

THE GEORGE WASHINGTON LAW REVIEW



ANNUAL REVIEW OF ADMINISTRATIVE LAW

FOREWORD

The Ordinary Questions Doctrine 985 *Lisa Schultz Bressman*

ARTICLES

Chenery II Revisited 1050 *Daniel T. Deacon*

What the New Major
Questions Doctrine Is *Not* 1117 *Anita S. Krishnakumar*

ADMINISTRATIVE LAW ESSAYS

Judicial Review of Agency
Noncompliance with Presidential
Administration Orders
and OMB Circular A-4 1163 *Eitan Sirkovich*

The Mathematical Question:
Defining “Relatively Easy”
Political Questions 1182 *Nathaniel Schwamm*



The George Washington Law Review, ISSN 0016-8076, is published in February, April, June, August, October, and December by students of The George Washington University Law School, 720 20th St., N.W., Washington, D.C. 20052. Email: gwlr@law.gwu.edu. Website: <http://www.gwlr.org>. Phone: (202) 994-4610. Fax: (202) 994-4609. Publication Office: Sheridan, PA, 450 Fame Avenue, Hanover, PA 17331. Please send address changes to the Editorial Office.

Subscriptions are \$50.00 per year; foreign, \$55.00 per year. District of Columbia residents please add 5.75% sales tax. Absent timely notice of termination, subscriptions are automatically renewed upon expiration. Periodicals postage is paid at Washington, D.C., and additional mailing offices.

Single issues of the current volume are available from the Editorial Office. Regular issues are \$10.00 each; symposia and *Annual Review of Administrative Law* issues, \$15.00 each; and double issues, \$20.00 each. To cover shipping charges, please add \$1.75 per issue to addresses in the United States, \$3.50 to Canada, \$3.75 to Mexico, and \$10.00 to elsewhere. For back issues of previous volumes, inquire of William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068. Microfilms of all volumes are available through William S. Hein & Co., Inc., as well.

POSTMASTER: Please send change of address and new subscriptions to The George Washington Law Review, ISSN 0016-8076, 2028 G St. NW, Suite LLC-022, Washington, D.C. 20052, at least 45 days before the date of the issue with which it is to take effect. Duplicate issues will not be sent without charge.

The George Washington Law Review invites the submission of manuscripts for publication. We regret that manuscripts cannot be returned unless a self-addressed, postage-prepaid envelope is submitted with the manuscript. We also welcome electronic submissions. Please see our website for further details.

THE GEORGE WASHINGTON LAW REVIEW

BOARD OF EDITORS 2023–2024

KENDALL ARCHER
Editor-in-Chief

NATHANIEL SCHWAMM
Senior Managing Editor

HYUNG-JO (HJ) CHOI
Senior Executive Editor

LAUREN LEHNER
Senior Production Editor

RACHEL LEVI BLAU
Senior Articles Editor

JESSICA SHELNUTT
Senior Notes Editor

PAUL HARRYHILL
Senior Online Editor

OLIVIA VENUS
*Senior Membership &
Development Editor*

MIN JI DOH
Senior Projects Editor

BEKAH BASS
W. AVERY CONRAD
KELSEY DION
STEPHON HOWIE
AVERY RANUM
ETHAN SYSTER
CAROLINE UEHLING
Articles Editors

JOSEPH DAVIS
IMMANUEL ELIJAH
ANASTASIA FOLEY
MAEVE MCBRIDE
JOSEMIGUEL RODRIGUEZ
ELIZABETH SNYDER
THOMAS VAUGHN
Managing Editors

KATIE CANTONE-HARDY
BRICE KIMBLE
ERYN LIN
DEVIN LOUIS
PRIYANKA MARA
AUGUSTA NAU
KIRA PYNE
XIAONAN QU
Notes Editors

AVA ROCHE
GRETEL ZUMWALT
Production Editors

MADELINE OCHI
Online Editor

ASSOCIATES

DANIEL ACOSTA
TIMOTHY APPLETON
KARSTEN A. BALL
NADIRA BELLO
BRADY BLOUIN
SYDNEY BOLL
SAM BORRUS
HANNAH BURDETTE
LAUREN BURNS
JAMES CRISAFULLI
KELLY CUTHBERTSON
NICOLETTE DELORENZO
JENNA DONATIELLO
MELISSA DOROW
AERYKA FAUSETT
SYDNEY FAY

ABRAM MORRIS FINLEY
JOEL GALLOWAY
DECLAN GLUECK
REILLY GOLDEN
RUSSELL GREEN
VASSILIKI GRIGORPOULOS
PINO HENRY
YANA HOLDEN
GILLIAN ISABELLE
EITHAN ITAEV
WON JOO
HAILEY KAY
JULIA KILEY
JOHN LALIME
JACOB LANGER
TESSA LASSER

ADDIE LYNCH
STEPHAN MARSH
JEREMY MARTINEZ
JOSEF WOLFGANG PAULSON
XINYU QIANG
SAMANTHA RAGGIO
AUSTIN REDA
SARAH REISINGER
THOMAS ROMANCHEK
JORDAN H. RUBIN
CHARLIE SCHMIDT
EITAN SIRKOVICH
JOHN TULEY
BRANT VERMEER
DREW WEISBERG
JOSEPH WILTON

CAROLYN JACOBS HARRIS, *Administrative Associate*

MEMBERS

AKSHARA ANIRJITA	JORDAN GUNNING	TARRA OLFAT
JOSEPH LEO ARKFELD	ARISTIDES N. HADJIPANTELI	LEXI ORGILL
LILY BARRETT	LANDIS HAGERTY	GIULIANNA PENDLETON
MARY ANN BARROW	KELLY HENNESSY	NICHOLAS J. PETRUZZIELLO
THOMAS BERES	LUIS SERGIO HERNANDEZ JR.	ROWAN PIERSON
CAMERON BERNIER	MISHAEL H. HIBSHOOSH	REGINA POSTREKHINA
JAKE BERNSTEIN	STEVEN HOLLINS	JACK RAINERI
JOSEPH CAHILL	SEAN HULLIHAN	NATALIE REED
CHRISTINA CASEY	JAVERIA IJAZ	RIX RYSKAMP
ROBERT CASINO	EMMA KEARNEY	ELANOR SANDS
ALLISON CHESKY	CARTER KING	STEPHANIE SAUER
NARISA A. CHOWDHURY	RYAN KOSCHES	LUKE SCHLOBOHM
JOE CIANCIOLA	FRANK KRATOVIL	NAWAL SEEDAT
LAUREN DAVIDSON	RACHEL LAYNE	BLAKE SLOANE
NATALIE DE BENEDETTI	ZHEN LI	BRIAN SMALLSHAW
TRISH DREES	TÉA LORSCH	ABIGAIL STEIN
NICOLE ECONOMOU	JEFFERY MA	ALLY STOCKMAN
MACKENZIE ELLIOTT	ERIN MCGUIRE	AUDREY STONE
SELENA EVERITT	KATIE MCKINNEY	LORNA STRACHAN
EMILY FALLIN	KATIE METZGER	LAUREN STURM
NOAH FISHER	KAITLYN MILINIC	XUEROU WANG
CAROLINE FLOAM	JORDAN MORRIS	MADELEINE WINDEL
DELANEY GATINE	SHLOKE SINGH NAIR	BEN WINNEG
ARIANA GILANI	DANIEL O'SHEA	LAURA ZECCA

The George Washington University Law School

2024–2025

Officers of Administration

Ellen W. Granberg, B.S., Ph.D., *President of the University*
Dayna Bowen Matthew, A.B., J.D., Ph.D., *Dean of the Law School; Harold H. Greene Professor of Law*
Michael Abramowicz, B.A., J.D., *Associate Dean for Strategy and Innovation; Oppenheim Professor of Law*
Randall S. Abate, B.A., M.S.L., J.D., *Assistant Dean for Environmental Law Studies*
Jason Belk, B.A., M.P.P., J.D., *Associate Dean of Students*
Carmia N. Caesar, B.A., J.D., *Associate Dean for Justice, Equity, Diversity, and Inclusion*
Rosa Celorio, B.S., J.D., *Associate Dean for International and Comparative Legal Studies; Burnett Family Distinguished Professorial Lecturer in International and Comparative Law and Policy*
Elizabeth L. Ewert, B.A., M.F.A., J.D., *Senior Associate Dean for Administrative Affairs; John S. Jenkins Family Professorial Lecturer in Law and Policy Chair*
Aram A. Gavoor, B.A., J.D., LL.M., *Associate Dean for Academic Affairs; Professorial Lecturer in Law; Professor (by courtesy), Trachtenberg School of Public Policy & Public Administration*
Suzanne Hard, B.A., J.D., *Associate Dean for Professional Development and Career Strategy*
Kathy Hessler, B.A., J.D., LL.M., *Assistant Dean for Animal Law*
David M. Johnson, B.A., J.D., *Assistant Dean for Advocacy Programs; Professorial Lecturer in Law*
Shehernaz D. Joshi, B.A., M.A., *Assistant Dean, Graduate and International Programs*
Laurie S. Kohn, B.A., J.D., LL.M., *Jacob Burns Foundation Associate Dean for Clinical Affairs; Associate Professor of Clinical Law; Director of the Family Justice Litigation Clinic; Director of the Access to Justice Clinic*
Keri A. McCoy, B.A., J.D., *Assistant Dean for Field Placement*
Alan B. Morrison, B.A., LL.B., *Lerner Family Associate Dean for Public Interest and Public Service Law; Professorial Lecturer in Law*
Scott B. Pagel, B.A., M.A.L.S., J.D., *Associate Dean for Information Services; Director of the Law Library; Professor of Law*
Michael Rand, B.S., B.S.B.A., M.A., Ph.D., *Assistant Dean for Business and Finance Law*
Alfreda Robinson, B.A., M.A., J.D., *Associate Dean for Trial Advocacy; Professorial Lecturer in Law; Co-Director of the Litigation and Dispute Resolution Program*
Lisa M. Schenck, B.A., M.P.A., J.D., LL.M., J.S.D., *Associate Dean for National Security, Cybersecurity, and Foreign Relations Law; Distinguished Professorial Lecturer in Law*
Steven L. Schooner, B.A., J.D., LL.M., *Jeffrey & Martha Kohn Senior Associate Dean for Academic Affairs; Nash & Cibinic Professor of Government Procurement Law*
Jonathan R. Siegel, B.A., J.D., *Associate Dean for Research and Faculty Development; F. Elwood and Eleanor Davis Research Professor of Law*
Sophia Sim, B.A., J.D., *Associate Dean for Admissions and Financial Aid*
Kristoffer Svendsen, LL.B., LL.M., Ph.D., *Assistant Dean for Energy Law*
Anthony D. Tiberio, B.A., M.A., J.D., *Assistant Dean of Students*
Jessica Tillipman, B.A., J.D., *Associate Dean for Government Procurement Law Studies; Government Contracts Advisory Council Distinguished Professorial Lecturer in Government Contracts Law, Practice & Policy*
John M. Whealan, B.S., M.S., J.D., *Associate Dean for Intellectual Property Law; Director, GW Center for Law and Technology*

Jacob Burns Law Library

Robert Bratton, B.A., M.L.S., *Head of Cataloging & Metadata Services*
Nate Delmar, B.A., J.D., M.L.I.S., *National Security Law Librarian*
Jennifer Fritz, B.M.M.E., M.L.I.S., *Systems Librarian*
Nicole Harris, B.A., J.D., M.L.I.S., *Assistant Director for Innovative Technology Services*
Mary Kate Hunter, A.B., J.D./B.C.L., M.S.L.I.S., *Head of Reference & Government Procurement Law Librarian*
Raphael D. Jackson-Ortiz, J.D., M.L.S., *Head of Legal Technology Services*
Germaine Leahy, B.A., M.L.S., *Energy & Environmental Law Librarian*
Iris Lee, B.A., M.L.S., J.D., *Head of Access Services*
Leslie A. Lee, B.A., J.D., M.L.S., *Assistant Director for Administrative Services*
Trina R. Robinson, B.A., J.D., M.L.I.S., *Assistant Director for Resource Management Services*
Traci Emerson Spackey, B.A., J.D., M.L.I.S., *Foreign & International Law Librarian*
Andrew M. Winston, B.A., J.D., M.S.L.I.S., *Assistant Director for Public Services*

Emeriti Faculty

Martin J. Adelman, B.A., M.S., J.D., *Theodore and James Pedas Family Professor Emeritus of Intellectual Property and Technology Law; Co-Director of the Intellectual Property Law Program; Co-Director of the Dean Dinwoodey Center for Intellectual Property Studies*

John F. Banzhaf, III, B.S.E.E., J.D., *Professor Emeritus of Law*

Jerome A. Barron, B.A., J.D., LL.M., *Harold H. Greene Professor of Law Emeritus*

W. Burlette Carter, B.A., J.D., *Professor Emerita of Law*

Donald C. Clarke, B.A., M.Sc., J.D., *David Weaver Research Professor Emeritus of Law*

Charles B. Craver, B.S., M.I.L.R., J.D., *Freda H. Alverson Professor Emeritus of Law*

Lynn E. Cunningham, B.A., B.D., J.D., *Professor Emeritus of Clinical Law*

Lawrence A. Cunningham, B.A., J.D., *Henry St. George Tucker III Research Professor of Law Emeritus*

Jack Harlan Friedenthal, B.A., J.D., *Howrey Professor Emeritus of Trial Advocacy, Litigation, and Professional Responsibility*

Miriam Galston, B.A., Ph.D., J.D., *Associate Professor Emeritus of Law*

Phyllis Goldfarb, B.A., Ed.M., J.D., LL.M., *Jacob Burns Foundation Professor of Clinical Law Emeritus*

Carol L. Izumi, B.A., J.D., *Professor Emeritus of Clinical Law*

Suzanne H. Jackson, B.A., J.D., *Professor Emerita of Clinical Law*

Laird Kirkpatrick, B.A., J.D., *Louis Harkey Mayo Research Professor Emeritus of Law*

Ira C. Lupu, B.A., J.D., *F. Elwood and Eleanor Davis Professor Emeritus of Law*

Peter H. Meyers, B.A., J.D., *Professor of Law Emeritus*

Thomas D. Morgan, B.A., J.D., *Oppenheim Professor Emeritus of Antitrust and Trade Regulation Law*

Ralph Clarke Nash, Jr., A.B., J.D., *Professor Emeritus of Law*

Anne K. Olesen, B.S., M.A., J.D., *Professor Emerita of Clinical Law*

Robert E. Park, B.S., B.A., J.D., LL.M., *Professor Emeritus of Law*

Peter Raven-Hansen, B.A., J.D., *Glen Earl Weston Research Professor of Law Emeritus*

Arnold W. Reitze, Jr., B.A., J.D., M.P.H., *J.B. and Maurice C. Shapiro Professor Emeritus of Environmental Law*

Catherine J. Ross, B.A., Ph.D., J.D., *Lyle T. Alverson Professor Emeritus of Law*

Roger E. Schechter, B.A., J.D., *Professor Emeritus of Law*

Lewis A. Schiller, B.A., J.D., *Professor Emeritus of Law*

Teresa Moran Schwartz, B.A., J.D., *J.B. and Maurice C. Shapiro Professor Emeritus of Public Interest Law*

David J. Sharpe, A.B., LL.B., S.J.D., *Professor Emeritus of Law*

Dinah L. Shelton, B.A., J.D., *Manatt/Ahn Professor of International Law Emeritus*

Eric Scott Sirulnik, B.A., J.D., LL.M., *Professor Emeritus of Law*

Lewis D. Solomon, B.A., J.D., *Van Vleck Research Professor of Law*

Ralph G. Steinhardt, B.A., J.D., *Lobingier Professor Emeritus of Comparative Law and Jurisprudence*

Joan H. Strand, B.A., J.D., *Professor Emeritus in Residence of Clinical Law*

Arthur E. Wilmarth, Jr., B.A., J.D., *Professor Emeritus of Law*

Luize E. Zubrow, B.A., J.D., *Professor Emeritus of Law*

Full-Time Faculty Members

Cori Alonso-Yoder, A.B., J.D., *Associate Professor of Fundamentals of Lawyering*

Jeremy Bearer-Friend, B.A., M.A., J.D., *Associate Professor of Law*

Emily Benfer, B.A., J.D., LL.M., *Associate Professor of Clinical Law; Director of the Health Equity Policy & Advocacy Clinic*

Alberto M. Benítez, B.A., J.D., *Professor of Clinical Law; Director, Immigration Clinic*

Paul Schiff Berman, A.B., J.D., *Walter S. Cox Professor of Law*

Francesca Bignami, A.B., M.Sc., J.D., *LeRoy Sorenson Merrifield Research Professor of Law*

Natalia Blinkova, B.A., M.A., J.D., *Acting Writing Center Coordinator; Associate Professor of Fundamentals of Lawyering*

Christopher A. Bracey, B.S., J.D., *Provost and Executive Vice President for Academic Affairs; Professor of Law*

Donald Braman, B.A., Ph.D., J.D., *Associate Professor of Law*

Robert Brauneis, B.A., J.D., *Michael J. McKeon Professor of Intellectual Property Law; Co-Director of the Intellectual Property Law Program; Co-Director of the Dean Dinwoodey Center for Intellectual Property Studies; Member, Managing Board, Munich Intellectual Property Law Center*

Karen B. Brown, B.A., J.D., LL.M., *Theodore Rinehart Professor of Business Law*

Leslie D. Callahan, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*

Arturo J. Carrillo, B.A., J.D., LL.M., *Professor of Clinical Law*

Steve Charnovitz, B.A., J.D., M.P.P., *Associate Professor of Law*

Mary M. Cheh, B.A., J.D., LL.M., *Elyce Zenoff Research Professor of Law*

Bradford R. Clark, B.A., J.D., *William Cranch Research Professor of Law*

Thomas Colby, B.A., J.D., *John Theodore Fey Research Professor of Law*
 John P. Collins, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Robert J. Cottrol, B.A., Ph.D., J.D., *Harold Paul Green Research Professor of Law*
 Katya Cronin, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Laura A. Dickinson, A.B., J.D., *Lyle T. Alverson Professor of Law*
 William S. Dodge, B.A., J.D., *Lobingier Professor of Comparative Law and Jurisprudence*
 David Fontana, B.A., J.D., *Samuel Tyler Research Professor*
 Mary Anne Franks, B.A., M.Phil., D.Phil., J.D., *Eugene L. and Barbara A. Bernard Professor in Intellectual Property, Technology, and Civil Rights Law*
 Theresa A. Gabaldon, B.S., J.D., *Lyle T. Alverson Professor of Law; Director of Academic Programs and Administration, C-LEAF*
 Iselin Gambert, B.A., J.D., *Director, Fundamentals of Lawyering Program; Professor, Fundamentals of Lawyering; Faculty Co-Director, Animal Legal Education Initiative*
 Robert L. Glicksman, B.A., M.A., J.D., *J.B. and Maurice C. Shapiro Professor of Environmental Law*
 Bethany Gullman, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Jeffrey S. Gutman, B.A., J.D., *Professor of Clinical Law; Director, Public Justice Advocacy Clinic*
 Lula Hagos, B.A., J.D., LL.M., *Associate Professor of Clinical Law; Director, Criminal Defense and Justice Clinic*
 Emily Hammond, B.S., J.D., *Glen Earl Weston Research Professor of Law; Faculty Director of Academic Sustainability Programs, GW Alliance for a Sustainable Future*
 Robin L. Juni, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Cheryl A. Kettler, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 F. Scott Kieff, B.S., J.D., *Stevenson Bernard Professor of Law; Faculty Director, C-LEAF*
 William E. Kovacic, B.A., J.D., *Global Competition Professor of Law and Policy; Professor of Law; Director, Competition Law Center*
 Cynthia Lee, B.A., J.D., *Edward F. Howrey Professor of Law*
 Renée Lettow Lerner, A.B., M.Litt., J.D., *Donald Phillip Rothschild Research Professor*
 Heidi H. Liu, A.B., J.D., Ph.D., *Associate Professor of Law*
 Jeffrey Manns, B.A., D.Phil., J.D., *Professor of Law*
 Maeva Marcus, B.A., M.A., Ph.D., *Research Professor of Law; Director of the Institute for Constitutional Studies*
 Brooke Ellinwood McDonough, B.A., J.D., *Acting Coordinator of Scholarly Writing; Associate Professor of Fundamentals of Lawyering*
 Caitlin Meade, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Joan S. Meier, B.A., J.D., *National Family Violence Law Center Professor of Clinical Law; Director, National Family Violence Law Center at the George Washington University Law School*
 Dalia Tsuk Mitchell, LL.B., LL.M., S.J.D., Ph.D., *The John Marshall Harlan Dean's Research Professor of Law; Professor of Law and History*
 Blake D. Morant, B.A., J.D., *Robert Kramer Research Professor of Law*
 Sean D. Murphy, B.A., J.D., LL.M., S.J.D., *Manatt/Ahn Professor of International Law*
 Dawn C. Nunziato, B.A., M.A., J.D., *The Pedas Family Endowed Professorship; William Wallace Kirkpatrick Research Professor*
 Spencer Overton, B.A., J.D., *The Patricia Roberts Harris Research Professor of Law*
 Todd D. Peterson, A.B., J.D., *Carville Dickinson Benson Research Professor*
 Richard J. Pierce, Jr., B.S., J.D., *Lyle T. Alverson Professor of Law*
 Erika Nicole Pont, B.A., J.D., *Associate Director, Fundamentals of Lawyering Program; Coordinator of the Dean's Fellow Program; Associate Professor of Fundamentals of Lawyering*
 Jennifer Wimsatt Pusateri, B.A., J.D., LL.M., *Associate Professor of Fundamentals of Lawyering*
 Laura S. Richman, B.A., Ph.D., *Associate Professor of Social Science and Health Law*
 Barak D. Richman, A.B., J.D., Ph.D., *Alexander Hamilton Professor of Business Law*
 Jeffrey Rosen, A.B., B.A., J.D., *Professor of Law*
 Stephen A. Saltzburg, B.A., J.D., *Wallace and Beverley Woodbury University Professor of Law; Co-Director of the Litigation and Dispute Resolution Program*
 Joan E. Schaffner, B.S., M.S., J.D., *Associate Professor of Law; Faculty Co-Director of the Animal Legal Education Initiative*
 Naomi T. Schoenbaum, B.A., J.D., *William Wallace Kirkpatrick Dean's Research Professor of Law*
 Joshua I. Schwartz, B.A., J.D., M.R.P., *E.K. Gubin Professor of Government Contracts Law; Co-Director of the Government Procurement Law Program*
 Omari Scott Simmons, B.A., J.D., LL.M., *Lyle T. Alverson Professor of Law*
 Anita M. Singh, B.A., B.S., M.A., J.D., *Associate Director, Fundamentals of Lawyering Program; Associate Professor of Fundamentals of Lawyering*
 Peter J. Smith, B.A., J.D., *Arthur Selwyn Miller Research Professor*
 Daniel Justin Solove, B.A., J.D., *Eugene L. and Barbara A. Bernard Professor of Intellectual Property and Technology Law; Faculty Co-Director, GW Center for Law & Technology*
 Alicia Solow-Niederman, B.A., J.D., *Associate Professor of Law*
 Jessica K. Steinberg, B.A., J.D., *Professor of Law*
 Sonia M. Suter, B.A., M.S., J.D., *Henry St. George Tucker III Dean's Research Professor of Law; Kahan Family Research Professor of Law; Founding Director, Health Law Initiative*

Edward T. Swaine, A.B., J.D., *Charles Kennedy Poe Research Professor*
 Joel Teitelbaum, B.A., J.D., LL.M., *Associate Professor of Health Policy; Associate Professor of Law (courtesy appointment)*
 Roger H. Trangsrud, B.A., J.D., *James F. Humphreys Professor of Complex Litigation and Civil Procedure*
 Jonathan Turley, A.B., J.D., *J.B. and Maurice C. Shapiro Professor of Public Interest Law; Director of the Environmental Law Advocacy Center; Executive Director, Project for Older Prisoners*
 Robert W. Tuttle, B.A., M.A., J.D., Ph.D., *David R. and Sherry Kirschner Berz Research Professor of Law and Religion*
 Charles Tyler, B.A., B. Phil., J.D., *Associate Professor of Law*
 Tania N. Valdez, B.A., J.D., *Associate Professor of Law*
 Kayonia L. Whetstone, B.A., J.D., *Associate Professor of Fundamentals of Lawyering*
 Kathryn Young, B.A., M.F.A., J.D., Ph.D., *Associate Professor of Law*
 Christopher R. Yukins, A.B., J.D., *Lynn David Research Professor in Government Procurement Law*

Fellows, Visitors, and Other Special Faculty Members

Mary Catherine Amerine, B.A., J.D., *Visiting Associate Professor of Law and Frank H. Marks Intellectual Property Law Fellow*
 Leah Calabro, B.A., B.F.A., J.D., *Visiting Associate Professor of Law and International and Comparative Law Fellow*
 Peter Calloway, B.A., J.D., *Visiting Associate Professor of Clinical Law and Friedman Fellow*
 Ashley Carter, B.A., J.D., *Visiting Associate Professor of Clinical Law*
 Caroline Cecot, A.B., J.D., Ph.D., *Visiting Associate Professor of Law*
 Roger Colinvau, B.A., M.Litt, J.D., *Visiting Professor of Law*
 Lolita Darden, B.E., J.D., M.F.E., *Visiting Associate Clinical Professor; Director of Intellectual Property and Technology Clinic*
 Holly R. Eaton, A.B., J.D., *Friedman Fellow and Visiting Associate Professor of Clinical Law for the Public Justice Advocacy Clinic*
 Jane Moretz Edmisten, B.A., M.A., J.D., *Visiting Associate Professor of Law*
 Giovanna E. Gismondi, LL.B., LL.M., S.J.D., *Visiting Professor of Law and Environmental Law Fellow*
 Drake Hagner, B.A., J.D., *Visiting Associate Professor of Clinical Law*
 Christina Lee, B.A., B.S., M.S., J.D., *Visiting Associate Professor of Law and Privacy and Technology Law Fellow*
 Robert Parrish, B.A., M.A., J.D., *Visiting Professor of Fundamentals of Lawyering*
 Sara Rosenbaum, B.A., J.D., *Harold and Jane Hirsh Professor of Health Law and Policy, School of Public Health and Health Services; Professor of Law (by Courtesy)*
 Melinda Roth, B.A., M.P.P., J.D., *Visiting Associate Professor of Law*
 Loren Voss, B.A., M.A., J.D., *National Security, Cybersecurity, and Foreign Relations Law Fellow; Visiting Professor of Law*

Professors of Practice

Jonathan G. Cedarbaum, A.B., M.A., M.Phil., J.D., *Professor of Practice for National Security, Cybersecurity, and Foreign Relations Law*
 Jeffrey I. Kohn, B.S., J.D., *Professor of Practice for Business and Finance Law*

Adjunct Faculty

Ernest B. Abbott, B.A., M.P.P., J.D., *Professional Lecturer in Law*
 Hdeel Abdelhady, B.A., J.D., *Professorial Lecturer in Law*
 Jason A. Abel, B.A., J.D., *Professorial Lecturer in Law*
 Victoria Ajayi, B.A., J.D., *Professorial Lecturer in Law*
 Brittany Aldredge, B.A., M.A., J.D., *Professorial Lecturer in Law*
 S. Craig Alexander, B.S., J.D., *Professorial Lecturer in Law*
 Stanimir A. Alexandrov, J.D., LL.M., S.J.D., *Professorial Lecturer in Law*
 Samiyyah R. Ali, B.A., M.A., J.D., *Professorial Lecturer in Law*
 John D. Altenburg, B.A., J.D., M.M.A.S., *Professorial Lecturer in Law*
 Eric Steven Angel, B.A., J.D., *Professorial Lecturer in Law*
 Hiba M. Anver, B.A., J.D., *Professorial Lecturer in Law*
 Jay Apperson, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 William P. Atkins, B.S., J.D., M.B.A., LL.M., *Professorial Lecturer in Law*
 Michael K. Atkinson, B.A., J.D., *Professorial Lecturer in Law*
 Donna Attanasio, A.B., J.D., *Professorial Lecturer in Law*
 Benedetta Audia, J.D., LL.M., *Professorial Lecturer in Law*
 Marshall Babson, A.B., J.D., *Professorial Lecturer in Law*
 Hallie Tremaine Balkin, B.A., J.D., *Professorial Lecturer in Law*
 Charles K. Barber, B.A., J.D., *Professorial Lecturer in Law*

Jonathan A. Barnes, B.A., J.D., *Professorial Lecturer in Law*
 Craig D. Barrett, B.A., J.D., M.A., LL.M., *Professorial Lecturer in Law*
 Michael St. Patrick Baxter, LL.B., LL.M., *Professorial Lecturer in Law*
 Robert Baxter, B.A., M.A., J.D., *Professorial Lecturer in Law; Director, Schenck National Security Crisis Negotiations Competition*
 Philip Bayer, B.S.E., J.D., *Professorial Lecturer in Law*
 Sara J. Bayram, B.A., J.D., *Professorial Lecturer in Law*
 Michael Beder, B.S., J.D., *Professorial Lecturer in Law*
 Locke Bell, B.S., J.D., *Professorial Lecturer in Law*
 James P. Benoit, B.S., M.B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Robert R. Berger, B.A., J.D., *Professorial Lecturer in Law*
 Frank J. Bewkes, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Linda E. Blauhut, B.A., J.D., *Professorial Lecturer in Law*
 Steven N. Blivess, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Samantha Block, B.A., B.S., M.A., J.D., *Professorial Lecturer in Law*
 Matthew Blum, B.A., J.D., *Professorial Lecturer in Law*
 Jeff Blumberg, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Nathaniel Blaine Bolin, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Alex Bopp, B.A., J.D., *Professorial Lecturer in Law*
 Ronald Joseph Borro, B.S., J.D., *Professorial Lecturer in Law*
 Christina E. Bortz, B.A., J.D., *Professorial Lecturer in Law*
 Andrew Bowne, B.A., J.D., LL.M., Ph.D., *Professorial Lecturer in Law*
 Samuel B. Boxerman, B.A., J.D., *Professorial Lecturer in Law*
 Jeffrey Breinholt, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Patricia A. Broderick, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Thomas E. Brzozowski, B.A., J.D., LL.M., M.S.S., *Professorial Lecturer in Law*
 Trent Buatte, B.A., J.D., *Professorial Lecturer in Law*
 Michael F. Buchwald, B.A., J.D., *Professorial Lecturer in Law*
 Todd Buchwald, B.A., J.D., *Professorial Lecturer in Law*
 Bobby Burchfield, B.A., J.D., *Professorial Lecturer in Law*
 David Calabrese, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Charles Henry Camp, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Alexander O. Canizares, B.A., J.D., *Professorial Lecturer in Law*
 George Cannon, Jr., B.A., J.D., *Professorial Lecturer in Law*
 Marinn Carlson, B.A., M.P.A., J.D., *Professorial Lecturer in Law*
 Phillip Carter, B.A., J.D., *Professorial Lecturer in Law*
 Rebecca Cary, B.A., J.D., *Professorial Lecturer in Law*
 Mike Chajon, B.S., J.D., *Professorial Lecturer in Law*
 Joshua D. Champagne, B.A., J.D., *Professorial Lecturer in Law*
 Robin K. Chand, B.A., J.D., *Professorial Lecturer in Law*
 Jennifer A. Chang-Lo, B.A., M.S., *Professorial Lecturer in Law*
 Dana J. Chase, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Louis A. Chiarella, B.A., J.D., M.A., LL.M., *Distinguished Professorial Lecturer in Government Procurement Law*
 Jennifer S. Choi, B.S., J.D., *Professorial Lecturer in Law*
 Megan A. Christensen, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Victoria Christoff, B.A., J.D., *Professorial Lecturer in Law*
 Frances Chrzan, B.A., J.D., *Professorial Lecturer in Law*
 Jaimie Clark, A.A.S., B.A., M.S., J.D., *Professorial Lecturer in Law*
 Michael S. Coffee, B.S., J.D., *Professorial Lecturer in Law*
 David K. Cohen, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Melissa Colangelo, B.A., J.D., *Professorial Lecturer in Law*
 Amanda S. Conn, B.A., J.D., *Professorial Lecturer in Law*
 William E. Cooper, B.A., J.D., *Professorial Lecturer in Law*
 Liza Craig, B.A., J.D., *Professorial Lecturer in Law*
 Polly Craighill, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Paul Crane, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Graham R. Cronogue, B.A., J.D., *Professorial Lecturer in Law*
 John R. Crook, B.A., J.D., *Professorial Lecturer in Law*
 William Davis, B.A., J.D., *Professorial Lecturer in Law*
 Ryan K.J. Dickey, B.S., J.D., *Professorial Lecturer in Law*
 Anne P. Donohue, B.A., J.D., *Professorial Lecturer in Law*
 Patrick A. Doody, B.S., J.D., *Professorial Lecturer in Law*
 Matthew J. Dowd, B.S., J.D., *Professorial Lecturer in Law*
 Donna M. Downing, B.A., M.P.P., J.D., LL.M., *Professorial Lecturer in Law*
 Geoff Drucker, B.A., J.D., M.S., *Professorial Lecturer in Law*
 Alan Dubin, B.A., J.D., *Professorial Lecturer in Law*
 Alexandra D. Dunn, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Dale Durrer, B.A., J.D., *Professorial Lecturer in Law*

