June 14, 1993).

199. Commission Guidance Regarding Disclosure Related to Climate Change, Securities Act Release No. 33-9106, 75 Fed. Reg. 6290 (Feb. 8, 2010).

200. Securities Act of 1933 § 7(a)(1), 15 U.S.C. § 77g; § 10(a)(1), 15 U.S.C. § 77j.

201. *Id.* § 19(a), 15 U.S.C. § 77s.

202. Securities Exchange Act of 1934, 15 U.S.C. § 78*l*(b)(1)(A).

203. *Id.* § 78m(a)(2).

204. *Id.* § 78c(b).

Critics of the SEC's climate change proposal urge that the federal securities laws do not specify environmental disclosure and that the new rule proposal will add substantial costs to corporate issuers.[205]

Will a new Court limit the SEC's disclosure requirements to those expressly specified in the Act? If so, the Act itself will become a treatise. To apply the federal securities laws to the vast range of investors and disclosure items particularized in Schedule A and its counterparty in the Securities Exchange Act takes hundreds of pages in Regulation S-K. There also are several other statutory provisions which, as applied to the full panoply of industries, expand current federal securities regulations to several thousand pages.

Nor can there be any doubt that Congress intended the Commission to have this regulatory authority.[206]

If Congress objected to the Commission's approach, it could easily have intervened.[207] Congress has amended the Securities Act and the Exchange Act on multiple occasions since the 1930s, so it has had ample opportunity to reconsider the broad authority it delegated for disclosure-based rules, or to constrain the Commission's power to require disclosures about new topics. It has not done so.[208]

The stakes here could not be higher. If the Commission lacks the authority to adopt its climate change proposed rule, much else in the Commission's long existing program could also be vulnerable. The most widely used Commission antifraud provision, Rule 10b-5, was adopted in 1942 from a statutory provision, § 10(b) of the Securities Exchange Act, which provides in *toto*:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

205. The Commission estimated that the primary direct costs of the rule proposal for registrants would be compliance costs, The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249), which the Commission estimated for the first six years of compliance for non-SRC registrants (not subject to continual disclosure requirements) would start at $640,000 ($180,000 for internal costs and $460,000 for outside professional costs) with annual costs in subsequent years estimated to be $530,000. For SRC registrants (subject to continual disclosure requirements), the costs would begin in the first year at $490,000 and subsequently be $420,000. *Id.* at 21439.

206. *See, e.g.*, Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1045 (D.C. Cir. 1979) ("[T]he Commission has been vested by Congress with broad discretionary powers to promulgate (or not to promulgate) rules requiring disclosure of information beyond that specifically required by statute.").

In *Levine v. NL Industries, Inc.*, 926 F.2d 199, 203–04 (2d Cir. 1991), the court interpreted Item 101 to require disclosure of both the cost of complying with environmental regulations *and* potential costs for failing to comply.

207. Professor Comment Letter, *supra* note 193, at 8.

208. Usha R. Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L.J. 435 (2017) (describing amendments to securities laws).

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.[209]

The Court in 1976 labelled Rule 10b-5 a "catch-all,"[210] an ancillary provision in Chief Justice Roberts's vocabulary. The language of the Rule can be characterized as vague and is not elsewhere defined in the Securities Act—requiring several trips to the Supreme Court to define terms such as *fraud*,[211] *materiality*,[212] or the *in connection with* element.[213]

The Court has implied a private cause of action for civil actions under Rule 10b-5, including class actions,[214] but has devoted numerous vats of judicial ink to defining concepts such as the duty to disclose to avoid insider trading liability.[215]

Were all of these earlier efforts by the Supreme Court wrong? Should the Court now scrap eighty years of jurisprudence and require Congress to start over? This would be a long process. Rule 10b-5 is just one of many provisions in the securities laws which has occasioned numerous judicial interpretations.[216]

CONCLUSION

The administrative state is under judicial assault. The United States Supreme Court with its current membership has the power to terminate selective agencies and programs and to limit agency enforcement of statutes and their own regulations. How far will the Court go in using these powers?

209. 17 C.F.R. § 240.10b-5 (1942).

210. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 (1976). On the background of Rule 10b-5, see 7 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 583–87 (6th ed. 2022).

211. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

212. *See, e.g.*, TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976); Basic Inc. v. Levinson, 485 U.S. 224 (1988); Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011).

213. *See, e.g.*, Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

214. *See Basic*, 485 U.S. at 250.

215. *See, e.g.*, Chiarella v. United States, 445 U.S. 222 (1980); Dirks v. SEC, 463 U.S. 646 (1983); United States v. O'Hagan, 521 U.S. 642 (1997).

216. For example, see Court decisions on the definition of *security* such as *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), which require over 330 pages to describe. *See also* 2 LOSS, SELIGMAN & PAREDES, *supra* note 194, at 1101–435.

The death of Justice Ruth Bader Ginsburg and the addition of Justice Amy Coney Barrett late in 2020 gives the Court one more vote that may strengthen the Court's willingness to proceed.[217] She characterizes herself as an originalist and is an admirer of Justice Scalia.[218] There is little in her appellate court record or law review writings directly addressing the issues posed in *West Virginia* or the Commerce Clause.