Randall D. Eliason, B.A., J.D., *Professorial Lecturer in Law*
 Andrew Eskin, B.A., M.B.A., J.D., *Professorial Lecturer in Law*
 Theodore R. Essex, B.A., J.D., *Professorial Lecturer in Law*
 Leslie Fair, A.B., J.D., *Professorial Lecturer in Law*
 Patrick Fang, B.B.A., J.D., *Professorial Lecturer in Law*
 William J. Farah, B.A., J.D., *Professorial Lecturer in Law*
 Stanley G. Fendley, B.A., M.B.A., J.D., *Professorial Lecturer in Law*
 Phil T. Feola, B.A., M.S., J.D., *Professorial Lecturer in Law*
 Scott Ferber, B.A., J.D., *Professorial Lecturer in Law*
 Stanley E. Fisher, B.S., J.D., *Professorial Lecturer in Law*
 Jared Fishman, B.A., J.D., *Professorial Lecturer in Law*
 Brandon Flick, B.A., J.D., *Professorial Lecturer in Law*
 Matthew Forst, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Cole R. Fox, B.A., J.D., *Professorial Lecturer in Law*
 Leon Fresco, B.A., J.D., *Professorial Lecturer in Law*
 Paul L. Frieden, B.A., J.D., *Professorial Lecturer in Law*
 Joshua Edward Gardner, B.A., J.D., *Professorial Lecturer in Law*
 Theresa Gee, B.A., J.D., *Professorial Lecturer in Law*
 Renée Gentry, B.A., J.D., *Distinguished Professorial Lecturer in Law; Director, Vaccine Injury Litigation Clinic*
 Jason Gerson, B.A., J.D., *Professorial Lecturer in Law*
 Francis A. Gilligan, B.A., J.D., LL.M., S.J.D., *Professorial Lecturer in Law*
 Kevin Gingras, B.A., J.D., *Professorial Lecturer in Law*
 Jonathan K. Gitlen, B.A., J.D., *Professorial Lecturer in Law*
 Kolya Glick, B.A., J.D., *Professorial Lecturer in Law*
 Kuyomars Golparvar, B.A., J.D., *Professorial Lecturer in Law*
 Timothy Goodman, B.S.F.S., J.D., *Professorial Lecturer in Law*
 Kiran N. Gore, B.A., J.D., *Professorial Lecturer in Law*
 John H. Gountanis, B.A., J.D., *Professorial Lecturer in Law*
 Nicole P. Grant, B.A., J.D., *Professorial Lecturer in Law*
 Jonathan J. Green, B.A., J.D., *Professorial Lecturer in Law*
 Allen Green, B.A., J.D., *Professorial Lecturer in Law*
 Jonathan L. Greenblatt, B.A., J.D., *Professorial Lecturer in Law*
 Erin J. Greden, B.A., J.D., *Professorial Lecturer in Law*
 Ben Grillot, B.A., M.S.L.S., J.D., *Professorial Lecturer in Law*
 J. Brett Grosko, B.A., M.A., J.D., *Professorial Lecturer in Law*
 R. Budd Haemer, B.S., Ch.E., J.D., *Professorial Lecturer in Law*
 Curt C. Haensel, B.A., J.D., *Professorial Lecturer in Law*
 Minsuk Han, B.A., J.D., *Professorial Lecturer in Law*
 Leila Hanafi, B.A., M.A., LL.M., Ph.D., *Professorial Lecturer in Law*
 Marc P. Hansen, B.A., M.A.T., J.D., *Professorial Lecturer in Law*
 Jonathan Haray, B.A., J.D., *Professorial Lecturer in Law*
 Calsy M. Hartman, B.S., J.D., *Professorial Lecturer in Law*
 Brian S. Harvey, B.A., J.D., *Professorial Lecturer in Law*
 Ann Woods Hawks, B.A., J.D., *Professorial Lecturer in Law*
 Hana Heineken, A.B., J.D., *Professorial Lecturer in Law*
 The Honorable Karen A. Henenberg, B.A., J.D., *Professorial Lecturer in Law*
 Henry Hertzfeld, B.A., M.A., Ph.D., J.D., *Research Professor of Space Policy and International Affairs*
 Kate E. Hill, B.A., J.D., *Professorial Lecturer in Law*
 Theodore Charles Hirt, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Adam S. Hoffinger, B.A., J.D., *Professorial Lecturer in Law*
 Eileen Barkas Hoffman, B.S., M.A., J.D., *Professorial Lecturer in Law*
 Jonathan Hooks, A.B., J.D., *Professorial Lecturer in Law*
 James E. Hopenfeld, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Marian Blank Horn, B.A., J.D., *Professorial Lecturer in Law*
 Meghan Hottel-Cox, B.A., J.D., *Professorial Lecturer in Law*
 Richard Hughes IV, B.A., M.P.H., J.D., *Professorial Lecturer in Law*
 The Honorable Craig S. Iscoe, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Brandon Jackson, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Fred B. Jacob, B.A., J.D., *Professorial Lecturer in Law*
 Lauren Johnson, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Alyssa M. Johnson, B.A., J.D., *Professorial Lecturer in Law*
 David S. Jonas, B.A., J.D., LL.M., LL.M., *Professorial Lecturer in Law*
 April Jones, B.A., J.D., *Professorial Lecturer in Law*
 David Brian Kacedon, B.S., J.D., *Professorial Lecturer in Law*
 Robert Kang, B.A., J.D., *Professorial Lecturer in Law*
 Debi R. Kant, J.D., *Professorial Lecturer in Law*
 Michael V. Kaplen, B.A., J.D., *Professorial Lecturer in Law*

Joshua M. Kaplowitz, B.A., J.D., *Professorial Lecturer in Law*
 Kristine Bridget Kassekert, J.D., LL.M., M.A., *Professorial Lecturer in Law*
 Robert S. Katz, B.S., J.D., *Professorial Lecturer in Law*
 Thomas Kearns, B.S., B.A., J.D., *Professorial Lecturer in Law*
 Kathleen M. Kedian, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Kim M. Keenan, B.S.F.S., J.D., *Professorial Lecturer in Law*
 Suedeene Kelly, B.A., J.D., *Professorial Lecturer in Law*
 Prashant K. Khetan, B.S., J.D., *Professorial Lecturer in Law*
 Minwoo Kim, B.A., J.D., *Professorial Lecturer in Law*
 Brian J. Kirkell, B.A., J.D., *Professorial Lecturer in Law*
 Peter Komorowski, B.A., A.A., M.A., J.D., *Professorial Lecturer in Law*
 Hean L. Koo, B.S., J.D., *Professorial Lecturer in Law*
 Carl Kravitz, A.B., J.D., *Professorial Lecturer in Law*
 John Kropf, B.A., M.P.I.A., J.D., *Professorial Lecturer in Law*
 Melissa A. Kucinski, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Jeffrey P. Kushan, B.S., M.A., J.D., *Professorial Lecturer in Law*
 Kamay Lafalsie, B.S., J.D., *Professorial Lecturer in Law*
 Jeffrey A. Lamken, B.A., J.D., *Professorial Lecturer in Law*
 Thomas D. Lasich, B.A., *Professorial Lecturer in Law*
 Kevin B. Laurence, B.A., J.D., *Professorial Lecturer in Law*
 Tawanna D. Lee, B.S., M.Ed., J.D., *Professorial Lecturer in Law*
 Craig E. Leen, A.B., J.D., *Professorial Lecturer in Law*
 Robert Leibenluft, B.A., J.D., *Professorial Lecturer in Law*
 David A. Levine, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Michael N. Levy, B.A., J.D., *Professorial Lecturer in Law*
 Nick Lewis, B.A., J.D., M.Sc., *Professorial Lecturer in Law*
 Josh Loigman, B.A., J.D., *Professorial Lecturer in Law*
 John Longwell, B.A., J.D., *Professorial Lecturer in Law*
 Alan J. LoRe, B.A., J.D., *Professorial Lecturer in Law*
 David Ludwig, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Cynthia C. Lynch, B.A., J.D., *Professorial Lecturer in Law*
 Susan Carney Lynch, B.A., J.D., LL.M., Dr.P.H., *Professorial Lecturer in Law*
 Eve Lyon, J.D., *Professorial Lecturer in Law*
 Daniel Mach, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Gregory E. Maggs, A.B., J.D., M.S.S., *Professorial Lecturer in Law*
 Peter B. Maggs, A.B., J.D., *Professorial Lecturer in Law*
 Robin M. Maher, B.A., J.D., *Professorial Lecturer in Law*
 John Mahon, B.S., B.A., J.D., *Professorial Lecturer in Law*
 Peter Malyshev, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 Karen B. Marcou, B.A., J.D., *Professorial Lecturer in Law*
 John D. Mason, B.A., J.D., *Professorial Lecturer in Law*
 William L. Massey, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Tanner Mathison, B.A., M.S., J.D., *Professorial Lecturer in Law*
 Jason Matson, B.A., J.D., *Professorial Lecturer in Law*
 Darryl J. Maxwell, B.A., J.D., *Professorial Lecturer in Law*
 Marc S. Mayerson, B.A., J.D., *Professorial Lecturer in Law*
 Andrea McBarnette, B.A., J.D., *Professorial Lecturer in Law*
 Kel B. McClanahan, B.S., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 Luke McCloud, B.S., J.D., *Professorial Lecturer in Law*
 James Peyton McCrary, B.A., M.A., Ph.D., *Professorial Lecturer in Law*
 Amanda H. McDowell, B.A., J.D., *Professorial Lecturer in Law*
 Courtland McEneny Ingraham, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Roderick R. McKelvie, B.A., J.D., *Professorial Lecturer in Law*
 Krissy McKenna, B.S., J.D., *Professorial Lecturer in Law*
 Michael J. McKeon, B.S., J.D., *Professorial Lecturer in Law*
 Scott McKeown, B.S., J.D., *Professorial Lecturer in Law*
 Chris McNett, B.S., M.S., J.D., *Professorial Lecturer in Law*
 Edward R. McNicholas, A.B., J.D., *Professorial Lecturer in Law*
 Deneen Melander, B.S., J.D., *Professorial Lecturer in Law*
 Anne-Valerie S. Mirko, B.A., J.D., *Professorial Lecturer in Law*
 David Mitchell, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Hank R. Molinengo, B.A., J.D., LL.M., *Professorial Lecturer in Law and Policy*
 William G.P. Monahan, B.S., M.P.A., J.D., *Professorial Lecturer in Law*
 Karen Morgan, B.A., J.D., *Professorial Lecturer in Law*
 Frank C. Morris, B.S., J.D., *Professorial Lecturer in Law*
 Sarah Morris, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Laura S. Morton, B.A., M.Sc., J.D., *Professorial Lecturer in Law*
 Benjamin Mark Moss, B.A., J.D., M.A., *Professorial Lecturer in Law*
 Darrell G. Mottley, B.S., M.B.A., J.D., *Professorial Lecturer in Law*

Danielle Muenzfeld, B.A., J.D., *Professorial Lecturer in Law*
 David S. Muraskin, B.A., M.Sc., J.D., *Professorial Lecturer in Law*
 Ari Nazarov, B.S., J.D., *Professorial Lecturer in Law*
 Katherine Nesbitt, A.B., J.D., LL.M., *Professorial Lecturer in Law*
 Barry M. Nudelman, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Krista A. Nunez, B.B.A., J.D., *Professorial Lecturer in Law*
 Benjamin Nussdorf, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Daniel Eric Ortiz, B.A., J.D., *Professorial Lecturer in Law*
 Richard J. Osterman, Jr., B.A., J.D., *Professorial Lecturer in Law*
 John S. Pachter, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Jeffrey A. Pade, B.S., J.D., *Professorial Lecturer in Law*
 Maria A. Pallante, B.A., J.D., *Professorial Lecturer in Law*
 S. Jennifer Panahi, B.A., J.D., *Professorial Lecturer in Law*
 Sean S. Park, B.A., J.D., M.S.S., *Professorial Lecturer in Law*
 Anand B. Patel, B.S., J.D., *Professorial Lecturer in Law*
 Amisha Rajni Patel, B.A., J.D., *Professorial Lecturer in Law*
 Charles N. Pede, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Douglas J. Pepe, B.A., J.D., *Professorial Lecturer in Law*
 Nancy Perry, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Stephen Pershing, B.A., J.D., *Professorial Lecturer in Law*
 James P. Petrila, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Sara Pikofsky, B.A., J.D., *Professorial Lecturer in Law*
 Robert B. Pincus, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Anna T. Pinedo, B.S., J.D., *Professorial Lecturer in Law*
 Steven A. Platt, B.A., J.D., *Professorial Lecturer in Law*
 Charles R. Pollack, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Daniel M. Portnov, B.A., J.D., *Professorial Lecturer in Law*
 Brian Michael Privor, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Randall R. Rader, B.A., J.D., *Professorial Lecturer in Law*
 Richard L. Rainey, B.S., J.D., *Professorial Lecturer in Law*
 Valencia R. Rainey, B.A., J.D., *Professorial Lecturer in Law*
 Zol Damon Rainey, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Larry E. Ray, B.A., J.D., *Professorial Lecturer in Law*
 Teresa Stanek Rea, B.S., J.D., *Professorial Lecturer in Law*
 Andrew D. Realon, B.A., J.D., Ed.D., *Associate Director for Student Academic Development;*
Professorial Lecturer in Law
 Harvey L. Reiter, B.A., J.D., *Professorial Lecturer in Law*
 Daniel L. Richard, B.A., M.A., J.D., *Professorial Lecturer in Law*
 James D. Ridgway, B.S., J.D., *Professorial Lecturer in Law*
 Roberta Oluwaseun Roberts, B.S., J.D., *Professorial Lecturer in Law*
 Lindsay Rodman, B.A., J.D., M.P.P., *Professorial Lecturer in Law*
 Dariely Rodriguez, B.A., J.D., *Professorial Lecturer in Law*
 Nury Gambarrotti Rodriguez, B.A., J.D., *Professorial Lecturer in Law*
 Caroline Rogus, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Peter F. Rose, B.A., J.D., *Professorial Lecturer in Law*
 Paul Rosenzweig, B.A., M.S., J.D., *Professorial Lecturer in Law*
 Eleanor Ross, B.A., J.D., *Professorial Lecturer in Law*
 Jane E. Rueger, B.A., J.D., M.B.A., *Professorial Lecturer in Law*
 Robin Rachel Runge, B.A., J.D., *Distinguished Professorial Lecturer in Law*
 Jayna Rust, B.J., M.A., J.D., *Professorial Lecturer in Law*
 Christopher Michael Ryan, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Peter O. Safir, B.A., J.D., *Professorial Lecturer in Law*
 Micah Salb, B.A., J.D., *Professorial Lecturer in Law*
 Michael I. Sanders, B.S., LL.B., LL.M., *Professorial Lecturer in Law*
 Chad T. Sarchio, B.A., J.D., *Professorial Lecturer in Law*
 Jessica Sarnowski, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Andrew Satten, A.B., J.D., *Professorial Lecturer in Law*
 Christopher W. Savage, B.A., J.D., *Professorial Lecturer in Law*
 Frank Scaduto, B.A., J.D., *Professorial Lecturer in Law*
 Mark E. Schamel, B.S., J.D., *Professorial Lecturer in Law*
 Andrew Schatz, B.S., J.D., *Professorial Lecturer in Law*
 Charles D. Schmitz, B.A., J.D., *Professorial Lecturer in Law*
 Daniel Schoeni, B.A., M.A., J.D., LL.M., Ph.D., *Professorial Lecturer in Law*
 Rebecca Schaeffer, B.A., J.D., *Professorial Lecturer in Law*
 David Shaw, B.A., M.S., J.D., *Professorial Lecturer in Law*
 Scott S. Sheffler, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Rami Sibay, B.A., J.D., *Professorial Lecturer in Law*
 Stacy Plotkin Silber, B.A., J.D., *Professorial Lecturer in Law*
 Soumya Silver, B.A., J.D., M.S.T., *Professorial Lecturer in Law*

Thomas J. Simeone, B.S., J.D., *Professorial Lecturer in Law*
 Kyle Singhal, B.S.S., J.D., *Professorial Lecturer in Law*
 Madeline Smedley, B.A., J.D., *Professorial Lecturer in Law*
 Brian D. Smith, B.A., J.D., *Professorial Lecturer in Law*
 Corey J. Smith, B.A., J.D., L.L.M., *Professorial Lecturer in Law*
 Jack D. Smith, B.A., J.D., *Professorial Lecturer in Law*
 Regan Smith, B.A., J.D., *Professorial Lecturer in Law*
 Robert H. Solomon, B.A., J.D., *Professorial Lecturer in Law*
 The Honorable Jeri Somers, B.A., J.D., *Professorial Lecturer in Law*
 Keith E. Sonderling, B.S., J.D., *Professorial Lecturer in Law*
 Regina Y. Speed-Bost, A.B., J.D., *Professorial Lecturer in Law*
 Leonard P. Stark, B.A., B.S., M.A., D.Phil., J.D., *Professorial Lecturer in Law*
 Andrew A. Steinberg, B.A., J.D., *Professorial Lecturer in Law*
 Dan E. Stigall, B.A., J.D., LL.M., *Distinguished Professorial Lecturer in National Security Law*
 Sydney L. Stringer, B.A., J.D., *Professorial Lecturer in Law*
 Sandra Lee Strokoff, B.A., M.A., J.D., *Professorial Lecturer in Law*
 John H. Sturc, B.A., J.D., *Professorial Lecturer in Law*
 Dwight H. Sullivan, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 Maria Swaby, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Collin David Swan, B.A., J.D., *Professorial Lecturer in Law*
 Carolyn Sweeney, B.A., M.Ed., J.D., *Professorial Lecturer in Law*
 John L. Szabo, B.S., J.D., *Professorial Lecturer in Law*
 Mary Lynn Tate, B.A., J.D., *Professorial Lecturer in Law*
 Raffi Teperdijan, B.B.A., J.D., *Professorial Lecturer in Law*
 Steven M. Tepp, B.A., J.D., *Professorial Lecturer in Law*
 Michael A. Terry, B.A., J.D., *Professorial Lecturer in Law*
 Karen DaPonte Thornton, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Matthew Thrasher, B.A., J.D., *Professorial Lecturer in Law*
 Andrew S. H. Ting, A.B., J.D., *Professorial Lecturer in Law*
 Mike Torres, B.A., J.D., *Professorial Lecturer in Law*
 Ethan Torrey, A.B., M.A., J.D., *Professorial Lecturer in Law*
 Mark Traphagen, B.A., J.D., *Professorial Lecturer in Law*
 Michael R. Tregle, Jr., B.A., J.D., *Professorial Lecturer in Law*
 Thomas Tso, A.B., A.M., J.D., *Professorial Lecturer in Law*
 Raizza Ty, B.S., J.D., *Professorial Lecturer in Law*
 Emily A. Unnasch, B.A., M.A., J.D., *Professorial Lecturer in Law*
 Melvin I. Urofsky, A.B., M.A., Ph.D., J.D., *Professorial Lecturer in Law*
 Paulina Vera, B.A., J.D., *Professorial Lecturer in Law*
 James Villa, B.A., J.D., *Professorial Lecturer in Law*
 Daniel Waldman, B.A., J.D., *Professorial Lecturer in Law*
 Johnny Hillary Walker, A.A., B.A., J.D., *Professorial Lecturer in Law*
 Lucas M. Walker, B.A., J.D., *Professorial Lecturer in Law*
 Hank B. Walther, B.A., J.D., *Professorial Lecturer in Law*
 Tara L. Ward, A.B., J.D., *Professorial Lecturer in Law*
 Marc Warren, B.A., J.D., LL.M., M.S., S.J.D., *Professorial Lecturer in Law*
 Edward Waters, B.A., J.D., *Professorial Lecturer in Law*
 Bradley Watts, B.A., J.D., *Professorial Lecturer in Law*
 Charles Wayne, B.A., J.D., *Professorial Lecturer in Law*
 Jason M. Weinstein, B.A., J.D., *Professorial Lecturer in Law*
 Larry Weinstock, B.S., J.D., *Professorial Lecturer in Law*
 Ann Weismann, B.A., J.D., *Professorial Lecturer in Law*
 William K. West, Jr., B.S.M.E., LL.B., *Professorial Lecturer in Law*
 Megan Murphy Wilcox, B.A., J.D., *Professorial Lecturer in Law*
 Beth A. Williams, A.B., J.D., *Professorial Lecturer in Law*
 Amanda Williams, B.A., J.D., *Professorial Lecturer in Law*
 Samuel J. Winer, B.A., J.D., *Professorial Lecturer in Law*
 Lance D. Wood, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 David W. Woodworth, B.A., M.A., J.D., LL.M., *Professorial Lecturer in Law*
 David Philip Yaffe, B.A., J.D., *Professorial Lecturer in Law*
 Esther You, B.A., J.D., LL.M., *Professorial Lecturer in Law*
 Lis Young, J.D., M.C.L., LL.M., *Professorial Lecturer in Law*
 John H. Zacharia, B.A., J.D., *Professorial Lecturer in Law*
 Imran Zaidi, B.A., J.D., *Professorial Lecturer in Law*
 Lisa M. Zarlenga, B.S., J.D., LL.M., *Professorial Lecturer in Law*
 Ellen M. Zavian, B.S., J.D., *Professorial Lecturer in Law*



FOREWORD

The Ordinary Questions Doctrine

*Lisa Schultz Bressman**

ABSTRACT

In Loper Bright Enterprises v. Raimondo, the Supreme Court overruled Chevron as inconsistent with the Administrative Procedure Act (“APA”), which requires courts to decide “all relevant questions of law” and therefore prohibits them from deferring to agency interpretations because the relevant statutory language is ambiguous. A different approach now governs judicial review of the countless routine, often specialized questions of statutory interpretation that agencies answer in the normal course of implementing their statutes—the “ordinary” questions. But Loper Bright did not provide direction on how courts should determine which of these questions are questions of law. This issue arises because many, if not most, ordinary questions involve questions of law that depend on questions of policy for resolution and can be characterized either way for purposes of judicial review. Under Chevron, courts did not need to decide how to characterize such mixed questions because the doctrine instructed them to treat statutory ambiguities as presenting questions of policy for the agency to decide. That directive eased the pressure of determining how

* Vice Dean and David Daniels Allen Distinguished Chair in Law, Vanderbilt Law School. I am grateful to Yesenia Jimenez and Taylor Lawing for excellent research assistance. I am also grateful to Michael Bressman, Suzanna Sherry, Ganesh Sitaraman, Kevin Stack, and the participants at the Duke University Public Law Colloquium for their extraordinary comments. I am especially grateful to the team on *The George Washington Law Review*, not only for inviting me to write the Foreword to their Annual Review of Administrative Law but for agreeing to re-edit this Foreword, which was in final page proofs for publication when *Loper Bright* was handed down, so that I could incorporate the decision. All mistakes are my own.

to handle such questions for purposes of judicial review under the APA. Loper Bright has altered the doctrine but not the nature of ordinary questions. Even though courts may no longer treat these questions as ones of policy "simply because the statute is ambiguous," they do not need to characterize every question as one of law simply because a statutory term or phrase is involved. Many agency interpretations are no different in kind or degree from the agency policy decisions subject to the arbitrary and capricious standard of review in the APA. Courts determine which of the underlying questions are for them to decide independently and which are for the agency to decide, subject to the arbitrary and capricious test. This is a judicial policy choice, and we should be interested in how courts make it. Before Chevron, courts made the choice on an ad hoc basis. After Loper Bright, the temptation is for courts to ignore the problem and decide what they can. This Foreword contends that courts should make the choice mindful of established judicial norms for questions of policy. More specifically, a court should consider whether resolving a question itself would amount to judicial policymaking in the relatively concrete ways that the arbitrary and capricious test discourages. The claim is not that courts should apply the arbitrary and capricious test straight away to ordinary questions. Rather, the considerations for applying that test are useful in the first instance to discern whether a question is best regarded as one of law or policy, consistent with the APA and the normative values that undergird the allocation of authority between courts and agencies.

TABLE OF CONTENTS

INTRODUCTION	987
I. THE PROBLEM OF ORDINARY QUESTIONS	993
A. <i>Ordinary Questions as Mixed Questions of Law and Policy</i>	993
B. <i>Chevron</i>	999
C. <i>Loper Bright</i>	1001
D. <i>Ordinary Questions After Loper Bright</i>	1010
II. FAMILIAR CONSIDERATIONS, NEW APPROACH	1011
A. <i>Judicial Review of Agency Policy Decisions</i>	1012
B. <i>The Ordinary Questions Approach in Practice</i>	1015
C. <i>D.C. Circuit Cases</i>	1016
1. <i>Empirical Evidence (Plus Analytical Methodology and Longstanding Usage)</i>	1018
2. <i>Factfinding Based on Experience Administering the Statute</i>	1020
3. <i>Decision-Making Methods and Processes</i>	1022
4. <i>Policy Options and Choices</i>	1027
a. <i>Statutory Purposes</i>	1027
b. <i>Statutory Buckets</i>	1029
c. <i>Reasonable Choices</i>	1030
D. <i>Questions of Law for Courts</i>	1031

III. THE ORDINARY QUESTIONS APPROACH IN CONTEXT . . .	1035
A. <i>Normative Values</i>	1036
B. <i>Relationship to Judicial Review and Statutory Interpretation</i>	1038
C. <i>An Alternative and an Objection</i>	1040
1. “Legal Craft” Plus “Outer Boundaries”	1041
2. Workability	1046
CONCLUSION	1047

INTRODUCTION

“*Chevron* is overruled.”¹ In *Loper Bright Enterprises v. Raimondo*,² the Supreme Court overruled the famous case as inconsistent with the Administrative Procedure Act (“APA”),³ which requires courts to “decide all relevant questions of law” and therefore prohibits them from deferring to an agency interpretation “simply because a statute is ambiguous.”⁴ A different approach now governs the countless routine, often specialized questions of statutory interpretation that agencies answer in the normal course of implementing their statutes—the “ordinary” questions. After *Loper Bright*, courts “must exercise independent judgment in determining the meaning of statutory provisions,” though they “may . . . seek aid from the interpretations of those responsible for implementing particular statutes.”⁵ A court may decide that the “best reading of a statute is that it delegates discretionary authority to an agency,” and under these circumstances, it must “independently interpret the statute and effectuate the will of Congress subject to constitutional limits.”⁶

But *Loper Bright* does not provide direction on how courts should decide which of the ordinary questions that agencies answer *are* “questions of law.”⁷ This issue arises because such questions, by their nature, often involve questions of law that depend on questions of policy for resolution, and therefore can be characterized as either for purposes of judicial review under the APA. Consider tobacco products. It was

¹ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244. I first presented the arguments and examples in this Foreword in a draft article published on the Social Services Research Network, <https://www.ssrn.com>, on September 14, 2023, and revised on January 11, 2024. I have edited it here to engage *Loper Bright*.

² 144 S. Ct. 2244 (2024).

³ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

⁴ *Loper Bright*, 144 S. Ct. at 2273 (quoting 5 U.S.C. § 706).

⁵ *Id.* at 2262.

⁶ *Id.* at 2263.

⁷ 5 U.S.C. § 706.

once a “major” question whether the Food and Drug Administration (“FDA”) had authority to regulate tobacco products such as cigarettes, but now that Congress has expressly granted the FDA such authority, the ordinary questions have been many and varied—for example, whether the FDA has authority to regulate premium cigars, whether the statutory requirements extend to vape shops, and when a new tobacco product is the substantial equivalent of a product already subject to regulation.⁸ The answers to these questions turn on scientific studies, experience-based findings, predictive judgments, and policy calls made by teams within the agency of physicians, statisticians, scientists, and policy specialists.⁹ The answers also involve, or interpret, statutory language, including “new tobacco product,” “manufacture,” and “substantially equivalent,” which brings in agency lawyers.¹⁰ The questions are mixed questions of law and policy.

Mixed questions—and thus many, if not most, ordinary questions—create a puzzle for judicial review precisely because of their dual nature.¹¹ The APA prescribes a standard of judicial review for questions of law (*de novo* review) and a standard for questions of policy (arbitrary and capricious review).¹² Under *Chevron*, courts did not need to decide how to characterize mixed questions because the doctrine provided its own approach, instructing them to treat agency interpretations as presenting questions of policy, so long as the relevant statutory language was

⁸ See *West Virginia v. EPA*, 597 U.S. 697, 725–25 (2022); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (finding that FDA regulation of tobacco products is a question of “economic and political significance”); *Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act*, 81 Fed. Reg. 28,974 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1,100, 1,140, 1,143) (FDA’s 2016 “Deeming” Rule, including deeming premium cigars and regulation of vape shops that manufacture tobacco products for direct sale to customers as “meeting the statutory definition of ‘tobacco product’”); *Food and Drug Administration Actions on Substantial Equivalence Reports*, 86 Fed. Reg. 55,224 (Oct. 5, 2021) (to be codified at 21 C.F.R. pts. 16, 1,107) (FDA’s 2021 “Substantial Equivalence Reports” rule, clarifying the information necessary to determine a new tobacco product is equivalent to a previously regulated product); *Cigar Ass’n of Am. v. FDA*, No. 16-cv-01460, 2022 WL 2438512, at *1 (D.D.C. July 5, 2022) (finding arbitrary and capricious the FDA’s Deeming Rule as to premium cigars); *Cigar Ass’n of Am. v. FDA*, No. 16-cv-01460, 2023 WL 5094869, at *6 (D.D.C. Aug. 9, 2023) (vacating FDA’s decision to deem premium cigars).

⁹ See e.g., *The FDA’s Drug Review Process: Ensuring Drugs Are Safe and Effective*, FDA (Nov. 24, 2017), <https://www.fda.gov/drugs/information-consumers-and-patients-drugs/fdas-drug-review-process-ensuring-drugs-are-safe-and-effective> [<https://perma.cc/9T7B-EHXA>].

¹⁰ *Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act*, 81 Fed. Reg. at 28,974; *Food and Drug Administration Actions on Substantial Equivalence Reports*, 86 Fed. Reg. at 55,224.

¹¹ See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 913–16 (2017); see *infra* Section I.

¹² See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (describing section 706).

ambiguous.¹³ That directive eased the pressure of determining how to handle mixed questions for purposes of judicial review under the APA. When a particular agency interpretation had obvious policy aspects, a court could treat it basically the same whether understood, on some hard-to-define register, as an interpretation of the statute (resolving a question of law) or an implementation of the statute (resolving a question of policy), if the relevant statutory language was ambiguous.

The Court has disposed of *Chevron*, reasserting that courts must decide all questions of law and are “not somehow relieved of [this] obligation” just because statutory language is ambiguous.¹⁴ Still, courts need not *characterize* a mixed question as one of law for them to decide just because statutory language is involved. They may decide that an agency interpretation is best understood as an agency policy decision, subject to arbitrary and capricious review under the APA. *That* is a judicial policy choice, and we should have an interest in how courts make it.

The core argument of this Foreword is that courts should decide whether to characterize an ordinary question as one of law or policy in consideration of established judicial norms for questions of policy, not on an ad hoc basis. More specifically, a court should hesitate to characterize an ordinary question as a question of law when resolving it independently would amount to judicial policymaking in the relatively specific ways that *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*¹⁵ and the Supreme Court’s other decisions elaborating the arbitrary and capricious test warn against.¹⁶ Those decisions tell courts to ensure that agencies have engaged in reasoned decision-making but to avoid substituting their judgment for that of the agency.¹⁷ Although the particular considerations that guide this review are expressed in terms of what agencies must do to survive it, they concomitantly establish norms of judicial behavior. After four decades of applying these decisions, courts appreciate the need for restraint when reviewing (1) the data, studies, assessment methods, or analyses that the agency has employed, (2) the facts that the agency has found based on its experience administering the statutory scheme, (3) a discretionary factor that the agency has deemed relevant to its conclusion, or (4) the policy options that the agency has identified and selected among.¹⁸ Ordinary questions frequently involve issues that fall

¹³ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244.

¹⁴ *Loper Bright*, 144 S. Ct. at 2266.

¹⁵ 463 U.S. 29, 42 (1983).

¹⁶ See *infra* Section II.A.

¹⁷ See generally Bamzai, *supra* note 11, at 981–85 (describing the history of the arbitrary and capricious standard).

¹⁸ See *infra* Section II.B.

into one of these basic categories. The claim is not that the arbitrary and capricious test should apply straight away to such questions.¹⁹ Rather, the considerations for applying that test are useful in the first instance to discern whether a question is best regarded as one of law or policy for purposes of judicial review, consistent with the APA.²⁰

Under this approach, no court should decide for itself whether, for example, (1) RiVive (naxoline hydrochloride), a nasal spray for the emergency treatment of opioid overdose, is “safe” and “effective” for over-the-counter use because that interpretation relies on the scientific risk assessment and the risk tolerance of the FDA;²¹ (2) graduate students are “employees” for purposes of labor law because that interpretation relies on the factfinding and the experience of the National Labor Relations Board (“NLRB”);²² (3) gender diversity and equity are relevant factors for allocating broadcast licenses “in the public interest” because that interpretation relies on the evaluation of broadcast use, given ever-changing conditions, by the Federal Communications Commission (“FCC”);²³ or (4) a solar facility’s “power production capacity” is based on the capacity “of all the facility’s components working together to produce grid-usable AC power” (i.e., a solar array plus the battery system that stores, inverts, and sends solar to the grid) rather than the subunit generating power (i.e., the battery) because that interpretation relies on the understanding of solar in the overall statutory scheme of “promot[ing] alternative energy sources” by the

¹⁹ Cf. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 135 (2010) (arguing that courts should apply reasonableness review to all agency interpretations).

²⁰ Others have been interested in the possible return of the law-policy distinction in judicial review of agency statutory interpretation. Most notably, Jeffrey Pojanowski has articulated an entire “neoclassical” theory of administrative law, an important part of which is interested in “pull[ing] apart the overlap between review of interpretation and policymaking,” and referring the latter to arbitrariness review. Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1086 (2016) [hereinafter, Pojanowski, *Without Deference*]; see also Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 888 (2020) [hereinafter, Pojanowski, *Neoclassical Administrative Law*]; Pojanowski, *Without Deference*, *supra*, at 1086–87 (arguing that courts should “independently resolve” “questions of statutory interpretation that, from the perspective of traditional lawyerly argument, are unclear” and treat “as questions of policy judgment subject to standard arbitrary-and-capricious review” questions of statutory interpretation that “turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities and likely outcomes”). Part III addresses his strategy.

²¹ See *FDA Approves RiVive*, DRUGS.COM (July 28, 2023), <https://www.drugs.com/new-drugs/fda-approves-rivive-naloxone-hydrochloride-over-counter-nasal-emergency-opioid-overdose-6068.html> [https://perma.cc/U248-77GZ] (reporting FDA approval of over-the-counter RiVive nasal spray).

²² See N.Y. Univ., 332 N.L.R.B. 1205, 1209 (2000), *overruled by* Brown Univ., 342 N.L.R.B. 483 (2004).

²³ Cf. *FCC v. Prometheus Radio Project*, 592 U.S. 414, 427 n.3 (2021) (refusing to decide the issue of whether the FCC may consider “minority and female ownership” in reviewing broadcast ownership).

Federal Energy Regulatory Commission (“FERC”).²⁴ These questions all manifest familiar indications of policy and should be characterized as questions of policy for the agency to interpret.

When an agency interpretation manifests no comparable policy-making indications, however, a court may conclude that it presents a question of law, even if the statutory language at issue is ambiguous. Suppose a workers’ compensation statute refers to “employees and independent contractors” in various provisions but leaves out the phrase “and independent contractors” in one provision for no reason apparent in the statute’s text, structure, or purpose. Under these circumstances, a court may conclude that the question of whether this provision includes independent contractors is a question of law for it to resolve, even though the provision is unclear on this issue. Consistent with *Loper Bright*, it may resolve the question with the help of the agency’s interpretation.²⁵

With new doctrine that distinguishes questions of law from questions of policy, courts instead may return to the ad hoc approach that predated *Chevron*, but they should not.²⁶ Before *Chevron*, courts framed some questions as general, amenable to judicial resolution, and some as specialized, or fact-based, for the agency to decide, subject to a deferential standard of review.²⁷ History reveals that this approach is unpredictable at best, and partisan at worst.²⁸ Scholars worried that courts decided mixed questions independently when they wanted and deemed questions as delegated to the agency, subject to arbitrary and capricious review, when they did not.²⁹ More recent history shows when courts are faced with uncertainty about which standard of review applies to a particular interpretation, they may avoid choosing one and say they would reach the same result under either.³⁰ As the Court recognized in *Loper Bright*, such inconsistency and avoidance occurred after it decided *United States v. Mead Corp.*,³¹ and told courts to make a threshold determination whether *Chevron* or *Skidmore v. Swift &*

²⁴ See *Solar Energy Indus. Ass’n v. FERC*, 59 F.4th 1287, 1291–93 (D.C. Cir. 2023).

²⁵ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024).

²⁶ See *infra* Section I.A.

²⁷ See Bamzai, *supra* note 11, at 913–17.

²⁸ See *id.*; *infra* Section I.A.

²⁹ See Bamzai, *supra* note 11, at 913–17; *infra* Section I.A.

³⁰ See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445–46, 1489 (2005); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003) (describing the aftereffects of *Mead*); *Loper Bright*, 144 S. Ct. at 2269 n.7 (citing Bressman, *supra* note 30; Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1127–29 (2009); Daniel S. Brookins, *Confusion in the Circuit Courts: How the Circuit Courts Are Solving the Mead-Puzzle by Avoiding It Altogether*, 85 GEO. WASH. L. REV. 1484, 1496–99 (2017)).

³¹ 533 U.S. 218 (2001).

*Co.*³² applied to a particular interpretation, in consideration of nearly identical factors.³³ Although *Loper Bright* eliminated this confusion by dispensing with *Chevron*, it may provoke similar confusion.

Some may respond that *Loper Bright* establishes—indeed mandates—a particular approach: courts must decide independently any question that is amenable to judicial resolution using the traditional tools of statutory construction and announce a “single, best meaning” or determine that a statute delegates “discretionary authority” to an agency, in which case, they must ensure that the agency interpretation is within its scope of that authority.³⁴ The difficulty is that these instructions do not solve the problem of ordinary questions so much as restate it or ignore it. Almost every statutory term or phrase has a “single, best meaning” if courts work hard enough—and this is especially true if courts may freely seek help from the agency interpretation.³⁵ Even if courts can separate fixed-meaning terms from delegating terms, almost every question that arises under delegating terms can be understood as defining the limits of agency authority in some sense. Ordinary scope-of-authority questions lack formal features that might help to distinguish them from other ordinary questions. They are unlike “major” questions, which the Supreme Court has felt comfortable distinguishing in “extraordinary” cases based on their vast “economic and political significance” or statute-altering consequence.³⁶ Courts must make judgment calls for ordinary questions if they are interested in “respect[ing] [congressional] delegations of authority” and “polic[ing] the outer statutory boundaries of those delegations,” as *Loper Bright* demands.³⁷

This Foreword proceeds in three parts. Part I introduces the problem of ordinary questions. Part II discusses the judicial norms for questions of policy that are useful to solve the problem, helping to discern which questions are for courts to decide independently and which questions are for agencies to decide subject to arbitrary and capricious review. This Part illustrates how such an approach might work, using a sampling of cases from the D.C. Circuit. Part III situates the approach sketched here in the context of judicial review and statutory interpretation. It includes consideration of the alternative approach for solving the problem of ordinary questions that some might say is more consistent with the tone, if not the demand, of *Loper Bright*, as well as the concern that the approach proposed here is unworkable.

³² 323 U.S. 134 (1944).

³³ *Loper Bright*, 144 S. Ct. at 2269 & n.7 (noting that “some courts have simply bypassed *Chevron*,” citing cases and academic articles); *Mead Corp.*, 533 U.S. at 231–35; *Barnhart v. Walton*, 535 U.S. 212, 224–25 (2002).

³⁴ *Loper Bright*, 144 S. Ct. at 2263, 2266.

³⁵ *Id.* at 2262, 2266.

³⁶ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

³⁷ *Loper Bright*, 144 S. Ct. at 2268.

I. THE PROBLEM OF ORDINARY QUESTIONS

Courts and commentators have long acknowledged that questions of statutory interpretation occur on both sides of the law-policy divide.³⁸ But disagreements have arisen during different periods in the administrative state about how to incorporate that observation into judicial review.³⁹ If questions of statutory interpretation involve matters that require specialized skill and knowledge, which institution—court or agency—should decide them? For forty years, this issue had been mostly settled, at least concerning nonmajor, ordinary questions.⁴⁰ But the Court's decision in *Loper Bright* has unsettled it again.⁴¹ This Part provides an account of ordinary questions, both their nature and their place in judicial review.

A. *Ordinary Questions as Mixed Questions of Law and Policy*

Agencies charged with implementing statutory schemes confront countless questions of statutory interpretation in the normal course of doing their jobs.⁴² Most are not “extraordinary” questions of vast “economic and political significance” to which the major questions doctrine applies.⁴³ Rather, they are ordinary questions to which *Chevron* has long applied. That is not to say such questions are unimportant. To the contrary, they often are quite significant, especially to the parties they directly affect.⁴⁴ Rather, they are ordinary in the sense that they are routine, arising because agencies exercise their statutory authority under broadly worded mandates and nonspecific terms that acquire meaning as agencies work them out, typically through the administrative procedures that Congress provides for that purpose, including notice-and-comment rulemaking and formal adjudication.⁴⁵ That meaning may change to the extent it depends on technical data, factual findings, relevant factors, and policy judgments that change over time.⁴⁶

³⁸ See Bamzai, *supra* note 11, at 960–62.

³⁹ See *id.*

⁴⁰ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244.

⁴¹ See *Loper Bright*, 144 S. Ct. at 2273.

⁴² See *City of Taunton v. EPA*, 895 F.3d 120, 123–24 (1st Cir. 2018) (setting the level of a certain pollutant that wastewater treatment plants may discharge without violating any state water quality standard).

⁴³ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

⁴⁴ See, e.g., Christina Jewett, *Judge Strikes Down F.D.A. Rule Regulating Premium Cigars*, N.Y. TIMES (Aug. 10, 2023), <https://www.nytimes.com/2023/08/10/health/fda-cigar-exemption.html> [<https://perma.cc/ZX3F-NF8J>].

⁴⁵ See, e.g., Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2017 (2011).

⁴⁶ See *supra* text accompanying note 18.

By their nature, ordinary questions often are mixed questions of law and policy. The “mixed questions” label is frequently associated with the application of law to fact, but this is only one form or perhaps the traditional encapsulation.⁴⁷ It may go without saying, but the type of questions that arise under modern regulatory statutes tend to involve more than the application of law to fact. For example, the meaning of “stationary source,” as either a single smokestack or an entire factory that emits pollution, for purposes of the Clean Air Act,⁴⁸ involves the interpretation of a nonspecific statutory term based on environmental science and policy.⁴⁹ Similarly, the method for project emissions accounting in the New Source Review (“NSR”) permitting process, including whether it is even possible to provide a single definition of “project” to cover all different NSR sources, is based partly on the Administrator’s judgment, which is based partly on experience with the process (and affected parties) over time.⁵⁰ Questions that involve the application of a broad statutory mandate to a particular subject or party also involve law and policy. The Clean Air Act requires the Environmental Protection Agency (“EPA”) to regulate “any air pollutant which, in the judgment of the Administrator, causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an

⁴⁷ See *Thompson v. Keohane*, 516 U.S. 99, 109–10 (1995) (describing, in the habeas corpus context, “issues of fact” as “basic, primary, or historical facts: facts ‘in the sense of a recital of external events and the credibility of their narrators’” and “[s]o-called mixed questions of fact and law” as “the application of a legal standard to the historical-fact determinations” (quoting *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963))); *U.S. Bank Nat’l Ass’n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 394 (2018) (describing a bankruptcy court as “mak[ing] findings of what we have called ‘basic’ or ‘historical’ fact—addressing questions of who did what, when or where, how or why,” adopting legal tests, and addressing “so-called ‘mixed question[s]’ of law and fact” by applying a legal standard to those facts (first quoting *Thompson*, 516 U.S. at 111; and then quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982))); *Pullman-Standard*, 456 U.S. at 289 n.19 (describing mixed questions as “questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated”).

⁴⁸ 42 U.S.C. §§ 7401–7675.

⁴⁹ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 858–59 (1984) (quoting 42 U.S.C. § 7411(a)(3)), *overruled by* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

⁵⁰ See Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting, 89 Fed. Reg. 36,870, 36,873, 36,875 (May 3, 2024) (“In developing this proposed rulemaking, the EPA has considered a petition for reconsideration it received on the 2020 PEA rule, the comments received on that rule’s proposal, and the Agency’s own experience . . .”). See generally Denial of Petition for Reconsideration and Administrative Stay: “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,” 86 Fed. Reg. 57,585 (Oct. 18, 2021); U.S. ENV’T PROT. AGENCY, RESPONSE TO PETITION FOR RECONSIDERATION SUBMITTED ON BEHALF OF THE ENVIRONMENTAL DEFENSE FUND (EDF) ET AL. (2021); *New Jersey v. EPA*, 989 F.3d 1038, 1051 (D.C. Cir. 2021) (addressing other aspects of the EPA’s new source review methodology).

increase in serious irreversible, or incapacitating reversible, illness.”⁵¹ The Administrator’s determination concerning a potentially hazardous pollutant involves a policy judgment about the potential pollutant’s health effects, in accordance with risk assessment guidelines developed over time by one office in the agency, based on information prepared and reviewed in scientific databases by another office.⁵²

Mixed questions of law and policy pose a puzzle for judicial review of agency interpretations. They do not fall neatly under either the *de novo* standard of review for questions of law or the deferential standard for questions of policy—or fact—because, by their nature, they involve both types of questions.⁵³ This conundrum occupied early debates about administrative law. Professor Aditya Bamzai has gathered the history of mixed questions of “law and fact,” and his work, though intended for a different purpose, is quite helpful here.⁵⁴ As he recounts, the initial approach to such questions was formal, instructing courts to separate the law parts from the fact parts and subject each to the relevant standard of review.⁵⁵ Questions of law were thus for courts to decide *de novo*, while questions of fact were for courts to review under an appropriately deferential standard.⁵⁶ With the rise of the modern administrative state

⁵¹ 42 U.S.C. § 7422(a).

⁵² Si Duk Lee, *Risk Assessment and Risk Management of Noncriteria Pollutants*, 6 TOXICOLOGY & INDUS. HEALTH 245, 245–47 (1990).

⁵³ See Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 23 (1985) (describing the “difficulty of knowing where the judge’s province ends and the administrator’s begins” with mixed questions because “there is no standard of review”); Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73, 73–74 (1950) (noting the difficulty of drawing the law/fact distinction); *Thompson v. Keohane*, 516 U.S. 99, 110 n.10 (1995) (noting that when courts must decide mixed questions of law and fact under a federal statute, including in the criminal, habeas, Federal Rules of Civil Procedure, and Title VII contexts, “the proper characterization of a question as one of fact or law is sometimes slippery”).

⁵⁴ See Bamzai, *supra* note 11, at 959–76. Bamzai’s account of mixed questions is part of a larger project recovering a lost convention—that courts defer to contemporaneous and consistent agency statutory interpretations but otherwise decide questions of law *de novo*—which, he argues, Congress intended to preserve in the scope of review provision of the APA. *Id.* at 908. There are many excellent discussions of the law-fact and law-policy distinctions in administrative law. See ADRIAN VERMEULE, *LAW’S ABNEGATION* 27–36 (2016); Theodore J. St. Antoine, *The NLRB, the Courts, the Administrative Procedure Act, and Chevron: Now and Then*, 64 EMORY L.J. 1529, 1532–37 (2015); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986). There are also many histories of the APA, including some that challenge Bamzai’s version. See Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1641–56 (2019); Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 145–47 (2021). In *Loper Bright*, the majority and the dissent each provide their own historical account of judicial review of agency interpretations, but I do not take them to be inconsistent with the account that I present here. See *Loper Bright*, 144 S. Ct. at 2257–63; *id.* at 2301–06 (Kagan, J. dissenting); *infra* text accompanying notes 99–106, 169–74.

⁵⁵ See Bamzai, *supra* note 11, at 959–62.

⁵⁶ *Id.* at 959.

during the New Deal, legal realists challenged the notion that questions of law could be distinguished from questions of fact.⁵⁷ Scholars observed that whether a particular question was for the court or agency depended on how the court chose to characterize it.⁵⁸ Bamzai writes:

The standard of judicial review, therefore, turned on whether a particular issue was characterized as one of “law” or one of “fact.” As one might expect, the distinction between law and fact in this context mirrored the law-fact line traditionally drawn in the law of evidence. And as one might expect, just as in the context of the law of evidence, the distinction between “law” and “fact” could pose line-drawing problems. In an influential treatise on the law of evidence, James Bradley Thayer observed that the application of a legal rule to facts had been incorrectly characterized by others as a “mixed question of law and fact,” whereas the jury “always [sic] . . . must reason, and must ‘judge the facts.’” According to Thayer, there was no bright-line rule separating “law” from “fact” because the difference between cases involving the application of a legal term—such as “reasonableness”—to unique facts “is simply one of more or less.” “The reasons for leaving questions as to the meaning and construction of [contract] writing to the judges,” Thayer reasoned, is not “that these are questions of law, for, mainly, they are not,” but rather “ground[s] of policy.” The same problem could arise in administrative law. In *Marquez v. Frisbie*, for example, the Court reasoned that “where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.”⁵⁹

Similarly, Bamzai notes, John Dickinson, a leading figure in the development of administrative law, acknowledged agreement at this time that there “are not two mutually exclusive *kinds* of questions.”⁶⁰ He stated that “[d]rawing the line between ‘facts’ and ‘law’ for purposes of judicial review . . . was not a matter of mere formal categorization, but rather a policy call dependent on the generality of the legal principle that the court or agency was articulating.”⁶¹ A court chose the level of generality at which to frame a question on an ad hoc basis.⁶² Some questions were general enough for courts to resolve, while others

⁵⁷ *Id.* at 971–76.

⁵⁸ *Id.* at 972–73.

⁵⁹ *Id.* at 960–61 (alterations in original) (footnotes omitted) (first quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 249–51 (1898); then quoting James Bradley Thayer, “*Law and Fact*” in *Jury Trials*, 4 HARV. L. REV. 147 (1890); and then quoting *Marquez v. Frisbie*, 101 U.S. 473, 476 (1879)).

⁶⁰ *Id.* at 972–73 (quoting JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927)).

⁶¹ *Id.* at 975.

⁶² *See id.*

were “of insufficient abstraction to justify the involvement of generalist courts in the functioning of expert agencies.”⁶³

As a doctrinal matter, Bamzai writes, the Supreme Court seemed to send mixed signals about how to handle “mixed question[s]” of law and fact during this period.⁶⁴ Some thought the Court was “experiment[ing]” with judicial deference to agencies on mixed questions.⁶⁵ They pointed, for example, to the 1941 case *NLRB v. Hearst Publications, Inc.*,⁶⁶ in which the Court said that mixed questions were for agencies to decide.⁶⁷ There, the Court deferred to the NLRB’s determination that “employees” includes newsboys, who were essentially independent contractors, for purposes of the National Labor Relations Act (“NLRA”).⁶⁸ It reasoned that the “task [of defining the term] has been assigned primarily to the agency created by Congress to administer the Act.”⁶⁹ The NLRA applies to employees “where all the conditions of the [employment] relation require protection,” and any “[d]etermination” thereof “involves inquiries for the Board charged with this duty.”⁷⁰ It stressed:

Everyday experience in the administration of the statute gives [the NLRB] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers.⁷¹

However, during the same period, the Court also found that, in some cases, a mixed question was not for the agency. For example, in the 1944 case *Skidmore v. Swift & Co.*, the Court did not accord controlling weight to the Administrator’s determination that the time firefighters spend waiting in the fire house for the fire alarm to sound is “working

⁶³ *Id.* To be clear, Dickinson later stated that the APA prohibited courts from deferring to agency interpretations. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024) (“[Dickinson] read the APA to ‘impose a clear mandate that all [questions of law] shall be decided by the reviewing Court itself, and in the exercise of its own independent judgment.’” (second alteration in original) (quoting John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 513 (1947))); *id.* at 2303 n.4 (Kagan, J., dissenting) (agreeing with this characterization of Dickinson’s view but clarifying that he “viewed [the bar on judicial deference to agency interpretations] as a ‘change’ to, not a restatement of, pre-APA law” (quoting Dickinson, *supra*, at 516)).

⁶⁴ Bamzai, *supra* note 11, at 980.

⁶⁵ See *id.* at 918; cf. Levin, *supra* note 53, at 24 (noting that “the supposedly contradictory” opinions issued during this period “can be reconciled”).

⁶⁶ 322 U.S. 111 (1944).

⁶⁷ *Id.* at 132–33.

⁶⁸ 29 U.S.C. §§ 51–169; *Hearst*, 322 U.S. at 132–33.

⁶⁹ *Hearst*, 322 U.S. at 130.

⁷⁰ *Id.* (quoting *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914)).

⁷¹ *Id.*

time” for purposes of the Fair Labor Standards Act (“FLSA”).⁷² It said that the Administrator’s interpretation was “not controlling upon the courts” because “Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, [Congress] put this responsibility on the courts.”⁷³ The Court said that the Administrator’s interpretations, however, “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁷⁴

When Congress enacted the APA in 1946, confusion arose as to whether it departed from any pre-existing deference rule for mixed questions.⁷⁵ Section 706 set forth the “[s]cope of review,” specifying that “court[s] shall decide all relevant questions of law,” and apply a more deferential “arbitrary [and] capricious” standard of review to “agency action.”⁷⁶ Bamzai notes that some commentators argued that section 706 was intended to repudiate the Court’s “experimentation” of allocating mixed questions to agencies and reinstate the formal view that courts must decide all questions of law.⁷⁷ Some contended that Congress did not address the issue of mixed questions at all and left in place a deferential *Hearst*-type rule.⁷⁸ Others predicted that, whatever Congress’s intent, the approach to mixed questions in the lower courts would devolve into a determination of relative institutional competence—courts are expert at general questions, agencies are expert at specialized questions.⁷⁹ Courts would decide the former independently and defer to agencies on the latter.⁸⁰

This prediction played out over the next few decades. Courts continued to determine on an ad hoc basis in particular cases how to characterize the relevant question of statutory interpretation for purposes of judicial review under the APA—as a question of law for them or a question of fact or policy for the agency.⁸¹ Courts made the “policy

⁷² 29 U.S.C. §§ 201–219; *Hearst*, 322 U.S. at 136.

⁷³ *Hearst*, 322 U.S. at 137, 140. The Administrator was responsible for “bringing injunction actions to restrain violations” of the FLSA and not issuing rules to implement the FLSA. *Id.* at 137–38.

⁷⁴ *Id.* at 140.

⁷⁵ See Bamzai, *supra* note 11, at 918.

⁷⁶ Administrative Procedure Act, 5 U.S.C. § 706.

⁷⁷ Bamzai, *supra* note 11, at 994, 1000.

⁷⁸ See *id.* at 992.

⁷⁹ See *id.* at 917–18, 986–87.

⁸⁰ Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 476 (1989) (describing courts’ role in deciding “questions of law” and agencies’ expertise on “facts . . . [and] policy”).

⁸¹ See St. Antoine, *supra* note 54, at 1535–36 (describing vacillation in Supreme Court decisions involving the NLRB, where the Court “seem[ed] to have set out on its own to” review agency decisions).

call” based on the perceived need for legal acumen or specialized knowledge in deciding the question.⁸² Legal realists worried that courts were especially likely to find a question as amenable to independent judicial resolution when they disagreed with the agency’s interpretation.⁸³

B. Chevron

Then, in 1984, *Chevron* supplied its own approach to judicial review of agency statutory interpretations and changed the terms of the debate.⁸⁴ Without referring to the APA, the Court announced that reviewing courts must decide whether the relevant statutory language has a clear meaning, and if it does not, the interpretation of that language essentially is a question of policy for agencies to decide.⁸⁵ The Court grounded its rule on a theory of legislative intent.⁸⁶ The Court said that Congress delegates authority to agencies explicitly, charging them to implement statutory provisions, and implicitly, intending them to resolve ambiguities that it inadvertently or intentionally leaves in those provisions.⁸⁷ The role of courts is not to resolve statutory ambiguities but to determine whether they exist, applying the “traditional tools of statutory construction.”⁸⁸ If a court finds that Congress has not spoken to an issue, it should allow the agency to fill the statutory gap—i.e., it should accord controlling weight or judicial deference to the agency’s interpretation—so long as that interpretation is “permissible.”⁸⁹ This rule is appropriate, the Court reasoned, because agencies, not courts, possess the expertise and political accountability—via the President—to make the policy choices that the resolution of statutory ambiguities

⁸² Bamzai, *supra* note 11, at 975.

⁸³ *Cf. id.* at 976 (questioning whether courts had more expertise than agencies at deciding questions of law).

⁸⁴ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984), *overruled by* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

⁸⁵ See Bamzai, *supra* note 11, at 997–98; *Chevron*, 467 U.S. at 845. See generally THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* (2022) (providing the quintessential history of *Chevron*). After it decided *Chevron*, the Court maintained the practice of separating law from fact when reviewing mixed questions decided by other courts, while acknowledging that the “fact or law” distinction is “slippery” and making it “will not always be easy.” See *Thompson v. Keohane*, 516 U.S. 99, 110–11 (1995) (quoting *Wainwright v. Witt*, 469 U.S. 412, 429 (1985)). But *Chevron* changed the debate about mixed questions in the administrative law context. *Cf.* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2093–97 (1990) (discussing the limitations of *Chevron* deference for mixed questions); Sunstein, *supra* note 80, at 475–76 (1989) (explaining the “tension” that exists between respecting the “policymaking competence” of agencies and applying “independent judicial review” to agency action).

⁸⁶ *Chevron*, 467 U.S. at 843–44.

⁸⁷ *Id.*

⁸⁸ *Id.* at 843 n.9.

⁸⁹ *Id.* at 843–44.

demands.⁹⁰ *Chevron* provided a separate framework for judicial review of agency interpretations, directing courts to treat the underlying questions as questions of policy for agencies to decide, whenever the relevant statutory language was ambiguous. It therefore eased the pressure of deciding how to characterize mixed questions for purposes of judicial review under the APA.

That is not to say *Chevron* cleared up all the confusion in this area. Over the subsequent decades, the Court cut back on the application of *Chevron*, tailoring the notion of congressional delegation upon which the deference rule relied. In 1994, it began by planting the seeds of the major questions doctrine, saying that Congress does not license agencies to alter the fundamental aspects of their regulatory scheme through relatively insignificant statutory provisions, that is, Congress does not “hide elephants in mouseholes.”⁹¹ In 2000, it said that Congress does not give agencies authority to reach matters of great “economic and political significance” through broadly worded provisions.⁹² In 2001, it decided that if Congress has not given an agency the authority to issue a controlling interpretation of the statute, or if the agency fails to exercise that authority in issuing a particular interpretation, the standard from *Skidmore* rather than *Chevron* applies.⁹³ It continued to reinforce these principles in the ensuing years.⁹⁴

But *Chevron* still applied to most cases, directing courts to decide whether the relevant statutory language is clear, and if not, defer to the agency interpretation so long as permissible.⁹⁵ For most questions, *Chevron* effectively allocated interpretive authority this way: the court decides the legal question of whether Congress has provided or precluded a specific meaning for statutory language at issue, and if not, the agency decides the policy question that Congress did not resolve, within given statutory limits. In other words, it instructed courts to use statutory ambiguity to draw the line between questions of law for courts and questions of policy for agencies.

⁹⁰ *Id.* at 865–66.

⁹¹ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001); *see also* *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (holding that the FCC lacked authority to alter a fundamental provision of its statutory scheme under its authority to “modify any requirement” of the statute).

⁹² *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

⁹³ *See* *United States v. Mead Corp.*, 533 U.S. 218, 231–35 (2001).

⁹⁴ *See* *Barnhart v. Walton*, 535 U.S. 212, 224–25 (2002); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–86 (2005); *King v. Burwell*, 576 U.S. 473, 496–97 (2015).

⁹⁵ *Chevron*, 467 U.S. at 843–44.

C. Loper Bright

In *Loper Bright*, the Court found that “[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA” and overruled the decision accordingly.⁹⁶ Chief Justice Roberts wrote the opinion for the Court, joined by all conservative Justices, with Justices Thomas and Gorsuch each writing a concurrence, and Justice Kagan writing the dissent for herself, Justice Sotomayor, and Justice Jackson.⁹⁷ Many will discuss what *Loper Bright* means, how it applies, and whether it is correct. This Section sets it out not for the purpose of evaluating it directly but in relation to the problem of ordinary questions, concentrating on the majority and dissenting opinions. This Section quotes those opinions generously because, as of this writing, *Loper Bright* is brand new, and attention is warranted to the Justices’ actual words rather than paraphrasing them.

The Court began with the history of judicial review, from Article III and *Marbury v. Madison*⁹⁸ to other early cases, which established that “[w]hen the meaning of a statute was at issue, the judicial role was to ‘interpret the act of Congress, in order to ascertain the rights of the parties.’”⁹⁹ The Court noted that “exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes,” particularly when those interpretations were “issued roughly contemporaneously with the enactment of the statute” and by “masters of the subject,” who often drafted and then later interpreted the laws.”¹⁰⁰ The Court underscored: “‘Respect,’ though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it.”¹⁰¹

The Court found no departure from this understanding in the cases leading up to the APA. To the contrary, those cases reaffirmed that “[t]he interpretation of the meaning of statutes . . .” was “exclusively a judicial function.”¹⁰² Meanwhile, *Skidmore* reinforced and elaborated the “respect” or “great weight” that courts could give an agency interpretation to “inform[]” their independent judgment.¹⁰³ The Court

⁹⁶ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

⁹⁷ Justice Jackson did not participate in the decision of *Loper Bright*; she did participate in the decision of the companion case, *Relentless, Inc. v. U.S. Dep’t of Commerce*. See *id.* at 2294 (Kagan, J., dissenting).

⁹⁸ 5 U.S. (1 Cranch) 137 (1803).

⁹⁹ *Loper Bright*, 144 S. Ct. at 2257 (quoting *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840)).

¹⁰⁰ *Id.* at 2257–58 (quoting *United States v. Moore*, 95 U.S. 760, 763 (1877)).

¹⁰¹ *Id.* at 2258.

¹⁰² *Id.* (quoting *United States v. American Trucking Ass’n, Inc.*, 310 U.S. 534, 544 (1940)).

¹⁰³ See *id.* at 2259 (first quoting *Gray v. Powell*, 314 U.S. 402, 412 (1941); then quoting *Am. Trucking Ass’n*, 310 U.S. at 549; and then quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

acknowledged some inconsistency in cases such as *Gray v. Powell*¹⁰⁴ and *NLRB v. Hearst*, in which it had “applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency.”¹⁰⁵ But it did not regard those cases as weakening or displacing the basic rule that courts decide all questions of law.¹⁰⁶ At any rate, the Court noted, they certainly did not come close to embracing *Chevron*-style deference.¹⁰⁷

Nor did the APA. The Court pointed to the text of section 706, which plainly states that a “court shall decide all relevant questions of law” while ensuring that agency decisions are not “arbitrary, capricious, [or] an abuse of discretion.”¹⁰⁸ Based on this and surrounding text, the Court declared that the APA “means what it says.”¹⁰⁹ It confirmed the plain meaning by examining the history of the APA as well as the views of leading administrative law scholars then.¹¹⁰ It found ample evidence that the APA instructs courts to decide “*all* [questions of law],” exercising “independent judgment in determining the meaning of statutory provisions.”¹¹¹

The Court described how courts perform their duty.¹¹² They use their traditional tools and “may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes,” citing *Skidmore*.¹¹³ And, the Court stated, “[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.”¹¹⁴ Courts “fulfill[] that role by recognizing constitutional delegations, ‘fix[ing] the boundaries of [the] delegated authority,’ and ensuring that the agency has engaged in ‘reasoned decision-making’ within those boundaries.”¹¹⁵

The Court announced that *Chevron*, which made no effort to engage with the APA, “defies the command of the APA that ‘the reviewing court’—not the agency whose action it reviews—is to ‘decide

¹⁰⁴ 314 U.S. 402 (1941).

¹⁰⁵ *Loper Bright*, 144 S. Ct. at 2259 (first citing *Gray*, 314 U.S. at 402; and then *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944)).

¹⁰⁶ *See id.* at 2259–60.

¹⁰⁷ *See id.* at 2260.

¹⁰⁸ *Id.* at 2261 (citing Administrative Procedure Act, 5 U.S.C. § 706).

¹⁰⁹ *Id.* at 2262.

¹¹⁰ *See id.*

¹¹¹ *Id.* (quoting Dickinson, *supra* note 63, at 513 (alteration in original) (emphasis added)).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 2263.

¹¹⁵ *Id.* (citation omitted) (first quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); and then quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)).

all relevant questions of law’ and ‘interpret . . . statutory provisions.’”¹¹⁶ *Chevron* “requires a court to *ignore*, not follow, ‘the reading the court would have reached’ had it exercised its independent judgment as required by the APA.”¹¹⁷ Furthermore, *Chevron* “demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time,” which is “much more” than “the ‘respect’ historically given to Executive Branch interpretations.”¹¹⁸ “Still worse,” *Chevron* “forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is ‘unambiguous.’”¹¹⁹

The Court said that *Chevron* “cannot be reconciled with the APA . . . by presuming that statutory ambiguities are implicit delegations to agencies” for several reasons.¹²⁰ For one thing, that presumption does not “approximate reality” because “[an] ambiguity is simply not a delegation of law-interpreting power.”¹²¹ Quoting *Chevron*, the Court observed that statutory ambiguities may result from “an inability on the part of Congress to squarely answer the question at hand, or from a failure to even ‘consider the question’ with the requisite precision.”¹²² They may be “unintentional,” owing to the “complexity” of ideas and the limits of language.¹²³ Ambiguity is not a reliable indication that Congress intends “an agency, as opposed to a court, resolve the resulting interpretive question.”¹²⁴

The Court further noted that ambiguities arise all the time in cases that do not involve a purported delegation or an agency. When courts confront such cases, they “understand that such statutes . . . do, in fact—must—have a single, best meaning,” and they “use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.”¹²⁵ They “do not throw up their hands because ‘Congress’s instructions have’ supposedly ‘run out,’ leaving a statutory ‘gap’” or “declar[e] a particular party’s reading ‘permissible.’”¹²⁶ In fact, the Court went on, the very notion of a “permissible” reading “makes no sense”

¹¹⁶ *Id.* at 2265 (quoting Administrative Procedure Act, 5 U.S.C. § 706).

¹¹⁷ *Id.* (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244).

¹¹⁸ *Id.* (quoting *Chevron*, 467 U.S. at 863).

¹¹⁹ *Id.* at 2265 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)).

¹²⁰ *Id.*

¹²¹ *Id.* (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989)).

¹²² *Id.* (quoting *Chevron*, 467 U.S. at 865).

¹²³ *Id.* at 2266.

¹²⁴ *Id.* at 2265.

¹²⁵ *Id.* at 2266.

¹²⁶ *Id.* (quoting *id.* at 2294 (Kagan, J., dissenting)).

because “[i]n the business of statutory interpretation, if it is not the best, it is not permissible.”¹²⁷

“Perhaps most fundamentally,” the Court remarked, “*Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”¹²⁸ Although *Chevron* recognized that courts are the “final authority on issues of statutory construction,” and that “in the absence of an administrative interpretation” a court must “impose its own construction on the statute,” it “gravely erred . . . in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play.”¹²⁹ Indeed, the Court continued, “[t]he very point of traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities.”¹³⁰

The Court rejected the Government’s—and the dissent’s—various arguments about why “Congress must generally intend for agencies to resolve statutory ambiguities”: to enlist agency “subject matter expertise,” to “promote[] uniform construction of federal law,” and to leave policymaking to political officials not courts.¹³¹ As to agency “subject matter expertise,” the Court said *Chevron*’s presumption ignores that courts are the experts for resolving statutory ambiguities, plus the presumption extends beyond technical issues as to which agency expertise is relevant.¹³² The Court noted that, even for technical issues, “delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise” because courts can seek assistance from the parties in the case and the agency’s interpretation.¹³³

The Court quickly dismissed the argument that *Chevron* is necessary for the “uniform construction of federal law.”¹³⁴ It questioned whether *Chevron* delivered uniformity when courts have been inconsistent in applying the decision. Additionally, it commented, there is “no reason to presume that Congress prefers uniformity for uniformity’s sake over the correct interpretation of the law it enacts.”¹³⁵

The Court then addressed the contention that *Chevron* is necessary to prevent courts from making policy in place of politically accountable officials. Although “[i]t is reasonable to assume that Congress intends

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 & n.9 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.* at 2267.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

to leave policymaking to political actors,” the Court said that *Chevron* is “especially mistaken, for it rests on a profound misconception of the judicial role.”¹³⁶ That is because the “resolution of statutory ambiguities involves legal interpretation,” a “task” that “does not suddenly become policymaking just because a court has an ‘agency to fall back on.’”¹³⁷ Moreover, “[c]ourts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences.”¹³⁸ The Court said that all courts must do to avoid “discretionary policymaking” is to “identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.”¹³⁹ Thus, “*Chevron* does not prevent judges from making policy. It prevents them from judging.”¹⁴⁰

Observing that *Chevron*’s presumption is a “fiction,”¹⁴¹ the Court briefly canvassed the various “refinements” that it had to make—from *Mead*, restricting the application of *Chevron* to cases in which “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority,”¹⁴² to the major questions doctrine, carving out issues of “deep economic and political significance”¹⁴³ that are too “[e]xtraordinary” for Congress to have delegated through “modest words, vague terms, or subtle device[s],” and others.¹⁴⁴ It noted that these “byzantine . . . preconditions and exceptions” had negative practical effects, causing some courts to “bypass[] *Chevron*,” either one of the steps or entirely, and avoid determining at which “step” they were deferring to the agency interpretation.¹⁴⁵

Having dismantled *Chevron*, the Court then found that stare decisis did not prevent it from overruling the long-standing precedent. It first observed that “[e]xperience has . . . shown that *Chevron* is unworkable.”¹⁴⁶ Not only had the Court needed to continually clarify the framework’s application over time, but no one in the decision’s lifetime had provided courts guidance on the pivotal issue: “How clear

¹³⁶ *Id.* at 2268.

¹³⁷ *Id.* (quoting *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019) (plurality opinion)).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

¹⁴³ *Id.* at 2269 (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)).