Justices Thomas and Gorsuch, in their concurring and dissenting opinion in *Seila*,[219] and Justice Kavanaugh, earlier as a judge in the *Free Enterprise* case,[220] were prepared to overrule *Humphrey's Executor*[221] and hold unconstitutional the tolerance of *Humphrey's Executor*'s independent agencies in the words of Gorsuch and Thomas. As the two Justices wrote: "That decision has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design."[222] The membership of the Court now has changed. Will the Court be willing to go further under the separation of powers and removal doctrines in pending cases and hold that the removal processes of the FTC and SEC are impermissible, or go further in articulating that specific statutes or statutory provisions are unconstitutional?[223] There potentially will be many cases that raise variants of this issue.

The holding in *United States v. Lopez*[224] not to provide Congress the basis for enactment of the Gun-Free School Zones Act of 1990; *United States v. Morrison*[225] with its holding that the Commerce Clause could not be extended to the application of the Violence Against Women Act of 1994 to a private act of violence motivated by gender; and *National Federation of Independent Business v. Sebelius*[226] with its unwillingness to extend the Commerce Clause to support the individual mandate to make a shared responsibility payment if an individual did not buy insurance under the Affordable Care Act, are limits on the rational basis test for applying the Commerce Clause which was not questioned by the Court from 1937 to

---

217. To date we have few writings by Justice Barrett on the administrative agencies. She did sign the majority decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), but did not write an opinion in that case.

218. *See, e.g.*, Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1 (2018); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017) ("Justice Scalia was the public face of modern originalism.").

219. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2211 (2020) (Thomas, J., concurring in part and dissenting in part).

220. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd in part*, 561 U.S. 477 (2010).

221. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

222. *Seila*, 140 S. Ct. at 2212 (Thomas, J., concurring in part and dissenting in part).

223. *See supra* text accompanying notes 78–82.

224. 514 U.S. 549 (1995).

225. 529 U.S. 598 (2000).

226. 567 U.S. 519 (2012).

1995.[227] The gloves are now off. Litigants can challenge as unconstitutional proposed rules such as that of the Securities and Exchange Commission concerning climate change disclosure or administrative agency existing rules on a variety of topics.[228]

There are other new arrows in the quiver of those who seek to rein in the administrative state. The Supreme Court long deferred under the *Chevron* doctrine to reasonable administrative interpretations of ambiguous statutes.[229] Under *Auer v. Robbins*, the Court also had long supported a similar deference to agency interpretations of their own regulations.[230] Supreme Court deference to *Chevron* appears to have ended. Increasingly, the Court has relied on the major questions doctrine as articulated in the *West Virginia* case[231] or cost-benefit analysis[232] to supplant deference to agency interpretation.

This does not mean that the Supreme Court intends to end all administrative agencies. That would be overreading even the most aggressive text written to date in dissenting or concurring opinions. But the Court does appear prepared to limit agency programs and some new agencies to those expressly created by Congress. While this may be consistent with a strict reading of the Constitution, it far exceeds the capacity of Congress to provide effective legislative oversight to a government now with hundreds of regulatory agencies and thousands of programs or to draft language to address every future change in circumstances. Administrative agencies, whether independent regulatory agencies such as the Federal Reserve System, or specific parts of the Executive Branch, such as the Center for Disease Control[233] or Office of the Comptroller of the Currency,[234] are essential to the effective oversight and governance of our complex economy and social life. Decisions such as *West Virginia* portend a stultification of administrative agency response to ongoing or future major issues and the potential revision of generations of settled law. Given the magnitude of decisions to date, such as those barring the FDA from regulating tobacco products despite language in the Food and Drug Cosmetic Act specifying that the FDA could regulate "articles [other than food] intended to affect the structure of any function of the body,"[235] or limits on the EPA's power to address motor vehicle gas emission

227. *See supra* text accompanying notes 94–102.
228. *See supra* text accompanying notes 189–209.
229. *See supra* text accompanying notes 121–29.
230. *See supra* text accompanying notes 153–64.
231. *See supra* text accompanying notes 180–85.
232. *See supra* note 168 and accompanying text.
233. *See* 42 U.S.C. § 247d–4.
234. *See* 12 U.S.C. § 1.
235. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000).

standards[236] or system wide carbon dioxide emissions,[237] much is at stake. We have reached a point where the fundamental point of Commerce Clause decisions such as *Carolene Products*,[238] *Darby*,[239] and *Wickard v. Filburn*[240] to provide judicial support for the creation of administrative programs where there is a rational basis, or the deference doctrines in *Chevron* and *Auer*, are being overridden by a strict formalism. As Frankfurter and Landis observed over eighty years ago, Congress only can effectively regulate a coterie of administrative agencies by setting clear objectives and giving the agencies broad discretion in choosing the means to achieve those objectives. If modern jurisprudence means to largely end the discretion of agencies to achieve legislative ends, we are in for a bumpy ride.

236. *See supra* text accompanying notes 173–74.
237. *See supra* text accompanying notes 180–84.
238. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).
239. United States v. Darby, 312 U.S. 100 (1941).
240. 317 U.S. 111 (1942).