¹⁴⁴ *Id.* (quoting *West Virginia v. EPA*, 597 U.S. 697, 723 (2022)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2270.

is clear?”¹⁴⁷ Courts know they can always find a “best meaning” for statutory language using their traditional tools; what they do *not* know, the Court stressed, is when they should stop applying those tools and declare ambiguity, thus triggering judicial deference.¹⁴⁸ The reality is that “[o]ne judge might see ambiguity everywhere; another might never encounter it.”¹⁴⁹ Because ambiguity is “[s]uch an impressionistic and malleable concept,” the Court said it “cannot stand as an every-day test for allocating’ interpretive authority between courts and agencies.”¹⁵⁰ The Court also found that *Chevron* has not “foster[ed] meaningful reliance” as a “stable background rule” given the Court’s “constant tinkering” and the doctrine’s lack of a “clear or easily applicable standard.”¹⁵¹ Furthermore, *Chevron* “affirmatively destroys” reliance and “fosters unwarranted instability in the law” by allowing an agency “to change positions” as much as it likes, subject to minimal legal constraints.¹⁵²

Before concluding, the Court stated that its decision to overrule *Chevron* does “not call into question prior cases that relied on the *Chevron* framework.”¹⁵³ It noted that “[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to stare decisis despite our change in interpretive methodology.”¹⁵⁴ And the claim that a case relied on the wrong framework does not constitute a “special justification” for overruling; it is tantamount to a claim that the case reached the wrong result, which is “not enough to justify overruling a statutory precedent.”¹⁵⁵

Justice Thomas concurred, writing that whether agencies decide questions of law or policy when interpreting statutes under *Chevron*, neither can stand.¹⁵⁶ Agencies usurp judicial power when they make law and usurp legislative power when they make policy.¹⁵⁷ Justice Gorsuch concurred to note that, in his view, *Chevron* violates separation of powers by abdicating judicial responsibility for questions of law.¹⁵⁸ He also offered a lengthy theoretical discussion of stare decisis and then explained why stare decisis does not save *Chevron*.¹⁵⁹

¹⁴⁷ *Id.* (quoting Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521).

¹⁴⁸ *See id.* at 2271.

¹⁴⁹ *Id.* at 2270.

¹⁵⁰ *Id.* at 2270–71 (quoting *Swift & Co. v. Wickham*, 382 U.S. 111, 125 (1965)).

¹⁵¹ *Id.* at 2272 (first quoting *id.* at 2298 n.1 (Kagan, J., dissenting); and then quoting *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 927 (2018)).

¹⁵² *Id.*

¹⁵³ *Id.* at 2273.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

¹⁵⁶ *See id.* at 2273–75 (Thomas, J., concurring).

¹⁵⁷ *See id.*

¹⁵⁸ *See id.* at 2281–82 (Gorsuch, J., concurring).

¹⁵⁹ *See id.* at 2276–94.

In her dissent, Justice Kagan defended *Chevron*'s presumption that agencies, not courts, should resolve the myriad ambiguities that invariably arise in regulatory statutes.¹⁶⁰ She pointed out in concrete terms "the problem that gave rise to *Chevron* (and also to its older precursors): The regulatory statutes Congress passes often contain ambiguities and gaps."¹⁶¹ She offered example upon example from prior circuit court cases demonstrating "what a typical *Chevron* question looks like—or really, what a typical *Chevron* question is."¹⁶² These examples involved highly specialized matters that demanded the precise expertise of the agencies in charge of implementing the statutory schemes; likewise, they were not the sort that Congress likely would resolve itself when drafting a statute.¹⁶³ A *Chevron* question, Justice Kagan said, involves "a statutory phrase [that] has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, 'fixed' the 'single, best meaning' at 'the time of enactment' (to use the majority's phrase)."¹⁶⁴ Thus, the question that *Chevron* addresses is: "Who decides which of the possible readings should govern?"¹⁶⁵ In Justice Kagan's view, *Chevron* provides a reasonable answer that Congress generally would intend for the agency not the court to decide.¹⁶⁶

Justice Kagan noted that "[t]his Court has long thought Congress would choose an agency, with courts serving only as a backstop to make sure the agency makes a reasonable choice among the possible readings."¹⁶⁷ She explained why, using concrete examples to show the importance of agency subject matter knowledge, particularly in implementing scientific and technical statutes.¹⁶⁸ In addition, she highlighted that "Congress would value the agency's experience with how a complex regulatory regime functions," again pointing to specific examples on a wide range of subjects.¹⁶⁹ That said, she continued, "deference . . . is [not] always appropriate," which accounts for the Court's "fine-tun[ing] the *Chevron* regime to deny deference in classes of cases in which Congress has no reason to prefer an agency to a court."¹⁷⁰ Justice Kagan described *Chevron*'s presumption as a "default rule" based on what Congress likely would want, observing that Congress has not acted to change the rule in the hundreds of statutes it has enacted since *Chevron*, though

¹⁶⁰ See *id.* at 2294 (Kagan, J., dissenting).

¹⁶¹ See *id.* at 2295.

¹⁶² *Id.* at 2296.

¹⁶³ See *id.*

¹⁶⁴ *Id.* at 2297 (quoting *id.* at 2266 (majority opinion)).

¹⁶⁵ *Id.*

¹⁶⁶ See *id.*

¹⁶⁷ *Id.*

¹⁶⁸ See *id.* at 2298.

¹⁶⁹ *Id.* at 2298–99.

¹⁷⁰ *Id.* at 2299.

“[t]he drafters of those statutes knew all about *Chevron*,” nor enacted legislation overruling it.¹⁷¹ Acknowledging that “the *Chevron* presumption is ‘fiction[al]’—as all legal presumptions in some sense are,” Justice Kagan said that the presumption has “gotten less and less so every day for 40 years.”¹⁷²

Justice Kagan took on the majority’s reading of the APA’s text, history, and scholarly understandings, observing that “Section 706 does not specify *any* standard of review for construing statutes” and “most ‘respected commentators’ understood Section 706 . . . as allowing, even if not requiring deference.”¹⁷³ She also challenged the majority’s understanding of the cases leading up to the APA, in particular *Gray v. Powell* and *NLRB v. Hearst*, which approved deference on “so-called mixed questions . . . involving the application of a legal standard to a set of facts.”¹⁷⁴ She said that the majority “first appears to distinguish between ‘pure legal question[s]’” and “mixed questions,” requiring courts to decide only the former and allowing them to defer on the latter, but she doubted that the majority has such an intent “because that approach would preserve *Chevron* in a substantial part of its current domain.”¹⁷⁵ Observing that mixed questions greatly outnumber pure legal questions, she noted that “[i]t is frequently in the consideration of mixed questions that the scope of statutory terms is established and their meaning defined.”¹⁷⁶ She found that “[t]he majority’s next rejoinder—that ‘the Court was far from consistent’ in deferring—falls equally flat.”¹⁷⁷ On her reasoning, if the cases leading up to the APA were inconsistent in requiring deference, and “the majority agrees that Section 706 was not meant to change the then-prevailing law,” then section 706 “cannot possibly be thought to have *prohibited* deference.”¹⁷⁸

After defending *Chevron*, Justice Kagan addressed *stare decisis*.¹⁷⁹ She said that *Chevron* was “entitled to a particularly strong form of *stare decisis*” because Congress “remains free to alter what we have done” and *Chevron* is “as embedded as embedded gets in the law,” applied by the Court some seventy times and lower courts “thousands upon

¹⁷¹ *Id.* at 2301 (citing Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 928 fig.2, 994 (2013)).

¹⁷² *Id.* at 2301 (quoting *id.* at 2268 (majority opinion)).

¹⁷³ *Id.* at 2302–03 (quoting *id.* at 2303).

¹⁷⁴ *Id.* at 2305.

¹⁷⁵ *Id.* at 2305–06.

¹⁷⁶ *Id.* at 2306.

¹⁷⁷ *Id.* (quoting *id.* at 2260 (majority opinion)).

¹⁷⁸ *Id.*

¹⁷⁹ *See id.* at 2306–10.

thousands” of times.¹⁸⁰ She also disputed the majority point-by-point concerning *Chevron*’s workability. As to the “variation” among judges as to “what ‘ambiguity’ means,” she stated that “the legal system has for many years, in many contexts, dealt perfectly well with that variation.”¹⁸¹ As to the “difficult” and “complicate[d]” exceptions that the Court has made to *Chevron*’s default rule, she said that those exceptions “fit with *Chevron*’s rationale.”¹⁸² Furthermore, “on the difficulty scale, they are nothing much” because courts will agree “[i]n 99 of 100 cases,” and, though “judges have indeed disputed [the] nature and scope,” of the “major questions exception,” that “disagreement concerns, on everyone’s view, a tiny subset of all interpretations.”¹⁸³

Meanwhile, she said the majority’s approach is “no walk in the park.”¹⁸⁴ She doubted that courts will know which statutory words or phrases denote “delegate[d] discretionary authority,” and which agency interpretations are “entitled to respect” under *Skidmore*.¹⁸⁵ Furthermore, she remarked, “[i]f the majority thinks that the same judges who argue today about where ‘ambiguity’ resides are not going to argue tomorrow about what ‘respect’ requires, I fear they will be gravely disappointed.”¹⁸⁶

Justice Kagan also warned that overruling *Chevron* would provide a “jolt to the legal system.”¹⁸⁷ She predicted that “[s]ome agency interpretations never challenged under *Chevron* now will be.”¹⁸⁸ And despite the Court’s assertion that its new decision would not unsettle prior decisions upholding agency action, of which “[t]here are thousands . . . many settled for decades,” she was not so “sanguine.”¹⁸⁹ To her mind, “[c]ourts motivated to overrule an old *Chevron*-based decision can always come up with something to label a ‘special justification.’”¹⁹⁰

¹⁸⁰ *Id.* at 2307–08 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)) (citing Kent Barnett & Christopher J. Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475, 477 & n.11 (2024)).

¹⁸¹ *Id.* at 2309 (quoting *id.* at 2271 (majority opinion)).

¹⁸² *Id.* at 2308 (quoting *id.* at 2270 (majority opinion)).

¹⁸³ *Id.* at 2309.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 2309–10 (first quoting *id.* at 2263 (majority opinion); and then quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

¹⁸⁶ *Id.* at 2309 (citation omitted) (quoting *id.* at 2265 (majority opinion)).

¹⁸⁷ *Id.* at 2310 (quoting *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 357 (2022) (Roberts, C. J., concurring in judgment)).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (quoting *id.* at 2273 (majority opinion)).

D. Ordinary Questions After *Loper Bright*

Loper Bright claims questions of law for courts, but it does not fully address the conundrum that ordinary questions pose for judicial review under the APA: How should courts decide whether a particular question is one of law for the court or one of policy for the agency when it can be characterized as either? Any number of questions that involve statutory terms or phrases involve questions of law *and* science, law *and* technology, or law *and* policy. They therefore can be characterized either as legal questions for courts or exercise-of-authority questions for agencies. Furthermore, as Justice Kagan wrote in her dissent, “[i]t is frequently in the consideration of mixed questions that the scope of statutory terms is established and their meaning defined.”¹⁹¹ Such questions can be characterized either as scope-of-authority questions for courts or exercise-of-authority questions for agencies. *Loper Bright* does affirm that courts have the responsibility under the APA to decide all questions of law, even when the statutory language is ambiguous, and confirms that the agency’s interpretation is available to provide technical assistance.¹⁹² But it does not say that courts must decide every question that involves statutory language or agency authority in some sense. Many policy decisions subject to the arbitrary and capricious test look this way, too. Courts make the judicial policy call concerning the proper standard of review under the APA in particular cases. How should they do so?

Courts may return to the ad hoc approach that predated *Chevron*. But history shows that this approach has significant limitations. During those years, the Court’s own cases reflected inconsistency, as the *Loper Bright* majority admits and the dissent confirms.¹⁹³ So, too, in lower courts, where the result was unpredictable and worse, charges of partisanship in judicial review, both prior to and under the APA.¹⁹⁴ Courts decided the questions they wanted and remitted to agencies the ones they did not.¹⁹⁵

Today, there is reason for concern that another pathology might emerge. As they begin to live with *Loper Bright*, courts will face uncertainty in particular cases about whether the question at issue is for them to decide independently, with the assistance of the agency’s interpretation under *Skidmore*, or for the agency to decide, subject to deferential review albeit no longer under *Chevron* but under the arbitrary and capricious test of the APA. This is the choice that existed for agency

¹⁹¹ *Id.* at 2306.

¹⁹² *See id.* at 2261, 2273 (majority opinion).

¹⁹³ *See id.* at 2259–60; *id.* at 2284 (Gorsuch, J., concurring); *id.* at 2306–07 (Kagan, J., dissenting).

¹⁹⁴ *See supra* Section II.A; *supra* text accompanying note 83.

¹⁹⁵ *See supra* text accompanying note 83.

interpretations before *Chevron*.¹⁹⁶ Courts may choose arbitrarily or, worse, use *Skidmore* especially when they want to narrow the agency's authority. But even when a court is inclined to agree with an agency interpretation, there is still a possible concern: a court might not choose a standard if it is uncertain which applies and instead say it would uphold the interpretation under either. Then no one knows whether the agency persuaded the court under *Skidmore* or reasonably exercised its own authority under the arbitrary and capricious test—not courts, agencies, Congress, or affected parties. That difference may matter if the agency seeks to change its interpretation in the future. Does it need to persuade the court to overrule statutory precedent, or does it have discretion to change, subject to reasoned decision-making constraints? As the *Loper Bright* majority indicated, a similar phenomenon occurred when the Court decided *Mead*, directing courts to consider, as a condition of applying *Chevron*, whether an agency has authority to issue interpretations with the “force of law” and has exercised that authority to issue the interpretation under review, and if not, to decide the question itself, affording the agency interpretation the “power to persuade” under *Skidmore*.¹⁹⁷ Courts found the *Mead* inquiry confusing when the agency did not possess or use traditional lawmaking procedures because the other factors that militated toward applying *Chevron* were nearly identical to those that favored applying *Skidmore*.¹⁹⁸ Some began to decide cases without selecting a standard, deferring to the agency under either and creating uncertainty in the law.¹⁹⁹

Ultimately, the extent of lower court confusion after *Loper Bright* is an empirical question. But prior experience with doctrinal change in this area does not bode well, and courts will face more cases challenging agency interpretations than ever before, if Justice Kagan's prediction is correct.²⁰⁰ A return to the ad hoc approach is not the only way for courts to move forward. The next Part offers guidance to courts for navigating the problem of ordinary questions in the new administrative law era.

II. FAMILIAR CONSIDERATIONS, NEW APPROACH

When courts are asked to review agency statutory interpretations, they should not ignore what they already know—the judicial norms for

¹⁹⁶ See *supra* text accompanying note 83.

¹⁹⁷ *United States v. Mead Corp.*, 533 U.S. 218, 231–35 (2001); *Loper Bright*, 144 S. Ct. at 2269 & n.7 (collecting cases).

¹⁹⁸ See Bressman, *supra* note 30, at 1445–46.

¹⁹⁹ See *id.*

²⁰⁰ See *Loper Bright*, 144 S. Ct. at 2310 (Kagan, J., dissenting) (doubting the majority's assurance that decisions upholding reasonable agency interpretations under *Chevron* would not be overruled on this basis, and noting that “some agency interpretations never challenged under *Chevron* now will be”).

questions of policy. These norms come from the Court's decisions over the past four decades elaborating the arbitrary and capricious test of the APA. The suggestion here is that the considerations underlying that test might be useful to determine in the first instance whether an ordinary question is properly regarded as a question of law or a question of policy. If a question of law, the court should resolve it independently; if a question of policy, the court should route the agency's interpretation to arbitrary and capricious review. This Part describes the approach and illustrates how it might work.

A. *Judicial Review of Agency Policy Decisions*

The "scope of review" provision, section 706 of the APA, directs courts to "hold unlawful and set aside agency action, findings, and conclusions . . . [that are] arbitrary, capricious, an abuse of discretion, or [contrary to law]."²⁰¹ Although this language is hardly self-explanatory, the Supreme Court only began to elaborate it in earnest four decades after Congress enacted it, as courts were beginning to review agency decisions under the regulatory statutes of the 1960s and 1970s.²⁰² The most famous case is *State Farm*, which the Court decided in 1983, one term before *Chevron*. The considerations from *State Farm* and decisions that followed have come to comprise their own doctrine known as both "the reasoned decision-making requirement" and "the hard look doctrine."²⁰³

State Farm contains several formulations of judicial review under the arbitrary and capricious standard. The most general description is that "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute."²⁰⁴ The Court described this standard as "narrow" and clarified that "a court is not to substitute its judgment for that of the agency."²⁰⁵ It also offered further

²⁰¹ 5 U.S.C. § 706(2).

²⁰² See Bamzai, *supra* note 11, at 995.

²⁰³ See, e.g., *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("The Administrative Procedure Act . . . establishes a scheme of 'reasoned decision-making.'"); (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)); Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1360 (2016) (examining Supreme Court cases and concluding that arbitrary and capricious review has been deferential and "far more flexible, accommodating, and intelligent about agency rationality"); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767 (2008) (empirical analysis suggesting that judges' political affiliation and other influences determine the validation rate of NLRB and EPA decisions).

²⁰⁴ *State Farm*, 463 U.S. at 42.

²⁰⁵ *Id.* at 43; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *State Farm*, 463 U.S. at 42) (describing the arbitrary and capricious standard as "narrow"); *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) ("Judicial review under [the arbitrary and capricious]

detail on what agencies and courts are expected to do; thus, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”²⁰⁶ Further, “[i]n reviewing that explanation, [a court] must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’”²⁰⁷ More specifically, the Court stated:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.²⁰⁸

In subsequent decisions, the Court offered more nuance, especially to this last, most concrete set of considerations.²⁰⁹

Though often framed in terms of what an agency must demonstrate to survive judicial review, the Court’s considerations establish norms of judicial behavior as well. For example, although a court must ensure that the agency has examined the relevant data, it must not provide its own assessment of the data.²¹⁰ And although a court must ensure that the agency has relied on relevant factors and no irrelevant factors in reaching its conclusion, it must not mandate a factor it prefers or strike a discretionary factor it dislikes.²¹¹ Thus, courts understand that when reviewing an agency’s policy decision, they normally should not second-guess that decision in the relatively specific ways that the Court has

standard is deferential, and a court may not substitute its own policy judgment for that of the agency.”); *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (“Review under the arbitrary and capricious test is deferential . . .”).

²⁰⁶ *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

²⁰⁷ *Id.* (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

²⁰⁸ *Id.*

²⁰⁹ See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 15–17 (2009) (listing factors that courts consider under the arbitrary and capricious test); Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 729–33 (2014). The Court has decided other arbitrary and capricious cases, some of which can be understood to address a particular concern for presidential opportunism concerning politically significant issues. See Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1752 (2021) (arguing that the Court has implemented an “accountability-forcing” version of arbitrariness review that focuses on “ensuring robust political accountability” and “political neutrality of agency decisions”); *cf.* *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 33 (2020) (holding that agency choice is arbitrary and capricious when it fails to consider an option in front of it); *Dep’t of Com. v. New York*, 588 U.S. 752, 785 (2019) (remanding agency choice if based on pretextual reasons).

²¹⁰ See *supra* notes 204–08 and accompanying text.

²¹¹ See *supra* notes 204–08 and accompanying text.

identified over time.²¹² Absent unusual circumstances, they should not disturb (1) data, studies, and decision-making methods upon which the agency has relied, analyses it has performed, and related judgments it has made;²¹³ (2) facts the agency has found and conclusions it has drawn based on its experience in administering the statute;²¹⁴ (3) discretionary factors the agency has deemed relevant or irrelevant to its decision;²¹⁵ or (4) policy options the agency has identified and selected among.²¹⁶

These considerations can be helpful under the APA as indications that a court should not review a particular agency interpretation *de novo* but under the arbitrary and capricious standard of review. Courts know what they should *not* be doing when reviewing agencies' policy decisions, and they should not disregard these norms because a particular policy decision has implications for the meaning of statutory language or the scope of agency authority, as so many do. Thus, a court should

²¹² The claim is that courts have familiarity with the applicable considerations under the arbitrary and capricious test, not that courts apply those considerations consistently across cases or even across circuits. *Cf.* Miles & Sunstein, *supra* note 203, at 796 (conducting empirical study of arbitrary and capricious cases and concluding that the D.C. Circuit applies the test differently than the other circuits).

²¹³ See *FCC v. Prometheus Radio Project*, 592 U.S. 414, 1153 (2021) (allowing an agency to interpret empirical studies and make predictive judgments based on data submitted in the notice-and-comment rulemaking process and recognizing that “[t]he APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies”); *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292–93, 295 (2016) (declining to find arbitrary and capricious the agency’s method for compensating certain electricity providers, which it developed in reliance on regulatory economist’s views and applied using a “net benefits” test it also chose); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103–04 (1983) (stating that under the arbitrary and capricious test of the APA, when an agency had made a decision “within its area of special expertise, at the frontiers of science . . . as opposed to [making] simple findings of fact, a reviewing court must generally be at its most deferential,” and declining to find arbitrary and capricious the agency’s predictive judgment though the data involved uncertainties); see also Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV’T L. REV. 1, 2–6 (2017) (discussing arbitrary and capricious review of an agency’s cost-benefit analysis).

²¹⁴ See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²¹⁵ See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 645–46 (1990) (allowing an agency to disregard the factor the court of appeals found relevant and stating that an agency can limit its consideration to the factors that Congress identified in the statute the agency is implementing); *Mobil Oil Expl. & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230–31 (1991) (allowing an agency to disregard a problem related to the one it was addressing, even if the latter affected the former); see also Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. STATE L. REV. 67, 68–69 (describing factors that a statute neither prohibits nor requires as “discretionary decisional factors,” providing cases elaborating the “relevant factors” agencies must consider, and noting that agencies determine which factors to consider in the absence of a statutory duty).

²¹⁶ *Elec. Power Supply Ass’n*, 577 U.S. at 292 (“A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.”); see *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 518 (2009) (refusing to hold arbitrary and capricious an agency decision based on change in the agency’s “overall enforcement policy” and in light of “technological advances”).

not find that an agency interpretation answers a question of law without pausing to examine the substance of that interpretation for any of the relatively specific indications that it addresses a question of policy. If such an indication is present, the court should categorize the question as one of policy for the agency to decide, subject to arbitrariness review. If no such indication is present, a court should conclude that the question is one of law for it to resolve independently.

The contention here is not that courts should apply the arbitrary and capricious test to agency interpretations manifesting these indications straight away.²¹⁷ Rather, courts should use the considerations for applying that test to help address the law-policy problem that ordinary questions present. The familiar policy indicia may help courts to discern, in a conscious and consistent manner, whether to resolve a question themselves or route the agency's interpretation to arbitrariness review.

B. *The Ordinary Questions Approach in Practice*

In practice, the approach sketched here has two analytical steps. When confronted with an agency interpretation, a court should first determine whether the statutory language at issue has a congressionally specified meaning—though for some broad statutory language, that inquiry will rest on whether the statutory language is narrow enough to foreclose the agency's interpretation.²¹⁸ If the statutory language does not have a particular meaning or is not narrow enough to rule out the agency's interpretation, a court should not announce the best meaning. Rather, at this juncture, the court essentially should determine the applicable standard of judicial review for the agency's interpretation. If the court finds a well-recognized indication of policy (e.g., data, facts, factors, options) in the substance of the agency's interpretation, it should treat the interpretation as presenting a question of policy to which the arbitrary and capricious test applies. If it finds no such indication, the court should conclude that the interpretation presents a question of law

²¹⁷ Cf. Pojanowski, *Without Deference*, *supra* note 20, at 1086–87 (suggesting that, without *Chevron*, courts would “independently resolve” “questions of statutory interpretation that, from the perspective of traditional lawyerly argument, are unclear” and treat “as questions of policy judgment subject to standard arbitrary-and-capricious review” those questions that “turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities and likely outcomes”). Many have argued *Chevron*'s step two does or should incorporate arbitrary and capricious review, or that the doctrine does or should collapse into arbitrary and capricious review. See Lisa Schultz Bressman, *Lower Courts After Loper Bright*, 31 GEO. MASON L. REV. 499, 505–06 (2024) (collecting sources).

²¹⁸ One might say there has to be discretionary “space” in the statutory language for the agency's interpretation. Peter L. Strauss, “*Deference*” is Too Confusing—Let's Call Them “*Chevron Space*” and “*Skidmore Weight*,” 112 COLUM. L. REV. 1143, 1145 (2012).

for it to decide *de novo*. Given the nature of ordinary questions, courts should expect to find more questions of policy than law.

As described, this approach may sound no different than *Chevron* or *Chevron*-plus-arbitrariness review—and therefore inconsistent with *Loper Bright*. It relieves courts of the obligation to resolve questions of law when Congress has not specified a meaning for the term or phrase at issue. It also requires courts to determine whether the agency interpretation is a reasonable interpretation of the statute, even if not the best interpretation.²¹⁹ In *Loper Bright*, the Court said *Chevron* “makes no sense” because it asks a court to determine whether an agency’s interpretation is a “permissible” interpretation of a statutory ambiguity, but an agency’s interpretation is only a permissible one if it is the “best” one, which is to say, “the reading that the court would have reached if no agency was involved.”²²⁰

But the approach suggested here is meaningfully different. It does not use statutory ambiguity to separate questions of law and policy; it guides courts in determining whether they are properly characterizing a question as one of law, not policy, notwithstanding statutory ambiguity. And it does not challenge the logic of statutory interpretation; it asks courts to read text as written. Courts can figure out whether a statutory term or phrase has a general meaning but no specific enough meaning to decide the case and whether broad statutory language is just that—not narrow enough to rule out the agency’s chosen action though broad enough to include it. If they cannot distance themselves from selecting a specific meaning or deciding whether the agency’s action is a go, that is okay. They can simply seek confirmation that the choice was theirs to make, using signals that reflect the Court’s own understanding of the judicial role for questions of policy under the APA.

C. D.C. Circuit Cases

A sampling of *Chevron* cases from the D.C. Circuit helps to illustrate how an ordinary questions approach would work—and perhaps counter-intuitively given the *Chevron* connection, how it would differ from that framework even when reaching the same result. The sampling here is not random. It consists of cases decided since the Roberts Court has been positioned to review them, applying *Chevron* in a distinctive manner. In each case, the D.C. Circuit found that traditional interpretive tools ran out quickly and that the statutory language had no meaning that either prohibited the agency’s interpretation or required another interpretation under step one of *Chevron*.²²¹ The court typically devoted

²¹⁹ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

²²⁰ *Id.*

²²¹ See e.g., *United Parcel Serv. v. Postal Regul. Comm’n*, 890 F.3d 1053, 1062 (D.C. Cir. 2018).

a dozen or more pages to describing the statutory scheme and followed with a paragraph or so of conclusory statutory analysis.²²² But the court did not then take the expected pathway under step two. It neither automatically deferred to the agency's interpretation, as some courts do at step two, nor applied the arbitrary and capricious test to evaluate the reasonableness of the agency's interpretation at step two, as the D.C. Circuit generally does.²²³ Rather, it superficially asked whether the agency's interpretation was reasonable in consideration of statutory sources other than the text (i.e., the statutory scheme or purpose) and then essentially terminated the interpretive inquiry by focusing on the extent to which the interpretation relied on policy sources (i.e., data, analytical methods, discretionary factors, or policy options).²²⁴ In each case, the court applied the arbitrary and capricious test separately from *Chevron* to evaluate whether the agency's interpretation was the product of reasoned decision-making.²²⁵ Sometimes the court noted that under D.C. Circuit precedent, step two and the arbitrary and capricious test overlapped "at the margins."²²⁶ But, in these cases, the court tended to apply them with little overlap at all.

Although the D.C. Circuit found in these cases that the agency's interpretation was "reasonable" under step two, one might say instead that the court found that it was reasonable for the agency to decide the question. The court highlighted in each case that the agency's interpretation involved at least one indication (e.g., data, fact, factor, option), and sometimes many indications, that the underlying question was one of policy. Although the court applied *Chevron*, as it was required to do, its analysis was not particularly dependent on the framework. As demonstrated below, the D.C. Circuit's approach basically would have been the same under an ordinary questions approach, which might indicate something: the D.C. Circuit seems to have been following something like an ordinary questions approach without saying so. In a way, the D.C. Circuit's approach, though nominally related to *Chevron*, can serve as a model for one that courts could follow in a post-*Chevron* world and suggests that such would be workable. The D.C. Circuit has not taken this method in every *Chevron* case,²²⁷ nor does this Foreword

²²² See e.g., *id.* at 1053–62.

²²³ See Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1462–68 (2018) (describing the different approaches to step two in federal appellate court decisions from 2003–2013).

²²⁴ See, e.g., *United Parcel Serv.*, 890 F.3d at 1062.

²²⁵ See, e.g., *id.* at 1066.

²²⁶ *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 92 (D.C. Cir. 2020) (quoting *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995)).

²²⁷ See, e.g., *Solar Energy Indus. Ass'n v. FERC*, 59 F.4th 1287, 1292–94 (D.C. Cir. 2023) (engaging in analysis of each element and finding that FERC's interpretation of "facility" and "power production capacity" under the Public Utilities Regulatory Policies Act of 1978 was "reasonable"

claim that this approach reflects its dominant methodology in all such cases.²²⁸ Rather, the contention is that the D.C. Circuit has seemed to chart a possible path for ordinary questions in the future.

1. Empirical Evidence (Plus Analytical Methodology and Longstanding Usage)

One thread in the D.C. Circuit's cases involves agency interpretations that are based on empirical evidence. Sometimes empirical evidence is easy to spot because it constitutes scientific data and technical studies. Other times, it looks a bit different. In *United Parcel Service v. Postal Regulatory Commission*,²²⁹ the D.C. Circuit examined an interpretation of the Postal Regulatory Commission that relied on expert testimony, as well as on the agency's choice of analytical methodology and longstanding usage of relevant statutory terms—which is to say, its experience-based and time-proven interpretation of those terms.²³⁰ The Commission had issued a rule selecting the methodology for the U.S. Postal Service to use in setting the rates of shipping products that compete with shipping products of other companies, like the United Parcel Service (“UPS”), under the Postal Accountability and Enhancement Act.²³¹ The Act requires the Commission to “‘ensure that each competitive product covers its costs attributable,’ defined as ‘the direct and indirect postal costs attributable to such product through reliably identified causal relationships,’” and covers “an appropriate share of the institutional costs of the Postal Service.”²³² The Commission defined “costs attributable” to include costs that varied with each product (such as highway transportation costs), and “institutional costs” to include fixed costs (like Postal Service facilities).²³³ It further defined variable costs as including costs that varied by the total amount of products (“volume-variable costs”), and specifically, “the principle of diminishing marginal costs” where the cost of adding another new unit decreases as the number of products increases.²³⁴ But the Commission discovered

under *Chevron* step two “in light of [the statute’s] language, structure, and purpose” and because it was “consistent with the legislative history” (quoting *Nat’l Treasury Emps. Union v. Fed. Lab. Rels. Auth.*, 754 F.3d 1031, 1042 (D.C. Cir. 2014))).

²²⁸ But see Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 46–49 (2017) (conducting empirical analysis of Circuit Court decisions applying *Chevron* and finding that the D.C. Circuit sometimes has a distinctive approach).

²²⁹ 890 F.3d 1053 (D.C. Cir. 2018).

²³⁰ *Id.* at 1056–61, 1066.

²³¹ Pub. L. No. 109-435, 120 Stat. 3198 (codified as amended in scattered sections 39 U.S.C.); *United Parcel Serv.*, 890 F.3d at 1055–56.

²³² *United Parcel Serv.*, 890 F.3d at 1055 (citation omitted) (quoting 39 U.S.C. §§ 3633(a)(2), 3631(b), 3633(a)(3)).

²³³ See *id.* at 1055–56.

²³⁴ *Id.* at 1056–57.

that its methodology “left some variable costs unattributed to any one product,” and it fixed the problem by shifting “these ‘inframarginal costs’” to “institutional costs,” which are divided among all products.²³⁵ This shift, in turn, lowers the price that the Postal Service charges for any individual product.²³⁶ During rulemaking, UPS challenged this methodology and proposed a different one.²³⁷ The Commission found that UPS’s methodology “relied on ‘unverifiable assumptions’ for both ‘the calculation and allocation of inframarginal costs.’”²³⁸

The D.C. Circuit ventured into this highly technical matter.²³⁹ It found that the Act did not unambiguously prohibit the Commission’s methodology or “unambiguously compel[]” UPS’s methodology, and it devoted the remainder of the discussion to whether the Commission’s interpretation was “reasonable under *Chevron*” step two.²⁴⁰ In finding the Commission’s methodology reasonable, the court acknowledged the agency’s “longstanding usage” of the term “institutional costs” and the expert testimony on which the Commission had relied in determining the meaning of “indirect costs,” as well as its rejection of UPS’s contrary evidence and analysis.²⁴¹ The court went on to apply the arbitrary and capricious test, finding that the agency’s interpretation reflected reasoned decision-making because it was well explained in the rulemaking record.²⁴²

Under an ordinary questions approach, the analysis would be similar. Any rate-setting methodology under the statutory language requires economic analysis performed by agency officials based on their own expertise and the testimony of outside economists. The Commission not only collected its own evidence but evaluated UPS’s contrary evidence, concluding that it rested on “unsupported assumption[s].”²⁴³ It also relied on its own experience with postal costs over time.²⁴⁴ Under the circumstances, a court could not treat the issue as a question of law without claiming authority to substitute its judgment (or UPS’s judgment) for the Commission’s. It would characterize the question as one of policy for the agency to decide, subject to arbitrariness review.

²³⁵ *Id.* at 1058 (quoting Order Concerning United Parcel Service, Inc.’s Proposed Changes to Postal Service Costing Methodologies (UPS Proposals One, Two, and Three), Docket No. RM2016-2, Order No. 3506 (Postal Regul. Comm’n Sept. 9, 2016)).

²³⁶ *See id.*

²³⁷ *Id.*

²³⁸ *Id.* at 1059 (quoting Order Concerning United Parcel Service, Inc.’s Proposed Changes to Postal Service Costing Methodologies, slip op. at 55–56).

²³⁹ *Id.* at 1060.

²⁴⁰ *Id.* at 1061–63.

²⁴¹ *Id.* at 1062–64.

²⁴² *Id.* at 1066.

²⁴³ *Id.* at 1059.

²⁴⁴ *Id.*

2. Factfinding Based on Experience Administering the Statute

Another strand of cases involves interpretations based on facts the agency gathered in the process of administering the statute. In *Pharmaceutical Research & Manufacturers of America v. FTC*,²⁴⁵ the D.C. Circuit reviewed the Federal Trade Commission's ("FTC") rule governing which asset transfers of patent rights were subject to the premerger reporting requirement under section 7A of the Hart-Scott-Rodino Antitrust Improvements Act.²⁴⁶ Part of the rule applied exclusively to certain asset acquisitions in the pharmaceutical industry, and the pharmaceutical industry rejected this selective targeting.²⁴⁷ During the rulemaking proceedings, the industry parties submitted a declaration of an economic consultant that the pharmaceutical industry was not the only industry with this arrangement.²⁴⁸ But the FTC found that its own "experience" contradicted this assertion.²⁴⁹ It had received no comparable nonpharmaceutical filings among the sixty-six it received over a five-year period, and it wished to "tailor[]" its rule to the specific sorts of problems that it had seen in the pharmaceutical industry.²⁵⁰

The D.C. Circuit found that "[n]othing in the plain meaning, context, or legislative history of the Act unambiguously precludes the FTC from promulgating a rule . . . merely because the rule focuses on a specific industry that is the sole source of the problem being addressed."²⁵¹ It then referred to the FTC's experience-based findings but did not even attempt to dispute such findings under *Chevron* step two, stating that "[t]he FTC's interpretation of the Act reflected in the Rule is obviously 'rationally related to the goals of' the statute" and "is perfectly reasonable."²⁵² It also found, separately applying the arbitrary and capricious test, that the interpretation was well explained in the rulemaking record.²⁵³

A court would reach the same conclusion under an ordinary questions approach. The agency's rule was based on its administration of the statutory scheme. To reach a contrary conclusion, the court would have to discount the agency's knowledge of its own process and look to the generalized evidence that the challengers provided—which is exactly

²⁴⁵ 790 F.3d 198 (D.C. Cir. 2015).

²⁴⁶ Pub. L. No. 94-435, 90 Stat. 1390 (codified as amended at 15 U.S.C. §§ 1311–1314); *Pharm. Rsch. & Mfrs. of Am.*, 790 F.3d at 199, 201–02.

²⁴⁷ *Pharm. Rsch. & Mfrs. of Am.*, 790 F.3d at 199–200.

²⁴⁸ *Id.* at 203.

²⁴⁹ *See id.* (quoting Premerger Notification; Reporting and Waiting Period Requirements, 78 Fed. Reg. 68,705, 68,708 (Nov. 15, 2013) (to be codified at 16 C.F.R. pt. 801)).

²⁵⁰ *Id.* at 208.

²⁵¹ *Id.* at 200.

²⁵² *Id.* at 208 (quoting *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011)).

²⁵³ *Id.* at 207–09, 212.

what the court should be reluctant to do. This is a question of policy for the agency, subject to arbitrary and capricious review.

In *National Treasury Employees Union v. Federal Labor Relations Authority*,²⁵⁴ the D.C. Circuit confronted an agency interpretation that arguably looked more like a question of law because it was tied more closely to the statutory language.²⁵⁵ The Federal Service Labor-Management Relations Statute²⁵⁶ permits union representatives to sit in on “‘any examination’ of a federal employee the union represents if . . . conducted by a ‘representative’ of the employing agency” and at which “the employee requests representation and . . . believes” the examination will “result in disciplinary action.”²⁵⁷ The Internal Revenue Service (“IRS”) excluded representatives of the National Treasury Employee Union (“NTEU”) from certain investigations of IRS employees conducted by Office of Personnel Management (“OPM”) investigators, and it was charged with unfair labor practices.²⁵⁸ The Federal Labor Relations Authority (“FLRA”) is responsible for implementing the statute, and it determined that the IRS was entitled to exclude the NTEU representative from the interviews because the OPM investigators were not “‘representatives’ of the IRS.”²⁵⁹ In making this determination, the FLRA relied on a definition of “representative of the agency” from a prior decision involving investigations by outside contractors, who are also not employed by the agency.²⁶⁰ The test was whether the investigator “performs an agency function and . . . is subject to agency control.”²⁶¹ The NTEU challenged this test and its application to the OPM investigators.²⁶²

Applying *Chevron*, the D.C. Circuit quickly concluded that the phrase “‘representative of the agency’ is ambiguous as there is nothing in the text of the Statute that gives precision to the broad phrase or otherwise evinces a clear congressional intent to foreclose the Authority’s interpretation.”²⁶³ It then found that the agency’s “function and control” analysis was reasonable as applied to OPM investigators.²⁶⁴ The D.C. Circuit observed that the FLRA relied on its own precedent concerning outside contractors, making fact-based comparisons between

²⁵⁴ 754 F.3d 1031 (D.C. Cir. 2014).

²⁵⁵ *See id.* at 1034–35.

²⁵⁶ 5 U.S.C. §§ 7101–7135.

²⁵⁷ *See Nat’l Treasury Emps. Union*, 754 F.3d at 1034 (quoting 5 U.S.C. § 7114(a)(2)(B)).

²⁵⁸ *Id.* at 1034–38.

²⁵⁹ *Id.* at 1034.

²⁶⁰ *Id.* at 1037 (quoting *Nat’l Treasury Emps. Union*, 66 F.L.R.A. 506, 509 (2012)).

²⁶¹ *Id.* at 1042.

²⁶² *Id.* at 1034, 1036.

²⁶³ *Id.* at 1042.

²⁶⁴ *Id.* at 1044.

their functions and relationship to the agency.²⁶⁵ Furthermore, the FLRA declined to rely on a line of Supreme Court decisions involving investigators employed in the National Aeronautics and Space Administration's ("NASA") Office of Inspector General because it found that the functions of the investigator and relationship to the agency were factually dissimilar to OPM investigators.²⁶⁶

This case involves a mixed question of law and fact in a traditional sense. The agency decided a question of law (whether "representative of [an] agency" is determined under a "function and control" analysis) and applied its interpretation to the facts (whether OPM investigators are representatives of the IRS).²⁶⁷ The court treated both as questions for the agency and that approach is consistent with an ordinary questions approach. The function-and-control test is not separable from its application but developed through its application in different contexts. Put differently, the FLRA did not first announce the rule and then apply that rule to the facts in the case, as a traditional law-fact focus might suggest. Rather, it engaged in analogical reasoning to determine the status of OPM investigators under a function-and-control analysis, choosing the relevant factual comparison—outside contractors rather than NASA investigators—based on its experience.²⁶⁸ To extract the question of law, a court would have to make judgments about the facts and claim authority to pick the proper analogy. Interpretations that are the product of experience and prior fact-based applications are for the agency, even if they can be seen in some sense as presenting separable questions of law.

3. *Decision-Making Methods and Processes*

Sometimes an agency interpretation specifies the decision-making or analytical method that the agency has chosen to implement provisions of its statute. In *Center for Sustainable Economy v. Jewell*,²⁶⁹ the D.C. Circuit examined the Department of the Interior's ("Interior") methodology for approving leases for exploration and development of oil and gas resources in the Outer Continental Shelf ("OCS") under the Outer Continental Shelf Lands Act.²⁷⁰ The statute requires the Secretary of the Interior to implement a program for offshore drilling that "strike[s] an appropriate balance . . . between local and national environmental, economic, and social needs," including consideration, for example, of whether proposed leases might be "unduly harmful to aquatic life

²⁶⁵ *Id.* at 1043.

²⁶⁶ *Id.* at 1043–44.

²⁶⁷ *Supra* text accompanying notes 260–64.

²⁶⁸ *Supra* text accompanying notes 265–67.

²⁶⁹ 779 F.3d 588 (D.C. Cir. 2015).

²⁷⁰ 43 U.S.C. §§ 1331–1356; see *Ctr. for Sustainable Econ.*, 779 F.3d at 593.

in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance.”²⁷¹ Interior adopted “a cost-benefit methodology” to implement this language, one aspect of which was determining “the costs of forgoing drilling” in a particular area.²⁷² Specifically, Interior evaluated whether “the environmental and social costs of relying on substitute sources of energy are equal to or greater than the costs from producing area resources.”²⁷³ The D.C. Circuit described this aspect of Interior’s methodology as “rest[ing] on the somewhat counterintuitive notion that *not* drilling for fossil fuels on the OCS would harm the environment” because people would rely on substitute fuel sources that would increase “air pollution, oil spills, and other disturbances.”²⁷⁴ In addition to including nondrilling costs, Interior decided to “tabulate costs nationally and allocate them proportionally,” meaning that the costs of “disturbances” experienced anywhere in the nation from substitute fuel sources were allocated proportionately among all potential leases, even if a potential drilling area would not experience the disturbance.²⁷⁵ The result was that “if extracting natural gas from the Alaskan OCS would cause less net social and environmental harm nationwide than would obtaining natural gas from substitute sources, Interior’s cost-benefit analysis should favor leasing on the Alaskan OCS over forgoing it.”²⁷⁶ This was true even though protecting the “pristine Alaskan wilderness” might be “more socially and environmentally beneficial than forgoing production in the Gulf of Mexico.”²⁷⁷

Applying *Chevron*, the D.C. Circuit found that Interior’s methodology “was neither expressly proscribed by the statute nor unreasonable.”²⁷⁸ The statute “requires consideration of the particular ecological characteristics and environmental sensitivities of the various program areas, but does not specify precisely how they must be considered.”²⁷⁹ The court determined that Interior “reasonably chose an analytical approach that captured what it concluded are two significant elements of environmental and social assessment”: foregoing drilling and national cost attribution.²⁸⁰ The agency’s approach was also consistent with the statute’s instruction “that the Secretary develop

²⁷¹ *Ctr. for Sustainable Econ.*, 779 F.3d at 594 (citing 43 U.S.C. § 1340(g)(3)).

²⁷² *Id.* at 603.

²⁷³ *Id.* (quoting J.A. 1873).

²⁷⁴ *Id.* at 603–04.

²⁷⁵ *Id.* at 604–05.

²⁷⁶ *Id.* at 604.

²⁷⁷ *Id.* at 605.

²⁷⁸ *Id.*

²⁷⁹ *Id.* (citing 43 U.S.C. § 1344(a)(2)(B), (G)).

²⁸⁰ *Id.* at 604.

a . . . program ‘which [s]he determines will best meet national energy needs,’” as well as the stated purpose of the statute “to treat ‘the [OCS] [a]s a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.’”²⁸¹

This case would come out no differently under an ordinary questions approach because it involved the agency’s choice of decision-making methodology. If “[n]othing in [the statute] require[d the challenger’s] methodology over [the agency’s],” then the court’s selection of a non-national allocation methodology would substitute the methodology it preferred for that of the agency.²⁸² Likewise, if the court decided that the cost-benefit analysis should not include the costs of foregoing drilling, it would have substituted its determination of the important aspects of the leasing program for that of the agency.²⁸³ These decisions were for the agency to make, subject to arbitrary and capricious review.²⁸⁴

One might think that this result is obvious under any approach; after all, the statute specifies the relevant considerations and tells the agency, not the court, “to strike an appropriate balance at each stage between local and national environmental, economic, and social needs.”²⁸⁵ But a future court, freed of *Chevron*, might disagree. The D.C. Circuit, though ruling against Alaska, seemed sympathetic to its interests, taking great pains to note that “Interior’s judgments may be debatable” and “[s]ome . . . may reasonably conclude they are not the best judgments.”²⁸⁶ Nevertheless, it resisted any urge to impose its own view.²⁸⁷ Offshore drilling is a sensitive issue on which reasonable minds can disagree. If Interior wishes to adopt a more protective stance under a new presidential administration, a reviewing court might see the Alaska matter as not for the agency to decide after all.²⁸⁸ Under an ordinary questions approach, a court would not revisit the agency’s authority to address the issue. Congress has granted the Secretary of the

²⁸¹ *Id.* at 606 (alterations in original) (quoting 43 U.S.C. §§ 1344(a), 1332(3)).

²⁸² *See id.*

²⁸³ *See id.* at 605.

²⁸⁴ *Id.* at 600.

²⁸⁵ *Id.* at 594.

²⁸⁶ *See id.* at 606.

²⁸⁷ *Id.*

²⁸⁸ *Cf.* Timothy Puko, *Biden to Block Oil Drilling in ‘Irreplaceable’ Alaskan Wildlands*, WASH. POST (Sept. 6, 2023, 6:23 PM), <https://www.washingtonpost.com/climate-environment/2023/09/06/biden-alaska-oil-drilling-ban-willow/> [<https://perma.cc/V8AT-GUXT>] (reporting that the Biden administration has cancelled oil leases granted during the Trump administration and banned oil drilling in “iconic” Alaskan wildlife preserve).

Interior authority to implement an offshore drilling program, specifying the relevant considerations for awarding drilling licenses and tasking the Secretary with striking the balance among them. The precise balance, as reflected in the Secretary's methodology, is for the agency to decide. Though the Secretary's decision is consequential, it is not for courts to second guess.²⁸⁹

*Baystate Franklin Medical Center v. Azar*²⁹⁰ is another sort of methodology case, involving the Department of Health and Human Services' ("HHS") process for calculating the wage index under its Prospective Payment System ("PPS").²⁹¹ HHS uses the PPS "to reimburse [participating] hospitals for treating Medicare [patients]," providing a set reimbursement rate for patients rather than reimbursing hospitals for the actual cost of service.²⁹² HHS calculates the payments on an annual basis and is required to adjust the labor-related portion of the hospitals' payments for geographic wage differences using a "'factor . . . reflecting the relative hospital wage level in the geographic area of the hospital compared to the national average,' . . . known as the 'wage index.'"²⁹³ Each year, the Centers for Medicare and Medicaid Services ("CMS") in HHS collects wage data from the hospitals and reviews that data

²⁸⁹ This does not mean that courts should stop determining whether a statute proscribes a particular factor under the statute. For example, in *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323 (D.C. Cir. 2020), the D.C. Circuit held that the FDA could not require a showing of clinical superiority for an orphan drug to receive market exclusivity under the Orphan Drug Act. *Id.* at 340. This Act allows the FDA to designate a drug as an "orphan drug" during development if it "treat[s] a rare disease or condition" and approve it for marketing after certifying its "safety and efficacy," as is required for all drugs. *Id.* at 325 (first quoting *Spectrum Pharms., Inc. v. Burwell*, 824 F.3d 1062, 1064 (D.C. Cir. 2016); and then quoting *Otsuka Pharm. Co., Ltd. v. Price*, 869 F.3d 987, 989 (D.C. Cir. 2017)). If the FDA approves an orphan drug for marketing, the Act requires the agency to grant the manufacturer a seven-year exclusivity period for "such drug." *Id.* (quoting 21 U.S.C. § 360cc(a) (2012), amended by Pub. L. No. 115-52, § 607, 131 Stat. 1005, 1049 (2017)). The Act "does not define 'such drug.'" *Id.* at 326. The FDA determined that no subsequent drug with the same "moiety" or "active ingredient" may be approved as an orphan drug during the exclusivity period and granted its own exclusivity period, except if that drug is "clinically superior to the first drug." *Id.* (quoting 21 C.F.R. § 316.3(b)(14)(i)). This essentially means it has greater effectiveness and safety than the first drug. *See id.* The FDA had a reason for its decision: an orphan drug could tie up the market for seven years—even if a more therapeutic version emerged during this time—and deprive another drug from receiving its own orphan drug benefits thereafter. *See id.* at 327. The D.C. Circuit found that the Act prohibited the FDA from considering the clinical superiority of the competing drug, when the Act provided that "[i]f the Secretary . . . approves an application . . . for a drug designated . . . for a rare disease or condition, the Secretary may not approve another application . . . for such drug." *Id.* at 326 (quoting 21 U.S.C. § 360cc(a) (2012)). Thus, the court determined that Congress was clear about the requirements for market exclusivity, and a showing of clinical superiority was not one of them. *Id.* at 340.

²⁹⁰ 950 F.3d 84 (D.C. Cir. 2020).

²⁹¹ *Id.* at 86.

²⁹² *Id.*

²⁹³ *Id.* (first quoting 42 U.S.C. § 1395ww(d)(3)(E)(i); and then quoting *Anna Jacques Hosp. v. Burwell*, 797 F.3d 1155, 1158 (D.C. Cir. 2015)).

under “an iterative process . . . outlined in a timetable” it publishes.²⁹⁴ Hospitals have an opportunity to correct their data before CMS finalizes the wage index through the notice-and-comment rulemaking process.²⁹⁵ Six months after the 2017 fiscal year deadline for data submission—and right before CMS published a notice of proposed rulemaking containing the wage index—Nantucket Cottage Hospital (“Nantucket”) sought to correct its data.²⁹⁶ CMS refused to accept the revised data, which would have required it to recommence its iterative process.²⁹⁷ Baystate Franklin Medical Center (“Baystate”) challenged the final rule, arguing that CMS’s failure to accept Nantucket’s corrected data was arbitrary and capricious because the agency did not rely on accurate data in setting the wage index.²⁹⁸ The D.C. Circuit rejected this argument and then went on to consider the rule under *Chevron*, although Baystate had not challenged the rule as a statutory interpretation.²⁹⁹ The court understood Baystate to be contesting the scope of the agency’s authority to set the wage index without accurate data.³⁰⁰ It found that the statute was silent on the issue of retroactive corrections and CMS could have gone either way.³⁰¹ The choice between “accuracy,” on the one hand, and “finality and efficiency,” on the other, was for the agency to make under the statutory scheme, and the choice it made was reasonable.³⁰²

In a circuit seemingly sensitive to indications of policy in agency decisions, this case should have been more straightforward than it was. CMS’s decision was on the line between policy and law to such extent that the challenger did not even make a *Chevron* argument. The D.C. Circuit might have stayed in the arbitrariness lane in evaluating CMS’s refusal to reopen the wage index process, and one wonders more generally how often courts have defaulted to or engaged *Chevron* analysis simply because an agency decision, in some sense, implicates statutory language as so many do—judicial propensities we might call “*Chevron* defaulting” and “*Chevron* hedging.”³⁰³ One also might wonder how many “legislative silence” cases are not statutory interpretation cases at all but statutory implementation cases. In any event, the D.C. Circuit thought the issue could be framed as statutory interpretation, involving

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 87.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 88.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 88–89.

³⁰⁰ *Id.* at 89.

³⁰¹ *See id.* at 92.

³⁰² *Id.* at 93.

³⁰³ I am unaware of empirical evidence of these phenomena, which now have greater significance in view of *Chevron*’s demise. I address this issue in a separate essay prepared for a symposium on *Chevron*’s future. *See* Bressman, *supra* note 217, at 7–8.

the issue of retroactive corrections or the scope of CMS's authority to set the wage index, and it preferred to hedge by applying *Chevron*.³⁰⁴ Once there, the choice between "accuracy" and "finality and efficiency" was for the agency to make.³⁰⁵ The decision whether to allow retroactive corrections would fall to the agency under an ordinary questions approach too. It is bound up in the design of the process for setting the wage index, whether viewed as the statutory choice between "accuracy" and "finality" or just a routine matter of statutory implementation.

4. Policy Options and Choices

The largest set of D.C. Circuit cases involves policy judgments comparable to those in the Supreme Court's prominent ordinary questions (or nonmajor questions) cases, including *Chevron*, *Mead*, *Barnhart*, and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.³⁰⁶ They involve a balancing of statutory purposes, the sorting of a subject into one statutory bucket or another, or the choice between specific meanings of more general statutory terms. These types of decisions are quintessential ones of policy, even though *Chevron* et al., no longer govern that determination.³⁰⁷ Below are representatives of each.

a. Statutory Purposes

In *Overdevest Nurseries, L.P. v. Walsh*,³⁰⁸ the D.C. Circuit reviewed a Department of Labor regulation governing the H-2A program of the Immigration and Nationality Act.³⁰⁹ The Act permits employers to hire workers "who are able, willing, and qualified" ("Subsection A") to do the job and when such employment "will not adversely affect the wages and working conditions of workers in the United States similarly employed" ("Subsection B").³¹⁰ The Secretary of Labor issued a regulation requiring agricultural employers to pay H-2A (non-U.S.) workers and non-H-2A (U.S.) workers in the "corresponding employment"

³⁰⁴ See *Baystate Franklin*, 950 F.3d at 89.

³⁰⁵ *Id.* at 93.

³⁰⁶ 545 U.S. 967 (2007); see *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Barnhart v. Walton*, 535 U.S. 212 (2002).

³⁰⁷ See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1330 (2014) (arguing that when agency judgments involve balancing "a host of incommensurate values, . . . courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one").

³⁰⁸ 2 F.4th 977 (D.C. Cir. 2021).

³⁰⁹ Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); *Overdevest Nurseries*, 2 F.4th at 980–81.

³¹⁰ *Overdevest Nurseries*, 2 F.4th at 980 (quoting 8 U.S.C. § 1188(a)(1)(A)–(B)).

the same hourly “adverse effect wage rate” and pay the adverse effect wage to non-H-2A workers who performed “any work included in the job order, or in any agricultural work performed by the H-2A workers.”³¹¹ Under the old definition, Overdevest Nurseries paid the adverse effect wage to H-2A “order pullers,” whose responsibilities were largely administrative and supervisory, and a lower hourly wage to less-skilled, non-H-2A “production workers.”³¹² Under the new definition, it was required to pay both types of workers the adverse effect wage.³¹³

Overdevest Nurseries challenged the new definition, arguing that the language “who are able, willing, and qualified” in Subsection A referred to the same class of workers who were “similarly employed” for purposes of Subsection B, based on the canons *ejusdem generis* and *noscitur a sociis* and the statute’s purpose to protect similarly employed American workers.³¹⁴ The D.C. Circuit disagreed and found that the statutory provision was not “unambiguous” because the canons did not support the inferences that Overdevest Nurseries had drawn.³¹⁵ Furthermore, the statute could be read as not only protecting U.S. agricultural workers doing the same jobs as foreign workers but also more generally as protecting all U.S. agricultural workers from “an influx of foreign workers performing unskilled work.”³¹⁶ It then determined that the Secretary’s new interpretation was reasonable under step two.³¹⁷ While the old definition was intended to further the purpose of protecting similarly employed U.S. workers, the Secretary discovered that its regulation in practice afforded less protection for longtime U.S. workers and “allowed employers to claim a need for [foreign] H-2A workers without defining the specific work they needed.”³¹⁸ The new definition repaired those flaws, extending protections beyond those U.S. workers engaged in “corresponding employment” to those engaged in any agricultural work.³¹⁹ It was reasonable because it comported with the more general purpose of the statute to protect all U.S. agricultural workers,³²⁰ and it was not arbitrary and capricious because the Secretary fully acknowledged and sufficiently explained the change.³²¹

This case involved a change from one specific interpretation of more general statutory language to another, both of which advanced the statute’s

³¹¹ *Id.* at 981 (quoting 20 C.F.R. § 655.103(b)).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 982.

³¹⁵ *Id.* at 982–83.

³¹⁶ *Id.* at 983.

³¹⁷ *Id.* at 983–84.

³¹⁸ *Id.* at 985.

³¹⁹ *Id.* at 981.

³²⁰ *Id.* at 984.

³²¹ *Id.* at 985–86.

purpose, depending on how that purpose was construed as applied to the particular provision. As *Overdevest Nurseries* demonstrates, the task of characterizing statutory purposes is based on policy considerations, including the agency's experience in administering the statutory scheme and enforcing its own regulations, and is therefore also for the agency. The result would be no different under an ordinary questions approach.

b. Statutory Buckets

In *Cigar Association of America v. FDA*,³²² the D.C. Circuit reviewed a part of the FDA's 2016 "Deeming Rule" implementing the Tobacco Control Act.³²³ The court described the Act as subjecting "newly regulated tobacco products . . . to requirements akin to those previously imposed by statute on cigarettes."³²⁴ The Act extends the Food Drug and Cosmetics Act ("FDCA")³²⁵ to "'any other tobacco products' that [the] FDA 'by regulation deems to be subject to' the [Act]."³²⁶ It further provides that the Secretary of HHS may issue regulations "appropriate for the protection of the public health."³²⁷ Under the Deeming Rule, the FDA classified a pipe as a "'component or part' of a tobacco product subject to" regulation under the FDCA, "rather than an 'accessory'" which is not.³²⁸ The Cigar Association of America ("Cigar Association") challenged the rule, arguing that a "component" must be "integrated into" a tobacco product.³²⁹ The D.C. Circuit found the statutory language ambiguous after examining the text, consulting dictionary definitions, and employing several textual canons of construction.³³⁰ It also rejected the Cigar Association's argument that the FDA failed to consider whether "pipes themselves have any direct effect on public health."³³¹ The court rejected this contention because, as the agency had determined in its rule, the "definition of 'component or part' does not require [the] FDA to identify a product's health effects in order to classify it as a 'component or part.'"³³²

³²² 5 F.4th 68 (D.C. Cir. 2021).

³²³ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009); *Cigar Ass'n of Am.*, 5 F.4th at 73–74.

³²⁴ *Cigar Ass'n of Am.*, 5 F.4th at 73 (quoting *Cigar Ass'n of Am. v. FDA*, 964 F.3d 56, 60 (D.C. Cir. 2020)).

³²⁵ 21 U.S.C. §§ 301–399.

³²⁶ *Cigar Ass'n of Am.*, 5 F.4th at 73 (quoting 21 U.S.C. § 387a(b)).

³²⁷ *Id.* at 76 (quoting 21 U.S.C. § 387g(a)(3)(A)).

³²⁸ *Id.*

³²⁹ *Id.* at 77.

³³⁰ *Id.*

³³¹ *Id.* at 78 (quoting Brief for Plaintiffs-Appellants at 46, *Cigar Ass'n of Am. v. FDA*, 5 F.4th 68 (D.C. Cir. 2021) (No. 20-5266), 2021 WL 1160495, at *46).

³³² *Id.* (quoting Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28,974, 28,975 (May 10, 2016) (codified at 21 C.F.R. §§ 1100, 1140 & 1143)).

Under an ordinary questions approach, this case would come out the same. It involves a classic policy decision, determining whether a subject falls into one statutory category or another.³³³ The classification depends on which qualities of the subject are relevant to achieving the purposes of the statutory scheme.³³⁴ Whether a pipe is more like a cigarette filter (a “component”) or the pouch that holds loose tobacco (an “accessory”) is a judgment for the agency to make.³³⁵ The only way for the D.C. Circuit to reach a different interpretation is to choose the other bucket—that is, to directly substitute its judgment (or the Cigar Association’s judgment) for that of the agency. This is a question for the FDA.

c. Reasonable Choices

In *Prime Time International Co. v. USDA*,³³⁶ the D.C. Circuit reviewed a United States Department of Agriculture (“USDA”) rule calculating “monetary assessments [imposed] on tobacco . . . manufacturers and importers” under the Fair and Equitable Tobacco Reform Act³³⁷ to fund a subsidy program for tobacco growers.³³⁸ The Act requires the USDA to (1) “calculate the total monetary assessment needed to fund the subsidy program”; (2) “apportion [the assessment] among six classes of tobacco products—cigarettes, cigars, snuff, roll-your-own, chewing, and pipe—based, in part, on each class’s share of the gross domestic volume of tobacco products”; and (3) “divide . . . assessment[s] . . . within [a] class ‘on a pro rata basis . . . based on each manufacturer’s and importer’s share of gross domestic volume.’”³³⁹ The agency issued the “Per Stick Rule,” which “calculates each cigar manufacturer’s” pro rata share of the assessment under the third prong “based on the number of cigars—also known as ‘sticks’—that the manufacturer puts into commerce.”³⁴⁰ “Prime Time, a manufacturer of small cigars, challenged the . . . [r]ule” because it did not account for the different tobacco volume between small and large cigars and only counted the number of sticks sold.³⁴¹ The D.C. Circuit began by stating, “This court hears many complex and difficult cases. This is not one of them.”³⁴² The USDA had relied on a reasonable interpretation of the Act, and Prime

³³³ See *supra* text accompanying notes 306–07.

³³⁴ See *supra* text accompanying notes 306–07.

³³⁵ *Cigar Ass’n of Am. v. FDA*, 5 F.4th 68, 77, 80 (D.C. Cir. 2021).

³³⁶ 753 F.3d 1339 (D.C. Cir. 2014).

³³⁷ Pub. L. No. 108-357, 118 Stat. 1521 (codified as amended at 7 U.S.C. §§ 518–519).

³³⁸ *Prime Time*, 753 F.3d at 1340–41.

³³⁹ *Id.* at 1340 (quoting 7 U.S.C. § 518d(e)(1)).

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.* at 1341.

Time relied on a series of false premises—including that there was only one good dictionary definition of “volume” (there was not) and that the USDA applied inconsistent metrics to its two volume determinations (it did not).³⁴³ The court said that even if Prime Time’s interpretation was the best one, that was irrelevant.³⁴⁴

Under the ordinary questions approach, this case is easy as well. Although the challenger made arguments based on the interpretation of the statute and the regulation, it only sought to contest the agency’s judgment to focus on the number of products sold rather than on the amount of tobacco sold.³⁴⁵ When a statutory term or phrase is general and may mean one more specific thing or another, the pick between or among the specific options is for the agency to make, subject to arbitrariness review.

D. Questions of Law for Courts

If these D.C. Circuit cases are any indication, courts might expect an ordinary questions approach to largely point in the same direction as *Chevron* because of the nature of ordinary questions—but not always. Sometimes, a statutory provision is ambiguous, but the question is not for the agency because a court may see none of the established indications of policy. Under these circumstances, a court may confidently conclude that the agency’s interpretation involves a question of law for it to review de novo using statutory sources, and, consistent with *Loper Bright*, consulting the agency interpretation for subject matter expertise if helpful.³⁴⁶

Consider the following example from a D.C. Circuit decision involving the interpretation of statutory terms that incorporate common law standards, *Browning-Ferris Industries of California, Inc. v. NLRB*.³⁴⁷ This case was part of the ongoing saga over the meaning of

³⁴³ See *id.* at 1342.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 1340.

³⁴⁶ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024). Sometimes consulting the agency’s interpretation in resolving a question of law is quite helpful. See, e.g., *Becerra v. Empire Health Found.*, 597 U.S. 424, 434 (2022) (finding technical statutory provisions “disclose a surprisingly clear meaning” when read with agency’s assistance).

³⁴⁷ 911 F.3d 1195, 1206 (D.C. Cir. 2018). For at least thirty years, the NLRB required a “joint employer” to exercise “direct and immediate control” over a work force shared with another employer; however, in 2015 during the Obama era, it shifted to making indirect control and control reserved-but-not-exercised a relevant factor. *Id.* at 1201, 1209. The D.C. Circuit ended up reviewing this case twice. See *Sanitary Truck Drivers & Helpers Loc. 350 v. NLRB*, 45 F.4th 38, 40 (D.C. Cir. 2022). Meanwhile, the NLRB during the Trump era issued a rule reinstating the direct control test, though it has just finalized a rule repealing that one and reinstating the indirect control test. See *Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1206; Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946, 73,946–47, 74,018 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103).

the term “joint employer” in the NLRA.³⁴⁸ Joint employers of the same workforce can be liable under the Act for unfair labor practices committed by the other, but the statute does not specify the factors that make companies joint employers.³⁴⁹ In a 2015 adjudication involving Browning-Ferris Industries, the NLRB interpreted “joint employer” to incorporate the common law of agency, and that under the common law, whether an employer had indirect control of or reserved a right to control the “essential terms and conditions of employment” was a relevant factor of a principal-agency relationship.³⁵⁰ For the previous thirty years, the agency had interpreted the phrase to require actual, direct control of the shared employees.³⁵¹ The D.C. Circuit concluded that the NLRB could change its test to incorporate common law standards but was not entitled to *Chevron* deference for its interpretation of what the common law entails.³⁵² The court stated that “the content and meaning of the common law is a ‘pure’ question of law, and its resolution requires ‘no special administrative expertise that a court does not possess.’”³⁵³ It agreed with the NLRB, however, that indirect and reserved control are elements of a principal-agency relationship under common law.³⁵⁴

The issues surrounding the joint employer test are many and will continue to afflict the NLRB’s interpretation of the term in the future.³⁵⁵ Be that as it may, the general lesson is that, when a statutory term or phrase incorporates common law standards, it is for the court to determine which standards the common law prescribes and for the agency to apply those standards to the facts in particular cases.³⁵⁶ This distribution

³⁴⁸ *Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1200–01.

³⁴⁹ *See id.* at 1206–07.

³⁵⁰ *Id.* at 1204–05, 1209.

³⁵¹ *Supra* text accompanying note 347.

³⁵² *See Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1206, 1222–23.

³⁵³ *Id.* at 1207 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968)).

³⁵⁴ *Id.* at 1209.

³⁵⁵ John Gotaskie Jr., *Did the D.C. Circuit Overrule or Uphold Browning-Ferris? Yes.*, JDSUPRA (Jan. 21, 2019), <https://www.jdsupra.com/legalnews/did-the-d-c-circuit-overrule-or-uphold-12006/> [https://perma.cc/YY96-EQ8V].

³⁵⁶ *See, e.g., Int’l Longshoremen’s Ass’n v. NLRB*, 56 F.3d 205, 211–12 (D.C. Cir. 1995) (because the term “agent” in the NLRA “incorporat[es] common law agency principles,” courts do “not defer to the agency’s judgment as [they] normally might under the doctrine of *Chevron*” but recognizing that “because even common law agency questions” involve factual determinations the “standard of review is not de novo”); *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 598 (D.C. Cir. 1989) (alteration in original) (holding that whether workers are employees or independent contractors is “a determination of pure agency law” that “involve[s] no special administrative expertise that a court does not possess” (quoting *United Ins. Co.*, 390 U.S. at 260)); *see also* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992) (interpreting the Employment Retirement Income Security Act and stating that courts should infer that Congress uses the term “employee” in its common law sense).

of authority would remain so under an ordinary questions approach. For example, in a future case, it would be for the court to determine whether the reserved right to control the essential terms and conditions of employment is not only a relevant factor at common law but also a sufficient one to establish that a company is a “joint employer.”³⁵⁷ Similarly, it would be for the court to resolve whether the precise factors that the NLRB considers as evidence of control exceed common law.³⁵⁸

A different and perhaps more recurrent example comes from a Third Circuit case, *Helen Mining Co. v. Elliott*.³⁵⁹ The Federal Coal Mine Health and Safety Act (“CMHSA”) provides disability benefits to coal miners suffering from “black lung” disease.³⁶⁰ To qualify for benefits, the Act imposes on miners the burden of proof on a series of complicated criteria and establishes equally complicated presumptions about some of the elements, such as causation of the disease, which can be rebutted by the Secretary of Labor.³⁶¹ The Act has been amended many times since it was enacted in 1969, including to permit rebuttal by the mine operator as well.³⁶² The most recent amendment revised the standards for rebuttal in the original provision that referred to rebuttal only by the Secretary.³⁶³ A question arose whether the revised standards also applied to rebuttal by the mine operator.³⁶⁴ The Department of Labor issued a regulation extending the revised standards to any “party opposing entitlement.”³⁶⁵ Finding the amendment ambiguous, the Third Circuit deferred to the agency’s interpretation under *Chevron*.³⁶⁶

Under an ordinary questions approach, a court could reasonably conclude instead that the question in *Helen Mining Co.* is the sort that courts, and not agencies, should address. It is a basic question of statutory interpretation that does not depend on empirical data or policy analysis, nor does it require any special experience with the statutory

³⁵⁷ The court in did not address this question in *Browning-Ferris*. See *Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1222.

³⁵⁸ It would be for the NLRB to determine, however, whether a particular employer has sufficient control of “essential terms and conditions of employment,” in the context of the actual employment relationship, even though this determination involves and affects the interpretation of the common law standard. See *id.* at 1200. The D.C. Circuit has acknowledged that sometimes the common law determination is “permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute,” in which case, the NLRB is owed some deference. *Int’l Longshoremen’s Ass’n*, 56 F.3d at 212 (quoting *N. Am. Van Lines, Inc.*, 869 F.2d at 599).

³⁵⁹ 859 F.3d 226 (3d Cir. 2017).

³⁶⁰ Pub. L. No. 91-173, 83 Stat. 742 (codified as amended in scattered sections of 30 U.S.C.); *Helen Mining Co.*, 859 F.3d at 229 (quoting 30 U.S.C. § 901).

³⁶¹ *Helen Mining Co.*, 859 F.3d at 229–30 (citing 30 U.S.C. § 921(c)(4)).

³⁶² *Id.* at 230.

³⁶³ *Id.* at 231.

³⁶⁴ *Id.* at 231, 233.

³⁶⁵ *Id.* at 231 (quoting 20 C.F.R. § 718.305(d)(1) (2013)).

³⁶⁶ *Id.* at 237–38.

scheme. Rather, it calls for a determinate answer—either the amendment extends the new standards to mine operators, or it does not—that Congress failed to provide due to the vagaries of the legislative process.³⁶⁷

Some cases would present difficult line drawing problems, particularly those involving nonscientific and nontechnical issues. Consider whether a graduate student is an “employee” under the NLRA.³⁶⁸ This question can be easily characterized as one of law because it involves the interpretation of a broad statutory term that is amenable to legal judgment, with the benefit of the agency’s experience concerning the terms and conditions that universities typically impose on graduate students.³⁶⁹ Furthermore, it involves a particularly important type of question—concerning the scope of the agency’s authority—because it determines whether graduate students are within the reach of the NLRB.³⁷⁰ But these are superficial descriptions. Even a slightly closer look reveals that the question depends on weighing the risks to the educational mission against the benefits of collective action in this context, which is based on empirical studies on both sides of the risk-benefit analysis and experience with the application of the statute in similar contexts.³⁷¹ These are the tasks that Congress would intend, and a reasonable observer would expect, the NLRB to undertake. By the same token, they are tasks within the agency’s authority, not concerning the

³⁶⁷ The Supreme Court employed similar reasoning in *King v. Burwell*, 567 U.S. 473 (2015), albeit to a major question: whether a provision in the Patient Protection and Affordable Care Act authorizing individual tax deductions for health insurance obtained from a “State exchange” also applied to health insurance obtained from a “Federal” exchange, mentioned elsewhere in the statute. *Id.* at 483. The Court said that this was not a question for the IRS because it concerned a central piece of major health care legislation. *Id.* at 486. It also suggested that question was not for the agency because it was the sort of basic interpretive question that courts typically address and that required a determinate meaning. *See id.* Of interest, this provision was enacted by the same Congress as the ambiguous rebuttal amendment to the CMHSA. *Supra* note 363 and accompanying text.

³⁶⁸ *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 152 (1999).

³⁶⁹ *See* Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 243–44 (1955).

³⁷⁰ *Bos. Med. Ctr.*, 330 N.L.R.B. at 152.

³⁷¹ *See* Michael C. Harper, *Judicial Control of the National Labor Relations Board’s Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. REV. 189, 218–20 (2009) (evaluating the NLRB’s decisions and arguing that the decision of whether to include or exclude graduate students should balance “weigh[ing] threats” to “educational goals and values like close faculty-student relationships and academic freedom,” against the “values of collective worker action,” based on empirical evidence about collective bargaining involving graduate students, studies of the effect of economic pressures on graduate students, and examples of collective-bargaining agreements in which there is assertedly no intrusion on the educational process); *Beth Israel Med. Ctr.*, No. 02-RC-121992, slip op. at 28–33 (N.L.R.B. May 13, 2014) (declining to apply its graduate student precedent to medical interns and residents). Note that, in a different context, the Supreme Court has determined that the Department of the Treasury has the authority to determine whether medical residents are “students” or full-time employees under the Federal Insurance Contributions Act. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 52–58 (2010).

scope of agency's authority in a *legal* sense. Courts should be mindful that they are at greatest risk of overstepping when they feel competent to make basic determinations of policy.

That said, courts would need not uphold an agency interpretation because they agree to review it under the arbitrary and capricious test. That test is not a free pass for the agency, as some courts thought *Chevron* was.³⁷² Indeed, several of the leading arbitrary and capricious cases, including *State Farm*, involved circumstances in which the Supreme Court pushed back on an agency's data, analysis, or policy choice.³⁷³

III. THE ORDINARY QUESTIONS APPROACH IN CONTEXT

Under an ordinary questions approach, courts would refrain from characterizing a question of statutory interpretation as one of law when established norms of judicial review indicate that it is better understood as a question of policy. Courts might instinctively gravitate toward this approach because it is consistent with what they know about questions of policy, *Loper Bright* notwithstanding. But should they? This Part shows that the approach sketched here is justifiable in terms of the normative values that underlie the allocation of interpretive authority between courts and agencies, *Loper Bright* included. This Part then shows that the approach can be conceptualized within the framework of judicial review and statutory interpretation. Finally, it addresses an alternative solution to the problem of ordinary questions and the concern that the approach here is unworkable.

³⁷² Some circuits, like the D.C. Circuit, found that step two overlapped with the arbitrary and capricious test. Chamber of Com. of the U.S. v. FEC, 76 F.3d 1234, 1235 (D.C. Cir. 1996) (“[T]he second step of *Chevron* . . . overlaps with the arbitrary and capricious standard.”); see also Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 603–04 (2009) (describing approaches to reconciling *Chevron* step two and the arbitrary and capricious test); Pojanowski, *Without Deference*, *supra* note 20, at 1085–88 (discussing “the relationship between Step Two and arbitrary-and-capricious review” and noting that “important questions remain open, particularly regarding th[is] relationship”).

³⁷³ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 5, 30 (2020) (finding arbitrary and capricious the Department of Homeland Security’s rescission of the Deferred Action for Childhood Arrivals program in part because the agency “fail[ed] to consider the option to retain deferred action” when it was “the centerpiece of the policy”); *Judulang v. Holder*, 565 U.S. 42, 64 (2011) (finding arbitrary and capricious the Bureau of Immigration Appeals’ rule permitting a resident noncitizen to apply for relief from deportation if the grounds for deportation were “comparable” to the grounds for exclusion from the country under a separate provision of the statute because agency considered factors “unmoored” from the statute).

A. Normative Values

Although the Supreme Court has produced divergent interpretive doctrines, it has consistently grounded the modern ones (at least since the mid-1980s) in separation of powers and legislative intent values.³⁷⁴ For example, the major questions doctrine seeks to ensure that Congress, not agencies, decide big-ticket policy issues and to respect Congress's unlikely choice to delegate such issues without clearly saying so.³⁷⁵ *Chevron* sought to ensure that expert and politically accountable agencies, not courts, make policy decisions under regulatory statutes, and to respect Congress's likely assignment of interpretive authority to agencies.³⁷⁶ *Loper Bright* does not disagree with the general values of agency expertise, political accountability, and congressional delegation—just the assumptions that *Chevron* makes about them, and the consequent presumption it creates.³⁷⁷ An ordinary questions approach finds foundation in these values, too.

An ordinary questions approach promotes separation of powers between agencies and courts but addresses the assignment of interpretive authority with more sensitivity than *Chevron*. It acknowledges that questions of law for courts may exist even if the statutory language is ambiguous, consistent with *Loper Bright*.³⁷⁸ Still, it continues to recognize that the routine questions of statutory interpretation are not always—and probably not even often—questions of law for courts. Rather, they are mixed questions of law and policy—and to the extent that courts should avoid deciding questions of policy that belong to another branch, they should carefully consider how to regard these questions. Toward this end, courts should refrain from treating questions as ones of law for them to resolve if doing so would amount to judicial policymaking in the familiar ways that the Court's arbitrary and capricious decisions discourage.³⁷⁹ The claim is not that separation of powers requires an ordinary questions approach. Rather, an ordinary questions approach promotes the values that separation of powers serves.³⁸⁰

Some might object, arguing that separation of powers requires courts to decide *all* questions of law, not just some—echoing Justice Gorsuch's concurrence in *Loper Bright*.³⁸¹ But the ordinary questions

³⁷⁴ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

³⁷⁵ See *Brown & Williamson*, 529 U.S. at 160.

³⁷⁶ See *Chevron*, 467 U.S. at 865–66.

³⁷⁷ See *Loper Bright*, 144 S. Ct. at 2266–69.

³⁷⁸ See *id.* at 2264–66.

³⁷⁹ *Supra* note 16 and accompanying text.

³⁸⁰ See *supra* Section II.A.

³⁸¹ See *Loper Bright*, 144 S. Ct. at 2281–82 (Gorsuch, J., concurring).

approach sketched here is not inconsistent with this argument for the same reason it is not inconsistent with the APA. Separation of powers need not be understood to require courts to *characterize* a question of statutory interpretation as a question of law whenever they can. Nor should it be understood this way. In a system of separated powers, courts should seek to avoid resolving questions of policy when Congress has chosen an agency for that task.³⁸² Thus, if an ordinary question can be characterized as one of policy, courts should at least hesitate before concluding that it is for them to resolve. As explained above, that does not mean courts should conclude that every ordinary question is for an agency to decide. If the agency's interpretation contains no indication of policy comparable to those the Supreme Court has identified, courts should feel confident in the decision to resolve it.

Some might raise a more focused objection, arguing that separation of powers requires courts to decide all questions that concern the scope of agency authority. An agency that lacks statutory authority cannot issue interpretations at all.³⁸³ An ordinary questions approach is not inconsistent with this argument either. The response is similar: separation of powers need not be understood as requiring courts to resolve any question that can be *characterized* as a scope of authority question, nor should it. Many agency interpretations can be viewed as implicating the scope of agency authority in some sense because statutory mandates are broad and definitional terms are general.³⁸⁴ But these interpretations, no less than any other, may involve the sort of policy matters that, in a system of separated powers, agencies rather than courts should decide. None of this is to say that courts should abdicate their role of ensuring that agencies act within the basic parameters of their statutory authority. Courts must always do so, and they might find that an ordinary interpretation is so unrelated to the agency's statutory mandate that it is unauthorized, even though the statutory language is broad enough to permit it. As Justice Stephen Breyer once wrote, although the FDA has power to regulate "drugs" and "devices" that "affect the structure or any function of the body" under the FDCA, the agency cannot regulate "room air conditioners" or "thermal pajamas."³⁸⁵

³⁸² See *Chevron*, 467 U.S. at 843–84 ("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.").

³⁸³ See *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (explaining that the core question in any case involving agency interpretation is "whether the agency has stayed within the bounds of its statutory authority" (emphasis omitted)).

³⁸⁴ See, e.g., Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 204 (2022) ("[B]road delegations of authority . . . are at the core of modern administrative government.").

³⁸⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 167–68 (2000) (Breyer, J., dissenting) (quoting 21 U.S.C. § 321(h)).

Of course, some might believe that separation of powers requires no or substantially less congressional delegation of authority to agencies and that courts should enforce this restriction through statutory interpretation. But that is a different separation of power issue than asking courts to secure the boundaries of the authority that Congress has delegated to an agency, within existing constitutional limits. The ordinary questions approach sketched here admittedly operates within this baseline.

In addition to promoting separation of powers as between courts and agencies, an ordinary questions approach respects the wishes of Congress—another foundation of the Court’s modern interpretive doctrines. Congress intends to delegate policymaking to agencies, and policymaking is often intertwined with statutory language. An ordinary questions approach helps courts to judge Congress’s intent. In *Loper Bright*, the Court rejected *Chevron*’s presumption that Congress intends agencies, not courts, to resolve statutory ambiguities.³⁸⁶ An ordinary questions approach does not make this mistake. It recognizes that statutes may present interpretive questions of the sort that have fallen to courts since *Marbury v. Madison*.³⁸⁷ It thus aims to provide guidance for discerning which questions are delegations and which are better understood as common byproducts of the legislative process. In this way, it helps courts to better ascertain and prioritize congressional intent.

B. Relationship to Judicial Review and Statutory Interpretation

An ordinary questions approach can be conceptualized within the framework of judicial review and statutory interpretation in different ways. It can be understood as a mechanism for operationalizing section 706 of the APA or organizing judicial review of agency interpretations. It also can be understood as a rule of thumb for interpreting regulatory statutes.

An ordinary questions approach can be viewed as operationalizing section 706 of the APA because it assists courts in determining which standard of review to apply, pointing them toward one standard of review (de novo for questions of law) or the other (arbitrary and capricious review for questions of policy) in consideration of whether that interpretation evinces certain policy indicia. In essence, it is analogous to *State Farm*, which provides specific considerations that guide judicial application of the arbitrary and capricious test.³⁸⁸ It is different from *State Farm*, though, because it does not flesh out a particular standard of review but ensures the overall functioning of judicial review

³⁸⁶ See *Loper Bright*, 144 S. Ct. at 2265–66 (2024).

³⁸⁷ 5 U.S. (1 Cranch) 137, 153–77 (1803).

³⁸⁸ See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44–57 (1983).

under section 706. In this respect, it is a bit like *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,³⁸⁹ which clarifies the text of the notice-and-comment rulemaking provision, section 553.³⁹⁰ That decision forbids courts from imposing procedural requirements for the notice-and-comment rulemaking process beyond those that section 553 provides.³⁹¹ An ordinary questions approach is not a stop sign, prohibiting courts from going further like *Vermont Yankee*, but more of a directional arrow, pointing courts to relevant standard of review for the particular question under review. Nevertheless, it enables the text of the APA to work.

One might conceptualize an ordinary questions approach apart from the APA, emerging as a form of judicial “common law,” which is how some described *Chevron*.³⁹² *Chevron* was said to reflect the Court’s recognition that some judicially created principle is necessary for allocating interpretive power between courts and agencies.³⁹³ With *Chevron* gone, reviewing courts may turn to self-help for separating questions of law from questions of policy. In this respect, an ordinary questions approach can be understood to supply the overarching framework for deciding how to characterize an ordinary question, and section 706 of the APA supplies the actual standards of review. Judicial common law was never a particularly strong basis for *Chevron*, as the Court in *Loper Bright* made evident in overruling the decision.³⁹⁴ It probably is not the soundest foundation for an approach that assists courts in applying the APA going forward.

An ordinary questions approach also can be understood as a rule of thumb for interpreting regulatory statutes. It helps courts decide which routine questions arising under those statutes should be filled by politically accountable, subject-matter experts (agencies) and which by tenure-protected, legal interpretation experts (courts)—to embrace the Chief Justice’s styling in *Loper Bright*.³⁹⁵ It also can be understood in relation to how Congress drafts those statutes, as Justice Amy Coney

³⁸⁹ 435 U.S. 519 (1978).

³⁹⁰ See *id.* at 542, 547–48; Administrative Procedure Act, 5 U.S.C. § 553.

³⁹¹ See *Vermont Yankee*, 435 U.S. at 547.

³⁹² See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300–01 (2012) (“*Chevron* analysis represents judicially created administrative law.”); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–99 (1998) (describing and critiquing *Chevron* as a common law doctrine).

³⁹³ See Lisa Schultz Bressman & Kevin M. Stack, *Chevron Is a Phoenix*, 74 VAND. L. REV. 465, 467 (2021).

³⁹⁴ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272 (2024) (“*Chevron* was a judicial invention that required judges to disregard their statutory duties.”).

³⁹⁵ See *id.* at 2273 (noting that judges are the “experts” in the “field . . . [of] legal interpretation”); see also *id.* at 2266 (“[A]gencies have no special competence in resolving statutory ambiguities.”).

Barrett has recently understood the major questions doctrine.³⁹⁶ In Justice Barrett's view, part of interpreting statutory text in context is considering how Congress likely drafts statutory language and how a reasonable observer comprehends it.³⁹⁷ With respect to the major questions doctrine, she explains that the textual context includes an awareness that Congress is unlikely to delegate away politically and economically significant questions without saying so—an awareness that is long-standing and empirically grounded.³⁹⁸

Seen in this light, an ordinary questions approach recognizes that Congress drafts regulatory statutes in a manner that raises mixed questions of law and policy. History shows that Congress was aware of mixed questions when enacting the APA.³⁹⁹ In addition, empirical work (the same work that Justice Barrett cites to explain the major questions doctrine) suggests that legislative drafters were aware of *Chevron* and understood that agencies would resolve statutory ambiguities that resulted from the drafting process—a point that Justice Kagan makes dissenting in *Loper Bright*.⁴⁰⁰ So even if it is unrealistic to presume that all statutory ambiguities are implicit delegations, as *Chevron* did, it is realistic to assume that Congress has drafted statutes with an appreciation that agencies, not courts, would resolve statutory ambiguities. At least for statutes enacted after *Chevron* and before it was called into question, this background drafting convention would hold.

C. *An Alternative and an Objection*

An ordinary questions approach endeavors to solve the problem of ordinary questions, helping courts to decide whether to review an agency interpretation de novo or under the arbitrary and capricious test of the APA. There is an alternative solution that some might say is more consistent with the tone of *Loper Bright*, if not its doctrinal demand.⁴⁰¹

³⁹⁶ See *Biden v. Nebraska*, 143 S. Ct. 2355, 2376–78 (2023) (Barrett, J., concurring); cf. Amy Coney Barrett, Essay, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017) (“Textualists consider themselves bound to adhere to the most natural meaning of the words at issue because that is the way their principal—the people—would understand them.”).

³⁹⁷ *Biden v. Nebraska*, 143 S. Ct. at 2378–80.

³⁹⁸ *Id.* at 2380–81. See generally Gluck & Bressman, *supra* note 171 (examining the connections between the legislative drafting process and judicial statutory interpretation principles).

³⁹⁹ See *supra* text accompanying notes 75–83.

⁴⁰⁰ Gluck & Bressman, *supra* note 171, at 1003–06 (the study cited by Justice Barrett); *Loper Bright*, 144 S. Ct. at 2301 (Kagan, J., dissenting) (“The drafters of those statutes knew all about *Chevron*.” (citing Gluck & Bressman, *supra* note 171, at 928 fig.2, 994)); cf. *id.* at 2272 (“Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case.”).

⁴⁰¹ See *Loper Bright*, 144 S. Ct. at 2268 (“[R]esolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an

Some also might doubt that the approach here is workable. This Section addresses these issues.

1. “Legal Craft” Plus “Outer Boundaries”

As part of an overall rethinking of administrative law years before *Loper Bright*, Professor Jeffrey Pojanowski took up the law-policy problem in statutory interpretation and proposed a particular solution.⁴⁰² Rejecting *Chevron*’s effort to draw the line at statutory ambiguity, Pojanowski contended that a court should separate questions of law and policy by asking whether the statutory text at issue is “tractable to standard lawyers’ arguments” about its meaning.⁴⁰³ If so, the court should treat the question as one of law to decide independently.⁴⁰⁴ But if the text is so discretionary that its interpretation is not susceptible to legal arguments, the court should treat the agency’s interpretation as a policy decision, subject to arbitrariness review.⁴⁰⁵ Pojanowski identified the phrase “in the public interest” as falling into this latter category because “legal craft” alone cannot address the meaning or application of this phrase.⁴⁰⁶ He offered several other examples, including the phrase “adequate margin of safety” and the terms “reasonable” and “feasible.”⁴⁰⁷ According to Pojanowski, a court confronting a question involving such statutory language would “file the question as one delegated to the agencies subject to arbitrary and capricious review.”⁴⁰⁸

Pojanowski’s approach sounds remarkably close to Chief Justice Roberts’s description of the judicial role in *Loper Bright*. Roberts writes that courts conduct “legal interpretation” when resolving statutory ambiguities, using their legal tools to do so (“That is the very point of the traditional tools of statutory construction,” he remarked).⁴⁰⁹ He states that “[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.”⁴¹⁰ Such statutes include those that “empower an agency . . . to regulate subject to the limits imposed by a term or phrase that ‘leaves agencies with

‘agency to fall back on.’” (quoting *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019)); *id.* at 2271 (“[T]he basic nature and meaning of a statute does not change when an agency happens to be involved.”).

⁴⁰² See Pojanowski, *Neoclassical Administrative Law*, *supra* note 20, at 887.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 899, 902.

⁴⁰⁷ *Id.* at 887, 889.

⁴⁰⁸ *Id.* at 887.

⁴⁰⁹ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266, 2268 (2024).

⁴¹⁰ *Id.* at 2263.

flexibility.”⁴¹¹ As examples, he points to the statutory terms “appropriate” and “reasonable.”⁴¹²

The difficulty is that this approach does not fully address the problem of ordinary questions.⁴¹³ It may work as to the most discretionary statutory terms or phrases—though even here judges and scholars may disagree on what counts as discretionary.⁴¹⁴ For the most part, however, it simply directs courts to resolve any question of statutory interpretation for which they possess the legal tools to do so. The difficulty is evident—and not just to legal realists. Almost all statutory terms and phrases are “[l]amenable to formal legal craft,” and that might be especially true the more textualist judges become.⁴¹⁵ Justice Scalia candidly admitted that textualism permitted him almost always to find clear meaning for statutory language and thus defeat “agency-liberating ambiguity” under *Chevron*.⁴¹⁶ Even when text is ambiguous, Chief Justice Roberts underscores that courts are accustomed to finding a best meaning for statutes “no matter how impenetrable,” and do so “us[ing] every tool at their disposal.”⁴¹⁷ He clarified that those tools include consulting the agency interpretation for assistance, as in *Skidmore*.⁴¹⁸ If every statutory term has a best meaning if courts work hard enough, then which terms delegate discretionary authority to agencies, subject to arbitrariness review? Statutory terms and phrases are as varied as the matters they address. Courts will still have to make the call—and if their choice is to just give most every statutory term or phrase a fixed meaning because they can, they are not attempting to “identify and respect [congressional] delegations.”⁴¹⁹ They are choosing the law side, as Justice Scalia recognized.

Skidmore itself drew a sharper line. In that case, “Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts.”⁴²⁰ The Administrator did make “rulings” in the context of enforcing the

⁴¹¹ *Id.* (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

⁴¹² *Id.*

⁴¹³ *Id.* at 2263–64, 2267–68.

⁴¹⁴ See Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 CORNELL L. REV. 1465, 1477–78 (2020) (arguing that agencies should resolve statutory ambiguities that involve “construction” as opposed to “interpretation,” which includes statutory terms like “source” or “harm”); Pojanowski, *Neoclassical Administrative Law*, *supra* note 20, at 887 n.185 (acknowledging that some might disagree as to which terms are in the “construction zone”).

⁴¹⁵ Pojanowski, *Neoclassical Administrative Law*, *supra* note 20, at 889.

⁴¹⁶ Scalia, *supra* note 147, at 521.

⁴¹⁷ *Loper Bright*, 144 S. Ct. at 2266.

⁴¹⁸ See *id.* at 2262 (noting that courts may “seek aid” from the agency interpretation in exercising independent judgment, consistent with the APA (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

⁴¹⁹ *Id.* at 2268.

⁴²⁰ *Skidmore*, 323 U.S. at 137.

statute, but those rulings did not “constitute an interpretation of the Act . . . which binds a district court’s processes.”⁴²¹ So the district court had no choice but to independently interpret that statute; there was no delegated agency authority to respect. Put differently, there was no law-policy problem. *Skidmore* therefore did not sweep statutory terms to the law side simply because courts possessed the tools to interpret them. The whole statute existed on the law side.

Even when a court does find that a statute delegates discretionary authority to an agency, the law-policy problem emerges when it seeks to determine whether an agency has remained within the “outer statutory boundaries” of that authority.⁴²² No one would dispute that courts have an obligation to ensure that agencies remain within the scope of their authority. To do so, however, courts must distinguish scope-of-authority questions from exercise-of-authority questions. Chief Justice Roberts has long believed that courts can draw the line, though the Court, with Justice Scalia writing for the majority, rejected the distinction between “jurisdictional” and “nonjurisdictional” questions.⁴²³ Despite Chief Justice Roberts’ faith, as Justice Scalia acknowledged, most every agency interpretation can be understood to define the scope of agency authority in some respect.⁴²⁴

Nor do ordinary questions have formal features that can help courts decide whether an agency has exceeded its delegated authority. They are unlike major questions, where the Court has felt more confident making this determination—not that lower courts will be so sure.⁴²⁵ At least, courts must point to some special “economic and political” or statute-altering “significance” suggesting that Congress would not intend to delegate the question without clearly saying so.⁴²⁶ Consider the questions that qualified as major in several of the Court’s central cases: whether the Occupational Safety and Health Administration (“OSHA”) can impose a COVID-19 vaccine mandate in the workplaces it regulates,⁴²⁷ whether the FDA can regulate nicotine and cigarettes in

⁴²¹ *Id.* at 139.

⁴²² *Loper Bright*, 144 S. Ct. at 2268.

⁴²³ See *City of Arlington v. FCC*, 569 U.S. 290, 296–301 (2013) (rejecting the distinction between “jurisdictional” and “nonjurisdictional” agency interpretations); *id.* at 316–22, 327 (Roberts, J., dissenting) (arguing that courts must ensure that Congress has delegated interpretive authority to an agency and fix the “boundaries” of that authority).

⁴²⁴ See *id.* at 296–98 (majority opinion) (describing the line between an agency interpretation that “concerns the scope of the agency’s statutory authority (that is, its jurisdiction)” and nonjurisdictional agency interpretations as “illusory”).

⁴²⁵ See, e.g., *West Virginia v. EPA*, 597 U.S. 697 (2022).

⁴²⁶ See *id.* at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

⁴²⁷ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 119 (2022) (“[Finding] that the mandate extends beyond the agency’s legitimate reach.”).

response to a national smoking-related health epidemic,⁴²⁸ and the manner in which the EPA can regulate carbon dioxide emissions related to climate change.⁴²⁹ It is easy to see the significance of these issues, though they were all in a day's work for the agencies—and to see them as on the periphery of each agency's authority, though reasonable minds may disagree on which side of the line they fall.

Now consider some ordinary questions by the same agencies under the same sources of authority. They look like the following: whether OSHA can regulate “the use of electronic surveillance and algorithmic management in the workplace,”⁴³⁰ the extent to which the FDA can regulate artificial intelligence (“AI”) “or machine learning-enabled medical devices,”⁴³¹ and whether the EPA can regulate industry-related discharge of naturally occurring, always present manganese.⁴³² Although these questions are undoubtedly on the cutting edge of science, technology, and policy, they involve the exercise of authority the agency very likely has: OSHA *may* regulate virtual workplace practices and production processes that pose risks to worker's safety and health,⁴³³ the FDA *may* regulate AI-enabled devices that are intended for “therapeutic”

⁴²⁸ See *Brown & Williamson*, 529 U.S. at 160 (claiming that FDA's interpretation was an overly “expansive construction of the statute”).

⁴²⁹ See *West Virginia v. EPA*, 597 U.S. at 735 (“[I]t is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme . . .”).

⁴³⁰ Rebecca Rainey, Parker Purifoy & Diego Areas Munhoz, *Punching In: OSHA Urged to Set Standard for Workplace Monitoring*, BLOOMBERG L. (Apr. 3, 2023, 5:45 AM), <https://news.bloomberglaw.com/daily-labor-report/punching-in-osha-urged-to-set-standard-for-workplace-monitoring-28> [<https://perma.cc/G7Z3-VP4R>].

⁴³¹ Jeannie Baumann, *ChatGPT Poses New Regulatory Questions for FDA, Medical Industry*, BLOOMBERG L. (June 21, 2023, 5:35 AM), <https://news.bloomberglaw.com/health-law-and-business/chatgpt-poses-new-regulatory-questions-for-fda-medical-industry> [<https://perma.cc/UZ9A-GPDZ>]. See generally *Artificial Intelligence and Machine Learning in Software as a Medical Device*, FDA (Mar. 15, 2024), <https://www.fda.gov/medical-devices/software-medical-device-samd/artificial-intelligence-and-machine-learning-software-medical-device> [<https://perma.cc/BPX5-KR7E>]; Marketing Submission Recommendations for a Predetermined Change Control Plan for Artificial Intelligence/Machine Learning-Enabled Device Software Functions, 88 Fed. Reg. 19,648 (Apr. 3, 2023).

⁴³² See Press Release, Ctr. for Biological Diversity, EPA Petitioned to Update 47-Year-Old Toxic Pollutant List (July 31, 2023), <https://biologicaldiversity.org/w/news/press-releases/epa-petitioned-to-update-47-year-old-toxic-pollutant-list-2023-07-31/> [<https://perma.cc/G448-5EDY>] (reporting that the EPA has been “[p]etitioned to [u]pdate [its] 47-[y]ear-[o]ld [t]oxic [p]ollutant [l]ist” to include, among other substances, manganese, a pollutant with “severe neurological impacts,” which is released by “coal mining and other industrial processes;” it “is particularly severe in Appalachia and has been detected at extremely high levels in drinking water, especially in low-wealth communities”); *Manganese*, NAT'L INSTS. HEALTH: OFF. DIETARY SUPPLEMENTS (Mar. 29, 2021), <https://ods.od.nih.gov/factsheets/Manganese-HealthProfessional> [<https://perma.cc/EH9U-RQJH>] (“Manganese is a . . . trace element that is naturally present in many foods and available as a dietary supplement.”).

⁴³³ 29 U.S.C. § 651.

use,⁴³⁴ and the EPA *may* regulate the discharge of some naturally prevalent elements that cause severe health effects.⁴³⁵ The questions are not measurably different in degree or fit than the other routine decisions that Congress has delegated to these agencies. Courts are left to draw the line. If courts decide independently any question that concerns the scope of agency authority at some level, they are not “polic[ing] the outer statutory boundaries of those delegations” but setting them.⁴³⁶

Sometimes drawing the line is relatively easy—no “room air conditioners” for the FDA, though they can be understood in a literal sense as “devices” that affect “any function” of the body under the FDCA.⁴³⁷ But the reason that the FDA cannot regulate room air conditioners is because most everyone would agree that these home appliances are clearly, not arguably, outside the zone of its delegated authority to regulate drugs and drug-related devices, or even devices that are intended for “therapeutic” use.⁴³⁸ Ordinary questions tend to not present such obvious mismatches, as the previous examples demonstrate. That is the very problem.

Some might contend that the ordinary questions approach sketched here does not draw the line or respect congressional delegation any better. It just favors the policy side. Thus, it tells courts to look for policy signals when Congress does not always intend to delegate discretionary authority to an agency just because so-called “policy” is involved. Furthermore, it tells courts to consider evidence found in the agency’s interpretation, not in congressional triggers like statutory text, and this evidence is subject to agency manipulation. These arguments misunderstand the approach proposed here. First, it does not establish a rule favoring the policy side. As discussed above, it sets up no presumption that Congress intends agencies to resolve all questions with policy aspects; it helps courts determine the proper standard of review for questions that involve law and policy, and it is at most a rule of thumb.⁴³⁹ To the extent it favors the policy side as applied, that result owes to the nature of ordinary questions and the reality of congressional delegation. Second, the approach here does not disregard the text or rely solely on agency triggers. It tells courts to engage the text,

⁴³⁴ See 21 U.S.C. §§ 321(h), 331; Marketing Submission Recommendations for a Predetermined Change Control Plan for Artificial Intelligence/Machine Learning-Enabled Software Functions, 88 Fed. Reg. at 19,648.

⁴³⁵ See 33 U.S.C. § 1317(a)(1); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (“hold[ing] that [the] EPA has the statutory authority to regulate the emission of [greenhouse] gases” because they “fit well within the . . . definition of ‘air pollutant’”).

⁴³⁶ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2268 (2024).

⁴³⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 168 (2000) (Breyer, J., dissenting) (quoting 21 U.S.C. § 321(g)(1)).

⁴³⁸ See *supra* text accompanying note 434 (quoting 21 U.S.C. §§ 321(h), 331).

⁴³⁹ See *supra* Section II.C.

even determine the best reading of that text, and to consult the agency's interpretation to help confirm that the question is theirs to decide. If the agency's interpretation reflects strategic behavior, a court need not credit that interpretation any more than it must when deciding a question independently under *Skidmore*. Courts decide how to characterize the questions under review, no matter how agencies (or their challengers) choose to present them.

2. *Workability*

Some might argue that an ordinary questions approach is unworkable, however otherwise appealing. The approach injects complexity into judicial review by asking courts to bifurcate their analysis and look for certain indications that a question of statutory interpretation is one of policy for the agency to decide before claiming it for themselves. Courts might be uncertain when to terminate their statutory analysis and look for policy indicia. In *Loper Bright*, the Court found *Chevron* unworkable for a similar reason: the doomed precedent required a court to "give up on its 'interpretive work' before it has identified [the] best meaning," without providing adequate guidance on when it should stop.⁴⁴⁰ Courts also might be uncertain what constitutes sufficient policy indicia in the substance of the agency's interpretation. Almost every agency interpretation has some policy aspect, so when do courts hold the reins? Thus, an ordinary questions approach purports to offer guidance on the allocation of authority between courts and agencies, but all it offers is opportunity for confusion.

There is reason for concern about the workability of any interpretive approach that is more complicated than a simple rule. As a practical matter, however, an ordinary questions approach is less likely to confuse courts than validate their instincts about judicial review of agency interpretations. At bottom, it would allow courts to defer when they feel the least well-equipped to exercise their own judgment—when an agency interpretation involves data-driven, fact-based, methodological, or substantive choices that normally are not subject to *de novo* review.⁴⁴¹ By the same token, it would confirm their sense that not every statutory ambiguity constitutes a congressional delegation or an agency matter. Sometimes a statutory ambiguity is just a statutory ambiguity, which is to say an unexceptional question of law for them to resolve.

⁴⁴⁰ *Loper Bright*, 144 S. Ct. at 2271.

⁴⁴¹ See Breyer, *supra* note 54, at 380–81; Bressman & Stack, *supra* note 393, at 479–80; Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 861 (2001) ("federal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them.").

The approach sketched here is also fairly user-friendly. It directs courts to identify indications in an agency's interpretation that are familiar and relatively concrete. These indications are certainly less amorphous than were the factors that determined whether a particular agency interpretation carried the force of law for purposes of applying *Chevron*.⁴⁴² The D.C. Circuit's experience in the cases discussed above might be loosely understood to provide some anecdotal support for the view that courts can manage them.⁴⁴³

Some might argue that no court would follow an ordinary questions approach, even if they could or should—they will keep for themselves questions they want and defer on questions they do not. There is no denying that courts may choose to resolve questions when they want and, of more concern, especially when they disagree with an agency's interpretation. But courts may be more inclined to follow an ordinary questions approach than we might suppose. They may welcome a way to avoid micromanaging the continuous flow of ordinary decisions that agencies make, especially if *Loper Bright* prompts an exponential increase in the number of cases they see. Statutory schemes are complex, and issues are specialized. Agency interpretations arrive before courts in a variety of procedural postures, accompanied by voluminous records.⁴⁴⁴ The pressure to get through the case docket is intense. Judges are not incapable of handling complicated questions of statutory interpretation or “scary” technical issues, and they frequently must dig in.⁴⁴⁵ At the same time, they may appreciate an approach that acknowledges the realities of judicial review and allows them to defer to an agency interpretation when they know they should.⁴⁴⁶

CONCLUSION

So long as regulatory statutes exist, courts will be asked to review the constant stream of interpretations that agencies make in the normal course of implementing those statutes. Such interpretations do not involve the type of “extraordinary” questions to which the major questions doctrine applies. They involve the kind of ordinary questions that,

⁴⁴² See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (applying *Chevron* after considering “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration [of] the Agency”).

⁴⁴³ See *supra* Section II.B.

⁴⁴⁴ Breyer, *supra* note 54, at 373.

⁴⁴⁵ See, e.g., *Becerra v. Empire Health Found.*, 597 U.S. 424, 434 (2022) (“The [statute’s] provisions are technical . . . [b]ut when read in that suitable way, the fraction descriptions disclose a surprisingly clear meaning . . .”).

⁴⁴⁶ For an argument that lower courts may have been overusing *Chevron* anyway, applying that framework to agency interpretations when they might actually have applied *State Farm* instead and not *Chevron* at all, see Bressman, *supra* note 217, at 507–08.

though not unimportant, agencies answer as a regular part of doing their jobs. Ordinary questions *do* pose a challenge for judicial review. They often are mixed questions of law and policy and can be characterized as either. A court, therefore, can frame a mixed question as amenable to judicial judgment or specialized, for the agency to decide like any matter of policy. This is a judicial policy choice.

For the first four decades of the APA, courts made this choice on an ad hoc basis, with little predictability even in the Supreme Court's own cases. For the four decades after that, courts did not need to decide how to characterize ordinary questions because *Chevron* took over, instructing them to treat agency interpretations as addressing questions of policy when the relevant statutory terms or phrases were ambiguous, and therefore making the call easier for purposes of the APA. *Loper Bright* ushers in a new era, directing courts to decide all questions of law, regardless of whether a statute is ambiguous. But it does not change the nature of ordinary questions: they often involve statutory language that gains meaning through the scientific, technological, economic, and policy judgments that agencies routinely make. When agencies answer these questions, their interpretations are not different in kind or degree from those that courts review under the arbitrary and capricious test of the APA. And so, courts may again struggle to determine "what is a question of law" under the APA. They can always choose to ignore the problem and decide any question they can. If the Court is to be taken at its word about respecting congressional delegations, they should not.

After *Loper Bright*, how a court chooses to characterize an ordinary question is consequential. It is the difference between deciding the question independently and allowing the agency to decide, subject to arbitrary and capricious review.⁴⁴⁷ This Foreword proposes that courts make this choice mindful of the judicial norms for questions of policy, which instruct them not to substitute their judgment for that of the agency. These norms come from the Court's decisions elaborating the arbitrary and capricious test. Courts know the sorts of agency policy decisions they should not be reviewing de novo, and they should not disregard these norms because a particular agency policy decision has implications for the meaning of statutory language or the scope of agency authority, as so many do. Rather, courts should harness the considerations for applying the arbitrary and capricious test to determine whether the underlying question is for them to resolve de novo or for the agency to decide, subject to arbitrariness review.

The approach sketched here does not suggest that courts ignore the law part of ordinary questions. In fact, it gives primacy to that part, directing courts to start with the statutory text, even though some might

⁴⁴⁷ Cf. *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used.").

ask why if a question could be characterized as either law or policy. Thus, a court first should consider whether the statutory language at issue has a congressionally specified meaning or meaning that necessarily rules out the agency's interpretation. When neither is the case, the court then should ask whether the substance of the agency's interpretation manifests a familiar policy indication. If a court finds such an indication, it should characterize the question as one of policy for the agency to decide, even if it could resolve the question itself. If a court finds no such indication, it should conclude that the question is one of law for it to resolve, even if the statute is ambiguous.

Judicial responsibility for questions of law is a cornerstone of the APA and separation of powers.⁴⁴⁸ In *Loper Bright*, the Court restored a more formal commitment to this role. Yet neither the APA nor separation of powers requires reviewing courts to characterize every ordinary question that involves a statutory term or phrase as a question of law simply because they can. Courts make this judgment call. They should seek to avoid deciding questions of the sort that they can appreciate belong to another branch. By their nature, ordinary questions often are such questions.

⁴⁴⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); cf. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2293–94 (2024).

Chenery II Revisited

Daniel T. Deacon*

ABSTRACT

Ever since the Supreme Court's 1947 decision in SEC v. Chenery Corporation, known as Chenery II, agencies have enjoyed wide latitude to develop policy through individual adjudications in addition to rulemaking. Chenery II has never been completely uncontroversial, and in recent years, calls to overturn or limit it have been expressed in increasingly fervent tones. Agency policymaking by adjudication has emerged as a new front in the struggle over the administrative state.

Against the backdrop of such calls, this Article revisits some of the fundamental questions concerning the Chenery II doctrine. I argue in favor of retaining Chenery II's core procedural holding. Indeed, except where the organic statute requires rulemaking, courts should never set aside an agency order because that order announces a policy that the court concludes should have been announced through rulemaking. But even if courts lack power to hold that agencies have violated procedural law by failing to use rulemaking in announcing a particular policy, the policy itself remains subject to more substantive limitations: it must have been the product of "reasoned decision-making," and it must comport with applicable binding law. I argue that courts can adapt these limitations, as applied to particular policies adopted via adjudication, to address the gravest concerns raised by Chenery II's skeptics. Finally, I evaluate two "soft" constraints on agency policymaking by adjudication, designed to influence agencies' procedural decisions without purporting to control them. I argue that these soft limits, though plausibly justifiable, may have real costs and reap uncertain benefits. It is at best unclear whether they should be adopted.

TABLE OF CONTENTS

INTRODUCTION	1051
I. THE SUPREME COURT'S CASELAW	1058
II. DEFENDING THE CORE OF <i>CHENERY II</i>	1063
A. <i>The Inevitability of Policymaking by Adjudication</i>	1064
B. <i>Policing Policymaking by Adjudication</i>	1070

* Assistant Professor of Law, University of Michigan Law School. I'm thankful to Tabatha Abu El-Haj, Nick Bagley, Evan Caminker, Don Herzog, Naomi Lamoreaux, Leah Litman, Nina Mendelson, Julian Mortenson, and Chris Walker for valuable comments and conversation. Thank you also to my copanelists and to the other participants at the 2023 Administrative Law Conference organized by the American Bar Association Section of Administrative Law & Regulatory Practice, where this Article was presented, as well as to the editors of *The George Washington Law Review* for inviting me to contribute to this issue and for their work on the piece.

III. RETROACTIVITY, ANTIRETROACTIVITY, AND FAIR NOTICE	1082
A. <i>The Limitations of Analogy</i>	1083
B. <i>Normalizing the Law of Administrative Retroactivity</i>	1088
1. The Tension	1088
2. The D.C. Circuit's Resolution	1091
3. A Better Way?	1093
4. The Constitutional Backstop	1099
IV. AMENDING, CIRCUMVENTING, AND VIOLATING REGULATIONS	1102
V. SOFT CONSTRAINTS ON POLICYMAKING BY ADJUDICATION	1110
A. <i>Duty to Explain</i>	1110
B. <i>Consequence-Manipulation</i>	1114
CONCLUSION	1116

INTRODUCTION

Every law student taking administrative law learns that, in *SEC v. Chenery Corp.* (“*Chenery II*”),¹ the Supreme Court broadly blessed agencies’ ability to formulate policy through adjudication as opposed to rulemaking.² So, an agency like the Federal Trade Commission (“FTC”) might promulgate regulations to specify “unfair or deceptive acts or practices” under section 5 of the FTC Act.³ However, it might also condemn certain behavior as part of an adjudicatory proceeding involving particular parties, who may or may not have had reason to know how the FTC would likely rule, creating a precedent warning that similar behavior will likely be found to violate the Act going forward.⁴ The class might go on to explore various limits that the Supreme Court or the lower courts have flirted with when it comes to so-called “policymaking by adjudication.” But students are cautioned not to be quick to conclude that an agency has transgressed the limits of *Chenery II*. The cases holding so are few and far between.⁵ A cozy consensus has emerged that agencies are more or less free to formulate

¹ 332 U.S. 194 (1947).

² *See id.* at 196.

³ Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41–58); 15 U.S.C. § 45.

⁴ *See, e.g., Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009–10 (9th Cir. 1981).

⁵ *See, e.g., Ronald M. Levin, The Case for (Finally) Fixing the APA’s Definition of “Rule,”* 56 ADMIN. L. REV. 1077, 1089 (2004) (noting the paucity of cases).

policy through a process of case-by-case adjudication,⁶ whether that adjudication involves a traditionally judicial dispute between two parties or something like licensing or the dispersal of benefits.⁷

Judges and scholars have long expressed varying degrees of uneasiness with the fact that agencies have in practice been granted wide latitude to make policy via adjudication.⁸ Dissenting in *Chenery II*, Justice Jackson rebuked the agency for engaging in “administrative authoritarianism” when it refused to allow certain transactions absent a controlling regulation.⁹ The period from the middle of the last century through the early 2000s saw a number of writings expressing concern

⁶ Of course, and as will become important at various points later in this Article, agency adjudicators must abide by the normal requirements of administrative law when making policy via adjudication. *See, e.g.*, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971) (review for compliance with statutory mandate); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366–72 (1998) (review of fact-finding); *FCC v. Fox Television Stations, Inc. (Fox Television I)*, 556 U.S. 502, 517–18 (2009) (review for reasoned decision-making).

⁷ On the varied nature of administrative adjudications, see Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 393–94 (2021). Many administrative adjudications are “informal,” meaning that the Administrative Procedure Act (“APA”) does not require the agency to follow trial-like processes, though the category of informal adjudication itself contains many different procedural varieties. *See id.*; *see also* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 143 (2019) (discussing how many adjudications that are technically informal under the APA can be “formal-like” in the amount of procedure afforded). Much policymaking by adjudication that makes its way into the courts is the product of decisions by agency heads or other bodies with final appellate authority, sitting in review of decisions by lower-level agency officials. *See* Bremer, *supra*, at 414.

⁸ I speak, in this Article, in terms of agencies making policy or announcing principles via adjudication. For a recent argument that agencies engaged in policymaking by adjudication may be issuing what are actually APA “rules” via adjudication, see Matthew C. Stephenson, *Embedded Rules*, 39 YALE J. ON REGUL. BULL. 59 (2021). Some of the below may support the view that, to the extent agencies are truly issuing rules via adjudication, most of those rules are properly characterized as interpretive rules or policy statements not subject to notice-and-comment requirements. *See infra* notes 390–404 and accompanying text (defending view that policies announced via adjudication are not binding in the way legislative rules are); *see also* Stephenson, *supra*, at 59–60. Other arguments may point in the direction of easing some of the restrictions courts place on the issuance of nonlegislative rules generally. *See, e.g., infra* notes 189–97 and accompanying text (questioning whether courts should draw a distinction between pronouncements that are “truly” interpretive and those that are not); *see also* Stephenson, *supra*, at 64 (urging that courts harmonize the doctrines that apply to nonlegislative rules and to policymaking by adjudication). That said, I attempt to sidestep the question of whether the doctrine that applies to policymaking by adjudication should be fully harmonized with that which applies to nonlegislative rules issued outside of an adjudicatory process. *See infra* note 91 (holding open the possibility that courts may validly treat gratuitous agency statements differently than those that are issued in the course of resolving a particular matter).

⁹ The dissent, joined by Justice Frankfurter, was not published until the term following *Chenery II*. *See* 332 U.S. 194, 216 (1947) (Jackson, J., dissenting).

with agency policymaking by adjudication, though only pockets of resistance to *Chenery II*'s core holding.¹⁰

In the last few years, however, worries about agency policymaking by adjudication have been expressed more forcefully, and opposition to *Chenery II* itself has intensified. Focusing specifically on the retroactive effect of much agency policymaking by adjudication, Professors Kristin Hickman and Aaron Nielson write that “creating new duties and then applying those duties to past conduct” can be described as “*literally* Orwellian.”¹¹ In the most extensive anti-*Chenery II* article in recent memory, Professors Gary Lawson and Joseph Postell argue that, in some circumstances, agency policymaking by adjudication might actually be unconstitutional as a sort of delegation of power to make law through adjudicatory processes that Congress itself does not possess.¹² And outside of academic circles, then-White House Counsel Don McGahn ripped *Chenery II* for letting agencies “announce new rules . . . without

¹⁰ A healthy amount of scholarship was penned in the decades following *Chenery II* arguing that rulemaking was generally superior to adjudication on good governance grounds, though it largely declined to question *Chenery II* as a doctrinal matter. See, e.g., Warren E. Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 L. & CONTEMP. PROBS. 658, 671 (1957); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 757 (1961); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922, 972 (1965); see also M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1403 n.69 (2004) (noting that “the drift of these articles was fairly uniform: agencies should use rulemaking more often than they did”). Similar good governance concerns pushed Judge Henry Friendly to articulate a set of limits on agency policymaking by adjudication, a project that ultimately met its fate at the hands of the Supreme Court. See *infra* notes 78–85 and accompanying text (discussing the *Bell Aerospace* litigation). More recently, Lisa Bressman and Elizabeth Magill, in separate articles, argued that *Chenery II* stands as a kind of administrative-law outlier in shielding certain agency decisions—decisions to formulate policy via adjudication as opposed to rulemaking—from meaningful judicial review. See Magill, *supra*, at 1385; Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 534–35 (2003).

¹¹ Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 974 (2021) (quoting *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 n.5 (D.C. Cir. 2008)); see also Aaron L. Nielson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON L. REV. 657, 667 (2021) (arguing that *Chenery II* was a “wrong turn, at least when taken too far”). At the Volokh Conspiracy blog, Jonathan Adler expressed his view that the Supreme Court should “corral (or cancel) *Chenery II* when the opportunity arises,” explaining that “[f]or those concerned about the size, scope, and arbitrary power exercised by the administrative state, *Chenery II* is far more important than *Chevron*.” Jonathan H. Adler, *Summary Reversal of Sixth Circuit in Calcutt v. FDIC Reaffirms the Importance of Chenery I*, VOLOKH CONSPIRACY (May 22, 2023, 12:22 PM), <https://reason.com/volokh/2023/05/22/summary-reversal-of-sixth-circuit-in-calcutt-v-fdic-reaffirms-the-importance-of-chenery-i/> [https://perma.cc/WZ8G-CVTN]. The related phenomenon of agency “regulation by enforcement,” where agencies use litigation instead of rulemaking in order to shape the law, has come under scrutiny. See Chris Brummer, Yesha Yadav & David Zaring, *Regulation by Enforcement*, 96 S. CAL. L. REV. 1297, 1301–02 (2024).

¹² Gary S. Lawson & Joseph Postell, *Against the Chenery II “Doctrine”*, 99 NOTRE DAME L. REV. 47, 61–64 (2023). Lawson and Postell’s argument is, importantly, limited to agency action that implicates life, liberty, and property. See *id.* at 51.

any fair notice to the parties being regulated.”¹³ Putting agency policymaking by adjudication in the same category as other kinds of “subregulatory actions,” McGahn condemned it as “illegitimate” and called for limiting of *Chenery II* as necessary to “preserv[e] individual liberty in the face of the burgeoning Leviathan.”¹⁴

Against the backdrop of such calls, this Article revisits some of the fundamental questions concerning the *Chenery II* doctrine. First, I argue in favor of retaining *Chenery II*’s core procedural holding. Indeed, I make a case for the view that courts should never set aside an agency order because that order announces a policy that the court concludes should have been announced through rulemaking.¹⁵ In that sense, then, *Chenery II*, which has been taken to largely insulate agencies from challenge based on their failure to proceed via rulemaking, should be maintained and even strengthened.¹⁶

In defending *Chenery II*’s core, I do not rely on the normative attractiveness of adjudication as a tool for the formulation of policy; indeed, it seems quite plausible that rulemaking is, at least in many circumstances, the superior policymaking device.¹⁷ In some ways, then, this Article fits into the older line of scholarship that, while arguing for the greater use of rulemaking, would not disturb *Chenery II* in any fundamental way.

I believe, however, that the case for *Chenery II*’s procedural holding is more unassailable than even many of its defenders have appreciated.¹⁸ It is not just that, though; when agencies do select between adjudication

¹³ Aaron Nielson has helpfully retranscribed McGahn’s remarks dealing with *Chenery II*. See Aaron L. Nielson, *D.C. Circuit Review—Reviewed: “I Vote for Chenery I, not Chenery II,”* YALE J. ON REGUL. (Nov. 24, 2017), <https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-i-vote-for-chenery-i-not-chenery-ii/> [<https://perma.cc/5MUR-DFRP>].

¹⁴ *Id.*

¹⁵ The exception is when the agencies’ organic statute requires rulemaking. See Lawson & Postell, *supra* note 12, at 48 (noting that statutes can require agencies to proceed via rulemaking). I set aside such circumstances here, as does most of the literature on *Chenery II*. See, e.g., Magill, *supra* note 10, at 1389.

¹⁶ For example, I argue that the procedural constraint seemingly imposed by a majority of Justices in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), should be abandoned, and the question of retroactivity is reconceptualized as a substantive constraint on agencies’ decision-making. See *infra* Part III.

¹⁷ For an article exploring when policymaking by adjudication might, in fact, be superior, see generally Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495 (2021).

¹⁸ Some of the arguments advanced in this Article bear a family resemblance to those advanced in the small, more openly pro-*Chenery II* literature. See generally Russell L. Weaver, *Chenery II: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161 (1988); William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351 (2000) [hereinafter Araiza, *Agency Adjudication*]; William D. Araiza, *Limits on Agency Discretion to Choose Between Rulemaking and Adjudication*, 58 ADMIN. L. REV. 899 (2006) [hereinafter Araiza, *Limits*]; Russell L. Weaver & Linda D. Jellum, *Chenery II and the Development of Federal*

and rulemaking, agencies have greater ability than courts to weigh the relevant considerations, as goes the classic justification for *Chenery II*.¹⁹ As Professor Elizabeth Magill pointed out in her classic article, this is true of many agency decisions that are scrutinized more thoroughly than agencies' choice of policymaking form.²⁰ So, what is the more complete case for *Chenery II*? It is partly that agency "policymaking by adjudication" is just the inevitable byproduct of administrative law doctrines that themselves have strong foundations—in particular, the reason-giving requirement²¹ and the obligation to decide cases consistently.²² It is partly—because of the inevitability of agency policymaking by adjudication—that agencies will engage in it in many circumstances where the agency cannot be said to have even made a *choice* to develop policy through adjudication as opposed to rulemaking.²³ It is partly that, due to both of the above observations, courts will have difficulty developing judicially manageable standards to rein in agency policymaking by adjudication.²⁴ More than that, however, the standards that courts will be tempted to reach for would operate at cross-purposes with other important values served by administrative law. Part of this project thus serves as a reminder for courts—and others—considering changes to *Chenery II* to "[l]ook [b]efore [y]ou [l]eap."²⁵ The post-*Chenery II* world might not be as great as one imagines it.

That said, even if courts lack power to hold that agencies have violated procedural law by failing to use rulemaking in announcing a particular policy, the policy itself remains subject to more substantive limitations: it must have been the product of reasoned decision-making, and it must comport with applicable binding law. I argue that courts can use these requirements to address some of the core concerns raised by *Chenery II*'s skeptics.

Administrative Law, 58 ADMIN. L. REV. 815 (2006). I will draw on those articles, as well as depart from them in various ways, in what follows.

¹⁹ See, e.g., 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 526–27 (6th ed. 2019); Richard J. Pierce Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308; Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 531 (2005); see also Magill, *supra* note 10, at 1416–19 (considering agency expertise as the first possible justification for the *Chenery II* principle before questioning whether expertise provides a full explanation for it).

²⁰ See Magill, *supra* note 10, at 1416.

²¹ See *infra* text accompanying note 162.

²² See *infra* text accompanying notes 96–97.

²³ See *infra* text accompanying notes 144–53.

²⁴ See *infra* text accompanying note 139.

²⁵ See Will Baude, *The "Look Before You Leap" Principle*, VOLOKH CONSPIRACY (June 29, 2023, 6:11 PM), <https://reason.com/volokh/2023/06/29/the-look-before-you-leap-principle/> [https://perma.cc/4AYZ-6DRM].

First, I suggest that the question of whether to make a given policy “retroactive”—meaning simply to apply the policy in question to the parties to the adjudication—be reconceptualized as a policy matter subject to reasoned decision-making requirements.²⁶ That is, statutes may be written to give an agency discretion regarding whether to apply a particular policy, announced in the adjudication at issue, to the parties at hand or to craft a kind of exception with respect to them and similarly situated parties. When agencies are given such discretion, whether to grant such an exception represents a decision regarding the stringency of the policy itself and depends on policy judgments usually thought, with good reason, to rest within the primary purview of the agency.

Conceived in that way, retroactivity would be subject to limitations familiar to courts in reviewing other matters over which agencies maintain discretion: courts would ensure that the agency has made the choice based on the factors relevant under the statute and that its choice was reasonably explained, including by assessing whether the agency had examined alternative forms of transition relief available to it.²⁷ Such transition relief might include pure nonretroactivity or decisions about, for example, whether to assess a fine or order with only forward-looking relief.²⁸ Although the agency would, under this framework, ultimately receive deference on the bottom-line determination regarding whether and how to make the policy “retroactive” to the parties at issue and similar matters, such requirements would guard against the prospect of administrative arbitrariness in the same way they do with respect to other dimensions of agencies’ policymaking discretion.²⁹ And recognizing that agencies may, pursuant to their relevant statutes, retain discretion regarding whether to make policies retroactive to the adjudication in question would make agencies freer than they are now perceived to be to except present parties from a newly announced policy.³⁰ In these ways, my proposal should provide some comfort to those most concerned with agency policymaking by adjudication because of its supposedly natural retroactive effects.

In suggesting that retroactivity questions should, as a general matter, be considered as raising policy issues, I acknowledge that there may be some constitutional limits on agencies’ ability to make policies retroactive. At least when faced with a potential deprivation of liberty or property, procedural due process principles require that parties

²⁶ See *infra* Part III.

²⁷ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48 (1983). On the scope of agencies’ obligation to respond to alternatives, see generally Daniel T. Deacon, *Responding to Alternatives*, 122 MICH. L. REV. 671 (2024).

²⁸ See *infra* Section III.B.

²⁹ See, e.g., Bressman, *supra* note 10, at 473–74 (stating that a purpose of reasoned decision-making requirements is “to prevent arbitrary administrative decision-making”).

³⁰ See *infra* Section III.B.3.

receive notice of the standards they must satisfy. Such notice might be given in the adjudication itself, as long as it is adequately done prior to the agency's decision.³¹ On the more substantive side, fair notice principles may constrain agencies when it comes to levying fines or penalties on the basis of past conduct.³² The exact contours of constitutional fair notice are outside the scope of this Article. But given that retroactivity generally involves judgments about tradeoffs similar to those over which agencies traditionally—and rightly—receive deference, courts should have the burden to articulate constitutional limitations backed by a constitutional theory sufficient to justify the reallocation of ultimate authority to the judiciary.³³

The second requirement particularly relevant to agency policymaking by adjudication is more straightforward and more clearly reflected by the current caselaw: in addition to following applicable statutes, agencies-as-adjudicators must also follow regulations the agency previously promulgated using notice-and-comment procedures.³⁴ Challenges alleging that an agency has violated its own regulations present legal questions amenable to judicial resolution.³⁵ Courts have occasionally erred, however, in thinking that agencies have a kind of “*Chenery II* power” to add to requirements imposed by regulations where principles such as *expressio unius est exclusio alterius* would normally indicate that the regulations in question occupy the field.³⁶ Based on that mistake, they have concocted a series of further limitations on *Chenery II* itself by questioning the agency's “decision” to effectively amend prior regulations through adjudication as opposed to rulemaking.³⁷ Instead, the entire inquiry should be reduced to whether the regulations allow or disallow, including implicitly, the policy in question. Where disallowed by principles such as *expressio unius*, that should be the end of the

³¹ See *infra* Section III.B.4.

³² See *infra* Section III.B.4.

³³ See *infra* Section III.B.4.

³⁴ See Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006). This limitation might be considered quasi-procedural in that its practical effect is to require the agency to use notice-and-comment procedures if it wants to depart from the regulation in question. But the courts' holding in successful challenges invoking agency regulations, as I would have it, would simply be that the agency violated an applicable regulation, not that it erred in some antecedent procedural choice to proceed via adjudication, see *infra* Part IV—indeed, as mentioned above, in many cases it will not be clear there ever was such a choice. See *supra* note 23 and accompanying text.

³⁵ Of course, various deference regimes may come into play. See, e.g., *Kisor v. Wilkie*, 588 U.S. 558, 566–73 (2019) (explaining precedent supporting deference to agency's interpretation of its own ambiguous regulations).

³⁶ See *infra* Part IV.

³⁷ See, e.g., *Patel v. INS*, 638 F.2d 1199, 1203–04 (9th Cir. 1980) (holding that the court abused its discretion in choosing adjudication over rulemaking because the resulting requirement was “broad” and “of prospective application”).

matter: the agency's policy may not stand.³⁸ Where agency regulations do not stand in the way of the policy in question, however, courts should not intervene regarding the agency's procedural method.

This Article proceeds as follows. Part I summarizes the Supreme Court's caselaw on agency policymaking by adjudication. Part II turns to defending *Chenery II*'s core procedural holding and the wide latitude it grants agencies to formulate policy by adjudication. Part III then takes up the retroactivity issue, arguing that courts have thought about retroactivity in the wrong way and that agencies' decisions regarding whether to apply the policy in question to the parties at hand should be thought of as a matter involving the substantive scope of the policy. Part IV turns to issues raised when an agency adjudicates against the background of previously promulgated or proposed regulations. Finally, Part V returns to the procedural side of the ledger and examines whether, in light of the limitations defended along the way, courts should additionally place various "soft" limits on agency policymaking by adjudication designed to raise the costs of agency policymaking by adjudication or nudge agencies in the direction of rulemaking.³⁹ I argue that these soft limits seem plausibly justifiable but that the case for them may be shakier than appears at first glance. If one thinks about administrative law in cost-benefit terms, it is at least not clear that embracing such limits would leave us in the black.

I. THE SUPREME COURT'S CASELAW

The Supreme Court has issued three, perhaps four,⁴⁰ decisions squarely dealing with agency policymaking by adjudication. This Part provides a brief refresher.

Chenery II grew out of a reorganization plan submitted to the Securities and Exchange Commission ("SEC" or "Commission") by the Federal Water Services Corporation ("Federal").⁴¹ Under the Public Utility Holding Company Act of 1935,⁴² the SEC had the statutory responsibility to ascertain whether Federal's plan was "fair and

³⁸ See *infra* Part IV.

³⁹ The first such limit involves requiring agencies to give reasons for why they have chosen to articulate a particular policy via adjudication as opposed to rulemaking. Section V.A. The second would allow agency policymaking by adjudication but manipulate the consequences of agencies' procedural choices in order to make rulemaking more enticing. Section V.B. Prior to *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the most obvious method for doing so would be to deny agencies *Chevron* deference when they proceed via adjudication. With *Chevron* off the books, it is harder to see how courts might proceed using this strategy. Section V.B.

⁴⁰ This Article puts aside the possible fourth, *Morton v. Ruiz*, 415 U.S. 199 (1974), for being basically inscrutable.

⁴¹ 332 U.S. 194, 197 (1947).

⁴² 15 U.S.C. § 79 (2003), *repealed by* Energy Policy Act of 2005, 42 U.S.C. §§ 16451–16463.

equitable' or 'detrimental to . . . the interest of investors.'"⁴³ During the period in which Federal's plans of reorganization were being formulated, insiders of the corporation engaged in certain stock transactions designed to ensure that they retained control of the reorganized entity.⁴⁴

In the order under review in *SEC v. Chenery Corp.* ("*Chenery I*"),⁴⁵ the predecessor case to *Chenery II*, the Commission concluded that the proposed reorganization did not pass muster, and, at the recommendation of the Commission, the plan was amended so that the insiders would be required to surrender their stock and not convert it into shares of the new corporation.⁴⁶ The agency defended its rejection of the initial plan on the basis of its understanding that Federal's managers were bound by certain fiduciary-type obligations articulated by courts of equity, obligations that the Commission believed would have been breached under the original plan.⁴⁷ In setting aside the SEC's order, the Supreme Court concluded that the Commission had misread the relevant caselaw.⁴⁸ Nevertheless, the Supreme Court indicated that the Commission may have been able to act on the basis of its own discretion, as opposed to its understanding of judicial precedent, in rejecting Federal's preferred plan under the relevant statutory standards.⁴⁹ However, in the order under review, the SEC had not done so, and the Court found that fatal.⁵⁰

On remand, the SEC again rejected a proposal that would have allowed Federal's insiders to convert shares purchased during the contemplated reorganization to those of the new company.⁵¹ This time, the SEC took up the Supreme Court's suggestion and based its determination squarely on its own view of the statutory standards read in light of the Act's purposes.⁵² Federal's management again complained to the courts;⁵³ now they argued that the Commission was prohibited from announcing a prohibition on transactions of the type in question in the context of Federal's particular adjudication,⁵⁴ and the SEC had not promulgated a rule on the matters in question prior to the submission of Federal's plans.⁵⁵ Because nothing prohibited the transactions in

⁴³ *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 82–85 (1943) (quoting 15 U.S.C. § 79g, k (repealed 2005)).

⁴⁴ *Chenery II*, 332 U.S. at 197.

⁴⁵ 318 U.S. 80 (1943).

⁴⁶ *Id.* at 85.

⁴⁷ *Id.* at 87.

⁴⁸ *Id.* at 87–89.

⁴⁹ *Id.* at 89–92.

⁵⁰ *Id.* at 92.

⁵¹ *Chenery II*, 332 U.S. 194, 196 (1947).

⁵² *Id.* at 199.

⁵³ *See id.* at 198–99.

⁵⁴ *Id.* at 199–200.

⁵⁵ *Id.* at 198.

question at the time they were made, management argued that the SEC was required to enter an order blessing Federal's proposed plan.⁵⁶

In the second appeal, the Supreme Court sided with the SEC, broadly blessing agencies' ability to engage in policymaking by adjudication.⁵⁷ *Chenery II*'s reasoning will be woven into the Sections that follow, so this Part provides only a briefly recap. First, in a comparatively neglected passage of the opinion,⁵⁸ the Court intimated that accepting the challengers' arguments would prevent the SEC from performing its legal obligations.⁵⁹ The Commission had a *duty* to decide whether the proposed plans were or were not "fair and equitable." Requiring the SEC to bless every transaction not covered by a previously announced legislative-type rule would hamstring the agency in performing that responsibility.⁶⁰ Second, although suggesting that rulemaking was to be preferred in many instances, the Court recognized there may be situations where proceeding to formulate general policy by adjudication was appropriate.⁶¹ And it is the agency that is best equipped to make the choice of how to proceed.⁶² Finally, the Court hinted that there may be situations where the retroactive effect of a policy announced via adjudication may render an agency's decision invalid, but it found no such problem in the case at hand.⁶³

Although *Chenery II* broadly blessed the legality of agency policymaking by adjudication, several decades later, the Court indicated that there may in fact be some limits on agencies' ability to issue what looks like rules without undertaking a rulemaking. The story of *NLRB v. Wyman-Gordon Co.*⁶⁴ begins with the decision of the National Labor Relation Board ("NLRB" or "Board") in a prior adjudication, not directly under review in *Wyman-Gordon*, involving the Excelsior Underwear company.⁶⁵ In an administrative adjudication following a failed attempt to unionize the Excelsior Underwear workforce, the Board purported to establish a policy that, for union elections, employers must provide a list of names and addresses of employees for purposes of facilitating union outreach.⁶⁶ But the Board declined to apply that policy in

⁵⁶ *Id.* at 199.

⁵⁷ *See id.* at 208–09.

⁵⁸ *See infra* note 98 and accompanying text.

⁵⁹ *See Chenery II*, 332 U.S. at 200–02 (stating that, if the SEC understood the transaction not to comport with statutory standards, "an order giving effect to the amendment merely because there was no general rule or regulation covering the matter would be unjustified").

⁶⁰ *See id.* (quoting 15 U.S.C. § 79k (repealed 2005)).

⁶¹ *Id.* at 201–03.

⁶² *Id.* at 203.

⁶³ *See id.* at 203–04.

⁶⁴ 394 U.S. 759 (1969).

⁶⁵ *See id.* at 761–62.

⁶⁶ *Id.* at 763.

order to set aside the election involving the parties to the *Excelsior Underwear* proceeding.⁶⁷ In a later adjudication, the NLRB invoked the names-and-addresses policy against Wyman-Gordon, citing its decision in *Excelsior Underwear Inc.*⁶⁸ In subsequent litigation, Wyman-Gordon argued that the *Excelsior* “rule” was invalid.⁶⁹

In a highly fractured decision, a majority of Justices agreed that the order in *Excelsior* amounted to a procedurally invalid rule, but a slightly different majority nevertheless upheld the Board’s actions against Wyman-Gordon. The various opinions wove together considerations of various sorts, but, with respect to *Excelsior*’s validity, the rationale most clearly embraced by a majority of Justices was that the NLRB had improperly announced a purely prospective policy without going through rulemaking proceedings.⁷⁰ That judgment appeared tied to the definition of rule in the Administrative Procedure Act (“APA”),⁷¹ which speaks in terms of the prospective effect of rules.⁷² The NLRB’s error was thus promulgating what was formally a rule under the APA but without going through notice-and-comment proceedings—or otherwise meeting an exception to notice and comment.⁷³ At the same time, a majority of the Court declined to upset the Board’s determinations with respect to Wyman-Gordon.⁷⁴ The plurality explained that the Board had applied the names-and-addresses policy to Wyman-Gordon, and therefore the actions under review did not suffer the same infirmity as that involving *Excelsior Underwear*.⁷⁵ And although the Board had cited *Excelsior* in directing Wyman-Gordon to provide the list, remanding under the circumstances would amount to an “idle and useless formality” given the NLRB’s ability to simply retake the challenged actions without purporting to rely on *Excelsior*.⁷⁶ Other Justices concurred in

⁶⁷ *Id.*

⁶⁸ 156 N.L.R.B. 1236 (1966); see *Wyman-Gordon*, 394 U.S. at 761–62.

⁶⁹ See *Wyman-Gordon*, 394 U.S. at 762.

⁷⁰ See *id.* at 765 (plurality opinion); *id.* at 775–76 (Douglas, J., dissenting); *id.* at 780 (Harlan, J., dissenting); see also Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1942 (2018) (“A more plausible and much narrower reading of the ruling is that the problem in *Excelsior Underwear* was that the order was prospective only.”).

⁷¹ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

⁷² See *Wyman-Gordon*, 394 U.S. at 780 (Harlan, J., dissenting); 5 U.S.C. § 551(4) (defining rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy”).

⁷³ See, e.g., *Wyman-Gordon*, 394 U.S. at 776 (Douglas, J., dissenting) (“The difficulty is that [the NLRB] chose a different course in the *Excelsior* case and, having done so, it should be bound to follow the procedures prescribed in the Act . . .”).

⁷⁴ See *id.* at 766 (plurality opinion); *id.* at 770 (Black, J., concurring).

⁷⁵ *Id.* at 766.

⁷⁶ *Id.* at 766 n.6. The plurality’s footnote 6 continues to stand for the proposition that *Chenery I* does not require remanding to the agency when doing so would be pointless. See *Calcutt v. Fed. Deposit Ins. Corp.*, 598 U.S. 623, 629 (2023).

the judgment because they found no illegality involving the *Excelsior* order in the first place.⁷⁷

The final installment of the Supreme Court's policymaking-by-adjudication trilogy came in *NLRB v. Bell Aerospace Co.*⁷⁸ That case dealt with, among other things, whether the NLRB was required to institute a rulemaking proceeding in order to classify a certain category of employees as nonmanagerial.⁷⁹ The Second Circuit had held, in an opinion by Judge Friendly, that the Board was so required.⁸⁰ The Court of Appeals first concluded that the Board's determination that the employees at issue were nonmanagerial would represent a reversal of the NLRB's prior position.⁸¹ It then pointed to a variety of factors, largely cobbled together from various opinions in *Wyman-Gordon*, together indicating that the Board was required to act through rulemaking.⁸² "The Board was prescribing a new policy . . . 'to fit all cases at all times,'" and it did not purport to provide notice to potentially affected parties.⁸³ The court also intimated that acting to establish the policy at issue through adjudication was not a practical necessity in labor representation cases.⁸⁴ And it found that "the argument for rule-making is especially strong when the Board is proposing to reverse a long-standing and oft-repeated policy on which industry and labor have relied."⁸⁵

The Supreme Court disagreed with the Second Circuit's conclusion and broadly reaffirmed agencies' ability to announce policy through adjudication. The Court noted that it had blessed the practice in *Chenery II*, quoting liberally from that decision, and reaffirmed that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."⁸⁶ The Court then stated that "[a]lthough there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion."⁸⁷ The Court noted that the agency may well have had good reason to act "in a case-by-case manner."⁸⁸ Turning to the other side of the ledger, the Court then stated:

⁷⁷ *Wyman-Gordon*, 394 U.S. at 770 (Black, J., concurring).

⁷⁸ 416 U.S. 267 (1974).

⁷⁹ *Id.* at 291-92.

⁸⁰ *See Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 495 (2d. Cir. 1973).

⁸¹ *Id.*

⁸² *Id.* at 495-96.

⁸³ *Id.* at 496 (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777 (1969) (Douglas, J., dissenting)).

⁸⁴ *See id.*

⁸⁵ *Id.* at 496-97.

⁸⁶ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

⁸⁷ *Id.*

⁸⁸ *Id.*

The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result. It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here.⁸⁹

Thus, in its last pronouncement on the issue, the Supreme Court underscored that agencies have a general ability to announce policy through adjudication, but it held out the possibility of some limits on that practice.⁹⁰

II. DEFENDING THE CORE OF *CHENERY II*

This Part defends a strong *Chenery II* principle: courts should not intervene when faced with a claim that an agency has erred by announcing a particular policy through adjudication as opposed to rulemaking.⁹¹ This Part brackets, for the moment, issues involving retroactivity and nonretroactivity, leaving such matters to Part III.

I begin by explaining why policymaking by adjudication is the natural byproduct of administrative adjudication as practiced pursuant to the APA. Far from being an aberrant phenomenon in need of special justification, policymaking by adjudication is inevitable when agency adjudicators are required to give reasons for their decisions and to maintain consistency in their treatment of like cases. In light of that inevitability, courts would face intractable administrability problems in identifying which kinds of agency policies nevertheless must be announced through rulemaking and not adjudication. Moreover, many of the rules courts would be tempted to reach for would operate in practice to deny agencies the ability to decide matters on stated grounds that they believe to be the best. In this way and others, embracing such rules would subvert other important goals of administrative law.

⁸⁹ *Id.* at 295.

⁹⁰ *See id.* at 294–95.

⁹¹ I assume, for purposes of discussion, that the policy is announced in the course of resolving a specific case before the agency—whether a licensing application, union certification dispute, particular enforcement action, or something else. A different set of considerations may apply when an agency announces a policy that is not connected to any such pending matter and labels the action an adjudication. *See* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 770 (1969) (Black, J., concurring) (stressing that the *Excelsior* policy “was adopted by the Board as a legitimate incident to the adjudication of a specific case before it”); *Safari Club Int’l v. Zinke*, 878 F.3d 316, 333–35 (D.C. Cir. 2017).

A. *The Inevitability of Policymaking by Adjudication*

Many explanations for the broad *Chenery II* principle boil down to the idea that when faced with a choice between developing policy by rulemaking or by adjudication, agencies are better positioned than courts to weigh the relevant considerations.⁹² Although that is some part of the puzzle, I begin in a different, and more fundamental, place. What one might call agency “policymaking by adjudication” is simply the natural byproduct of systems of adjudication that have been subject to requirements of administrative law, requirements that have themselves been imposed in service of due-process-type values. This rather simple observation helps to better understand *Chenery II*’s foundations and undermines a recent objection to policymaking by adjudication that, as I understand, would imply that policymaking by adjudication may be illegal even when an agency lacks the ability to make policy through other ways—such as rulemaking.

Agency policymaking by adjudication is inevitable in the following sense.⁹³ First, Congress has the constitutional ability to invest agencies with adjudicatory authority provided certain conditions are met.⁹⁴ Second, agencies must offer contemporaneous justifications for their actions, including in adjudications.⁹⁵ Third, agencies must provide consistent explanations for their actions over time or acknowledge and explain inconsistencies.⁹⁶ In other words, they must follow their own precedent or provide reasons for departing from it.⁹⁷

Add to the above the Court’s recognition in *Chenery II* that agencies have a duty to adjudicate according to the standards set by Congress—the SEC had the duty, the responsibility, to decide whether

⁹² See *supra* note 19 and accompanying text.

⁹³ For an argument for the inevitability of *Chenery II*, which overlaps in some respects with my argument that policymaking by adjudication is inevitable, see Weaver & Jellum, *supra* note 18, at 824–27.

⁹⁴ See *Crowell v. Benson*, 285 U.S. 22, 53–64 (1932). There are active questions concerning how broadly the Constitution allows agency adjudication and in what subject areas. And in *Jarkesy v. Securities and Exchange Commission*, the Supreme Court shrank, to an as-yet-unknown degree, the domain in which agencies may initially adjudicate certain claims, particularly when civil penalties are at stake. See 144 S. Ct. 2117, 2139 (2024). We can set that uncertainty aside here, for the present question is whether there is a problem with agency policymaking by adjudication within whatever domains the Constitution allows administrative adjudication to occur.

⁹⁵ See *Chenery I*, 318 U.S. 80, 94 (1942) (“[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.”); see also *Dep’t of Com. v. New York*, 588 U.S. 752, 780 (2019) (explaining that judicial review “is ordinarily limited to evaluating the agency’s contemporaneous explanation”).

⁹⁶ See, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

⁹⁷ *Nat’l Treasury Emps. Union v. Fed. Lab. Rels. Auth.*, 404 F.3d 454, 457–58 (D.C. Cir. 2005) (“The [Agency’s] failure to follow its own well-established precedent without explanation is the very essence of arbitrariness.”).

transactions required to be presented to it were “fair and equitable.”⁹⁸ And finally, consider that in making those determinations, the law will occasionally not be clear because how the standards apply to the facts at hand may not have been addressed by the statute itself, agency regulations, or other sources of law.⁹⁹

Under the conditions described above, agencies will inevitably make policy through adjudication. Take the facts of *Chenery II*.¹⁰⁰ The agency was under the statutory obligation to decide whether a transaction involving the facts at issue was “fair and equitable.”¹⁰¹ No prior statute or regulation answered that question.¹⁰² The agency had to say yes or no.¹⁰³ Its yes or no answer, and the reasons it gave for its determination, would then serve as precedent that would govern transactions with the same or sufficiently similar facts.¹⁰⁴ The “policy” was thus established in the order at issue in *Chenery II* that such transactions were not “fair and equitable,”¹⁰⁵ though the agency could presumably depart from that precedent in future proceedings if it wished, so long as it provides a valid justification for the new policy.¹⁰⁶ A “yes” answer would have functioned similarly—establishing a policy that such transactions

⁹⁸ See *supra* notes 59–60 and accompanying text; see also Weaver & Jellum, *supra* note 18, at 820 (expanding on why the SEC had to decide whether the transaction in question met the statutory standards and could not simply have blessed the transaction because it lacked a rule on point).

⁹⁹ See Weaver, *supra* note 18, at 168–69. Of course, that may not *always* be the case. Mature adjudicative systems may have a greater proportion of cases that reflect what Ronald Cass called—somewhat misleadingly—the “judicial model” of agency adjudication, in which the agency acts solely as a “neutral arbiter weigh[ing] evidence and ascertain[ing] facts” in the context of settled law. RONALD CASS, AGENCY REVIEW OF ADMINISTRATIVE LAW JUDGES’ DECISIONS 117 (1983) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/project-report-recommendation-83-3> [<https://perma.cc/J9ED-B4XU>]. See generally Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1 (2023) (canvassing the wide range of decisions, from the technical and the low-profile to the politically freighted, that agency adjudicators must make). But it will inevitably be so, in some number of cases, that the agency and its adjudicators must decide. See Weaver, *supra* note 18, at 168–69.

¹⁰⁰ 332 U.S. 194 (1947). It should not matter whether the facts were undisputed or established through the adjudicatory process itself.

¹⁰¹ See *supra* notes 59–60 and accompanying text.

¹⁰² *Chenery II*, 332 U.S. at 198.

¹⁰³ See *id.* at 208 (explaining the SEC’s need to determine whether a company’s plan of reorganization satisfied the “fair and equitable” rule).

¹⁰⁴ See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969) (plurality opinion) (“Subject to the qualified role of stare decisis in the administrative process, [adjudicated cases] may serve as precedents.”).

¹⁰⁵ See *Chenery II*, 332 U.S. at 208 (reinstating SEC’s rejection of company’s reorganization plan as not “fair and equitable”).

¹⁰⁶ See *Fox Television I*, 556 U.S. 502, 515 (2009) (explaining that an agency must at least “show that there are good reasons for the new policy” and “display awareness that it is changing position”).

were allowed under the statute. Either way, policymaking by adjudication has occurred.

Viewing agency policymaking as the natural byproduct of administrative adjudication within the confines of administrative law has several implications. First, it reveals the extent to which agency policymaking by adjudication is bound up with agencies' democratic responsibility to administer statutes pursuant to instructions provided to them by Congress. Because agencies often possess discretion, few these days would subscribe to the view that agencies act as "mere transmission belt[s] for implementing legislative directives in particular cases."¹⁰⁷ But precisely because agencies *do* have discretion in many cases—and are invested with that discretion by Congress—agency policymaking by adjudication has an important role to play in completing Congress's scheme by fleshing out legislative standards in the context of particular cases.¹⁰⁸ Agencies flesh out such standards by providing reasons for their determinations, reasons that will often cut somewhat more broadly than the case at hand.¹⁰⁹ Those reasons can then be scrutinized to make sure they accord with the underlying statute and the agency's prior pronouncements. Agency policymaking by adjudication need not be seen as aberrant and thus in need of special justification. It is part and parcel of administration itself.¹¹⁰

Second, that agency policymaking by adjudication goes hand in hand with agency adjudication itself should further alert us to the possibility that such policymaking was ubiquitous at the time of the APA's passage in 1946, well before the decades traditionally associated with the rise of rulemaking.¹¹¹ Indeed, what we would today call agency policymaking by adjudication was a well-known phenomenon in the years prior to 1946. In a 1934 report commissioned by the Brookings Institution and described as resulting from ten years of study, the authors wrote that "[a]dministrative agencies can settle cases coming before them, both on their merits and also with the avowed purpose of furthering a particular social or economic policy that has been initiated

¹⁰⁷ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

¹⁰⁸ See Emily Bremer, *Power Corrupts*, 41 YALE J. REG. 426, 428 (2024) ("Administrative agencies . . . bear the principal responsibility for keeping [legislative] promises by giving effect to the law in the real world.").

¹⁰⁹ See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995) (arguing that "ordinarily, to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself" and that "[w]hen we provide a reason for a particular decision, we typically provide a rule, principle, standard, norm, or maxim broader than the decision itself" (emphasis omitted)).

¹¹⁰ See Bremer, *supra* note 108, at 428–31 (arguing for an increased focus on administration in administrative law).

¹¹¹ See *id.* at 449 (describing "standard story" in which agencies began to make greater use of their rulemaking authorities in the 1970s).

by the legislature or the executive.”¹¹² It then went on to list various advantages of formulating policy via administrative adjudication—advantages that will sound familiar to modern ears.¹¹³ As far as agency practices, Professor Emily Bremer has described how the Federal Communications Commission (“FCC”) used a combination of adjudication and rulemaking to formulate policy in the decades prior to the APA.¹¹⁴ It is not difficult to find further instances of agency policymaking by adjudication in the pre-APA period.¹¹⁵

And yet, as Bremer has written, the APA did not expressly place limits on agencies’ ability to formulate policy by adjudication.¹¹⁶ That is not because no one called for such limits. Bremer documents calls for agencies to use rulemaking to a greater degree as early as the 1930s.¹¹⁷ While developing legislation that would eventually culminate in the APA, Congress had before it statutory language that would have announced “a declared preference for rulemaking over adjudication.”¹¹⁸ But it adopted neither it nor anything similar.¹¹⁹

Third, the inevitability of agency policymaking by adjudication complicates some of the broadsides leveled against the practice. Start with Justice Jackson’s invocation of administrative “authoritarianism” in *Chenery II*.¹²⁰ For one, viewed in the above frame, the course of events in *Chenery II* seem not so dissimilar from what happens all the time in courts, both state and federal—a broad standard is applied

¹¹² FREDERICK F. BLACHLY & MIRIAM E. OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 202–03 (1934).

¹¹³ See *id.* at 202–08.

¹¹⁴ See Bremer, *supra* note 108, at 452–53.

¹¹⁵ See, e.g., *NLRB v. Pa. Greyhound Lines, Inc.*, 303 U.S. 261, 263–64, 271 (1938) (upholding NLRB’s determination that it could require employers to withdraw recognition from a previously employer-dominated labor organization and to post notices of such withdrawal, even after the employer had been ordered to cease and desist controlling the organization). At the Supreme Court level, an intriguing allusion to agency policymaking by adjudication can be found in a somewhat hard to parse passage by none other than Justice Frankfurter, who would go on to dissent in *Chenery II*. In upholding the FCC’s chain broadcasting regulations, Justice Frankfurter emphasized that the Commission would retain the ability to refine its regulatory standards in the context of particular cases, writing for the Court:

The Commission . . . did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the ‘public interest, convenience, or necessity.’ If time and changing circumstances reveal that the ‘public interest’ is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Nat’l Broad. Co. v. United States, 319 U.S. 190, 225 (1943) (quoting 47 U.S.C. § 307(c)(1)).

¹¹⁶ See Bremer, *supra* note 108, at 450.

¹¹⁷ See *id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Chenery II*, 332 U.S. 194, 216 (1947).

in a particular case to the parties at hand, and the court's resolution serves as precedent going forward.¹²¹ More fundamentally, because the SEC had the obligation to apply the statutory standard at hand, and because it had to decide whether the *Chenery* reorganization could go forward, it *had* to apply whatever the "new policy" was going to be to those before it.¹²² The "authoritarianism" critique would, therefore, seem to draw its strength not from the sense that principles of fairness required that the agency decline to make "new law" but instead from the belief that such principles demanded that it make new law in favor of the regulated entity. I further address variations on this when we turn to the retroactivity question.¹²³ For now, the point is simply that, in circumstances similar to *Chenery II*, the critique seems more a substantive objection than a demand that the agency should have refrained from making policy outside of the rulemaking process.

Viewing agency policymaking by adjudication as the natural byproduct of agency adjudication subject to the requirements of administrative law also undercuts a recent argument that the practice involves an unconstitutional delegation by Congress of the authority to "make law" via adjudicatory processes.¹²⁴ Professors Gary Lawson and Joseph Postell argue that because Congress lacks authority to make law through adjudication, Congress may not be able to "subdelegate" such authority to administrative agencies, at least in some subset of cases involving private rights.¹²⁵ Perhaps, Lawson and Postell allow, Congress could authorize agencies to prescribe "new standards of conduct" using rulemaking, which more closely resembles a legislative-type process.¹²⁶ But agency policymaking by adjudication goes too far in that

¹²¹ See *infra* Section III.A (further investigating the analogy between agencies and courts).

¹²² See *supra* notes 100–06 and accompanying text; see also Eisenberg & Mendelson, *supra* note 99, at 59 (noting other circumstances in which agencies lack the choice to make policy other than by rulemaking).

¹²³ See *infra* Part III.

¹²⁴ See Lawson & Postell, *supra* note 12, at 48–49.

¹²⁵ See *id.* at 61–67. One initial comment on this formulation: I do not believe it is right to reduce the constitutionality of agency authority to whether Congress can "subdelegate" this or that function. Indeed, the modern nondelegation caselaw denies that Congress can constitutionally delegate—or subdelegate—its authority at all. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Rather, Congress authorizes agencies to do things using its Article I powers, including the Necessary and Proper Clause, and agencies exercise the executive power in carrying out their tasks. Cf. *INS v. Chadha*, 462 U.S. 919, 954 n.16 (1983) (explaining that although agency action can "resemble 'lawmaking,'" executive power is not "legislative," and it is therefore subject to checks distinct from "the approval of both Houses of Congress and the President"). No subdelegation need be involved. But we can put aside this possibly semantic debate for present purposes, and I recognize that Lawson and Postell are operating within a different framework than that reflected in present-day caselaw. See Lawson & Postell, *supra* note 12, at 51.

¹²⁶ See Lawson & Postell, *supra* note 12, at 59–60.

it untethers the act of “lawmaking” from the processes that Congress itself must follow.¹²⁷

With admirable modesty, Lawson and Postell concede that they have not made an “airtight” case against the constitutionality of the broad *Chenery II* principle,¹²⁸ suggesting instead that “there are sufficient questions about the constitutionality of the practice to warrant caution before concluding that agencies have a free hand to choose how to make law.”¹²⁹ In the same spirit, I do not claim to have a knock-down rejoinder, especially as we proceed from very different premises.¹³⁰ But some of the above observations weaken the intuitive appeal of the Lawson-Postell view. Lawson and Postell frequently talk of agencies “mak[ing] law”¹³¹ or “creat[ing] new standards of conduct”¹³² in the same sense that legislation does but through an adjudicatory process. That is not really correct, however. As explained above, agencies are making bottom-line determinations regarding matters presented to them and, because of requirements imposed upon them by administrative law, giving reasons for those determinations that then apply as precedent—precedent that can be departed from if the agency overcomes certain explanatory burdens.¹³³ Indeed, in the next adjudication, the agency presumably must be receptive to parties’ arguments that the agency depart from its own precedent and give reasons for the retention of its prior policy if that is what the agency chooses, lest the agency face challenge for failing to consider an alternative.¹³⁴ That is what makes policies announced via adjudication different from both agency regulations and statutes, neither of which can be departed from by way of an individual adjudication.¹³⁵

Thus, can it be that what are ultimately constraints—the reason-giving requirement and the obligation to follow precedent or to explain departures from it—are what transform agency adjudication into forbidden “lawmaking”? That seems odd. Would it be a better world were agencies to simply make decisions in a “yes” or “no” manner, with no reasons given, and where the agency could simply disregard what it had previously concluded without explanation? That would seem to threaten the kind of “immanent principles of due process” that Lawson

¹²⁷ See *id.*

¹²⁸ *Id.* at 61.

¹²⁹ *Id.* at 64.

¹³⁰ See, e.g., *id.* at 51 (explaining that aspects of their argument depend on a view of the Constitution’s original meaning not reflected in current case law).

¹³¹ E.g., *id.* at 63.

¹³² E.g., *id.* at 54.

¹³³ See *supra* notes 100–06 and accompanying text.

¹³⁴ See Deacon, *supra* note 27, at 710–11 (explaining that an agency should have to explain its decision to retain the status quo when urged to change course).

¹³⁵ See *infra* notes 386–404 and accompanying text (defending this difference).

and Postell elsewhere invoke.¹³⁶ But Lawson and Postell's article is devoted to explaining why agency policymaking by adjudication—or lawmaking as they would have it—is uniquely unconstitutional, not why agency adjudication *per se* is.¹³⁷

B. Policing Policymaking by Adjudication

Even if some degree of policymaking by adjudication is inevitable, the question remains whether courts might nevertheless find that an agency has, in particular circumstances, abused its discretion by choosing to make certain *kinds* of policies through adjudication as opposed to rulemaking. Judicial efforts to police agencies in that often illusory choice would face insurmountable problems. The issues are essentially two, which often work in tandem. First, given the inevitability of policymaking by adjudication,¹³⁸ such efforts would raise grave concerns regarding whether there are judicially manageable standards that could be applied to set aside any individual act of agency policymaking by adjudication. In this respect, my argument elaborates John Manning's suggestion that administrability concerns are an important part of explaining *Chenery II*'s permissiveness.¹³⁹ Second, the practical effect of policing agency policymaking by adjudication would, in many cases, be to limit agencies' ability to act based on grounds they believe to be the best or to encourage agencies to give insincere grounds for their actions, thus undermining other important administrative law values.¹⁴⁰

Before diving in, one caveat. Many of the difficulties explored below assume a judicial setting—they describe issues that *courts* would have to grapple with if *Chenery II* were eroded. Sketching out those difficulties is not to imply that agencies may never err, consciously or not, by failing to address certain issues through rulemaking; as stated above, there may well be a case that rulemaking is often superior on a number of grounds.¹⁴¹ Nor does it necessarily lead to the conclusion that efforts to police agency adjudication outside of the judicial setting should be abandoned. Although full consideration of such matters is outside the scope of this Article, there may be a place for jawboning by politicians or for agency-imposed limitations.¹⁴² But that agencies may

¹³⁶ See Lawson & Postell, *supra* note 12, at 63.

¹³⁷ See *id.* at 47.

¹³⁸ See *supra* Section II.A.

¹³⁹ See John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 901 (2004).

¹⁴⁰ See *infra* note 179 and accompanying text.

¹⁴¹ See *supra* note 17 and accompanying text.

¹⁴² See Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1239–42 (2021) (arguing that the immigration agencies should move to greater reliance on notice-and-comment rulemaking via use of “internal administrative law”).

err does not mean courts are justified in engaging in intrusive methods of judicial review—through a variety of deference doctrines, principles of reviewability, and the like, administrative law in fact tolerates predictable agency error when the costs of judicial scrutiny would exceed its benefits.¹⁴³

To begin to see the costs associated with limiting *Chenery II*, consider that, in many cases, it will be difficult—if not impossible—to isolate any discrete “choice” the agency has actually made between adjudication and rulemaking. Arbitrary and capricious review, the presumptive vehicle for policing agency policymaking by adjudication, applies only where the agency has made a choice.¹⁴⁴ But because agency policymaking by adjudication is the inevitable byproduct of agency adjudication,¹⁴⁵ it is hard to fault an agency for making policy in the specific adjudication under review—the agency had no choice *at that point in time*. The fault of the agency, if any, was the “choice” to leave the law unclear in the first place, presumably by failing to promulgate a rule dealing with the situation.

Viewed from this angle, the difficulties become apparent. In many circumstances, the agency will never have made such a choice. A party might apply for a permit, or seek the approval of a transaction, shortly after the statute is passed and before the promulgation of a rule is practically possible.¹⁴⁶ Even where that is not the case, it may be difficult, if not impossible, to isolate any choice an agency has made to formulate policy via adjudication and not rulemaking. There may be many reasons that an agency has not formulated a rule on point—failure to foresee the issue in question and resource limitations compounded by requirements pertaining to section 553 notice-and-comment proceedings perhaps chief among them.¹⁴⁷

Of course, sometimes it may be possible to reasonably impute to an agency a kind of choice to develop law through adjudication as opposed to rulemaking. The NLRB, for example, has famously—or infamously—shied away from rulemaking, making nearly all of its law

¹⁴³ See e.g., *Kisor v. Wilkie*, 588 U.S. 558, 564, 568, 571 (2019) (explaining “potent . . . but cabined” rule “that a court should defer to the agency’s construction of its own regulation,” which is “attuned to the comparative advantages of agencies over courts in making such policy judgments”).

¹⁴⁴ See *Nat’l Tire Dealers & Retreaders Ass’n, Inc. v. Brinegar*, 491 F.2d 31, 37 (D.C. Cir. 1974).

¹⁴⁵ See *supra* notes 93–106 and accompanying text.

¹⁴⁶ See, e.g., *Chenery II*, 332 U.S. 194, 198 (1947) (addressing SEC’s decision to bar purchase of preferred stock where “neither Congress nor the Commission had promulgated any general rule proscribing such action”).

¹⁴⁷ See Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department’s Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1245 (1974) (“The failure to use rulemaking is far less a product of conscious departmental choice than a result of impediments to the making of rules created by the Department’s internal procedures.”).

through adjudicative processes.¹⁴⁸ A pattern of agency enforcement proceedings, over which the agency maintains agenda control, may also be more likely to be the product of some antecedent choice to eschew rulemaking.¹⁴⁹ But even in those situations, any choice we might impute to the agency is quite unlike choices that administrative law is adept to handle—such as whether to raise or lower emissions standards as part of a particular proceeding.¹⁵⁰ The NLRB’s historical use of adjudication to develop policy seems to be more the product of a kind of cultural orientation than a decision that was made at some point in time.¹⁵¹ Likewise, a decision to focus enforcement resources on an area that could also be addressed through rulemaking is not the kind of decision that would typically be evident from an administrative record focused on the specific agency adjudication at issue. Such record will rarely illuminate the agency’s past internal deliberative decision-making or the factors that led the agency down the path it is on today.¹⁵² Thus, more intrusive methods of judicial review would have to be devised, methods that would be designed to probe agency officials’ past programmatic decision-making regarding how to allocate agency resources and why. And even if such decision-making could be brought to light, it is here that the classic justification for *Chenery II*, the courts’ relative weakness when it comes to assessing the kind of considerations at play, would apply with most force.¹⁵³

¹⁴⁸ See *Facilitating the Use of Rulemaking by the National Labor Relations Board*, ADMIN. CONF. OF THE U.S. (June 14, 1991), <https://www.acus.gov/sites/default/files/documents/91-5.pdf> [<https://perma.cc/4R73-2RXQ>].

¹⁴⁹ See Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 96 (2016) (describing decisions regarding whether to undertake certain enforcement actions as part of agencies’ agenda-setting role).

¹⁵⁰ See, e.g., *Sierra Club v. EPA*, 939 F.3d 649, 674 (5th Cir. 2019) (upholding the Environmental Protection Agency’s (“EPA”) approval of state’s emissions determination using arbitrary and capricious standard).

¹⁵¹ See Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274–75 (1991) (describing NLRB’s decades-long commitment to developing policy via adjudication).

¹⁵² See, e.g., *Compiling a Decision File and an Administrative Record*, U.S. FISH & WILDLIFE SERV. (Mar. 2, 2007), <https://www.fws.gov/policy-library/282fw5> [<https://perma.cc/D9K4-7FYW>] (describing the administrative record as only containing documents relevant to agency’s “decision-making process” for a particular “final [agency] decision”).

¹⁵³ One further word—or two—on the enforcement context. It cannot be that agencies are prohibited, full stop, from announcing policies in adjudications that have resulted from agency-brought complaints—that is impossible in a world where law inevitably contains gaps and ambiguities. See *Kisor v. Wilkie*, 588 U.S. 558, 566 (2019). And so, courts would still have to develop criteria to separate tolerated agency policymaking from that which is disallowed. I argue below that such attempts will be fraught with problems. See *infra* notes 157–64.

To the extent that enforcement proceedings raise the possibility that an agency will unfairly, or with illicit motives, single out particular parties, I argue below that agencies should generally be required to explain why they are applying the policy to the parties at hand, or why they are levying

Perhaps for these reasons, the limits on agency policymaking by adjudication most often proposed, and in isolated cases adopted, have not involved assessing some antecedent choice to develop law through adjudication, even though *Chenery II* is usually conceived of as involving “agency choice of policymaking form.”¹⁵⁴ Rather, the agency’s fault lies not in some past decision to proceed via rulemaking or adjudication but in deciding an adjudication before it *in a particular way*, a way that should have suggested the need for rulemaking.¹⁵⁵ In the case actually before it, the agency presumably should have employed different reasoning while undertaking a rulemaking to govern future cases, or it should have held the adjudication in abeyance, if possible, until a rulemaking could be concluded.¹⁵⁶

Framed in this way, the issue then becomes how to identify when an agency’s reasoning has touched some danger zone indicating the need for rulemaking and requiring a judicial order setting aside the results of a particular adjudication in question. Let us go through the possibilities. To preview: each will suffer from one or both of the problems identified at the outset of this Section.

First, perhaps the problem is that the agency has decided the adjudication in question in a way that is too general, too unconnected to the particular facts at hand, or in a way that “fit[s] all cases at all times.”¹⁵⁷ The intuition pointing toward rulemaking here is pretty simple. Before the formulation of a general kind of policy, the agency may well benefit from hearing from the broad constituency affected by the policy.¹⁵⁸ That constituency would also benefit from the kind of notice provided pursuant to rulemaking proceedings.¹⁵⁹

a fine as opposed to ordering prospective relief, at least where they have discretion in the matter. See *infra* Section III.B.3.

¹⁵⁴ See Magill, *supra* note 10, at 1405–06.

¹⁵⁵ See, e.g., *First Bancorporation v. Bd. of Governors of the Fed. Rsr. Sys.*, 728 F.2d 434, 438 (10th Cir. 1984); Lawson & Postell, *supra* note 12, at 88–89.

¹⁵⁶ See Lawson & Postell, *supra* note 12, at 87 (“[W]hile the law since *Chenery II* has been generous towards agencies’ ability to make law through adjudications, there is no *conclusive* presumption that agencies can simply make policy through adjudication without engaging in rulemaking first.”).

¹⁵⁷ *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 496 (2d Cir. 1973) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777 (1969) (Douglas, J., dissenting)).

¹⁵⁸ See Shapiro, *supra* note 10, at 930 (“One of the substantial advantages claimed for rulemaking is that it requires the agency to allow general participation in the deliberative process by all those who may be affected by the rule, while no such opportunity is afforded in adjudication.”).

¹⁵⁹ See Pierce Jr., *supra* note 19, at 308–09.

The beginning of the difficulty, however, is that there is no stable way to draw a distinction between policies that are too general to be announced through adjudication and those that are not. Every agency decision in an adjudication will be attached in some way to the facts of the case before it.¹⁶⁰ If it is not, the agency would face a separate arbitrary-and-capricious challenge.¹⁶¹ How general an agency's resolution of the adjudication will appear to be amounts to a function of the facts the agency thinks are relevant in a legal or policy sense and how many other cases out in the world share those facts. The level of generality at which the agency decides to resolve a given adjudication is, therefore, somewhat outside of the control of the agency itself. How widely shared specific facts are is certainly outside the agency's ambit. And, if the agency sincerely believes the facts it chooses to highlight are the relevant ones under the statute, that, in some sense, is as well.

Thus, not only would having courts decide how general is too general pose a difficult line-drawing problem, but it is also, in some sense, incoherent to say that an agency has acted improperly in resolving an adjudication at one level of generality versus another. Indeed, the agency would be acting insincerely, in a way otherwise worthy of condemnation, if it chose to resolve the adjudication on grounds other than that which it felt were the genuine ones.¹⁶² But that is what courts would be inviting if they limited agencies in adjudications to deciding cases pursuant only to facts peculiar to the parties. The *Bell Aerospace*¹⁶³ Court, drawing on *Chenery II*, recognized as much, writing that agencies have a "statutory duty to decide the issue at hand in light of the proper standards and that this duty remained 'regardless of whether those standards previously had been spelled out in a general rule or regulation.'"¹⁶⁴

To make things more concrete, consider the following cases. In the proceedings challenged in *First Bancorporation v. Board of Governors of the Federal Reserve System*,¹⁶⁵ one of the few cases to set aside an agency adjudication for the generality of its reasoning, the agency concluded that a certain category of bank account could not be offered on an unregulated basis.¹⁶⁶ It did so because it found that such accounts would undermine the public policy objectives of the relevant statute.¹⁶⁷ That conclusion would certainly set policy at some level of

¹⁶⁰ See *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (the agency's decision must draw a "rational connection between the facts found and the choice made").

¹⁶¹ See *id.*

¹⁶² See *Dep't of Com. v. New York*, 588 U.S. 752, 783–84 (2019).

¹⁶³ 416 U.S. 267 (1974).

¹⁶⁴ *Id.* at 292 (quoting *Chenery II*, 332 U.S. 194, 201 (1947)).

¹⁶⁵ 728 F.2d 434 (10th Cir. 1984).

¹⁶⁶ See *id.* at 438.

¹⁶⁷ See *id.*

generality—nonparty banks that offered accounts of the kind in question would be subject to the precedential effect of the agency’s conclusion in future proceedings.¹⁶⁸ But if the agency understood such accounts to be inconsistent with the statute, what was it supposed to do? Contrive an explanation that seemed more particular with respect to the specific parties before it? The court in *First Bancorporation* seemed to want the agency to engage in a discussion more specifically tied to the bank’s actual customers.¹⁶⁹ But that does not really achieve anything if it turns out that the bank’s customers are, in the relevant respects, similar to everyone else’s. Again, the policy’s generality is just the product of facts in the world and what is legally relevant to the decision.

A similar conundrum is posed by *Chenery II* itself. The facts there were not in dispute.¹⁷⁰ The transactions were what they were, and an agency judgment either that they were condemnable or not condemnable would have resulted in a policy allowing or prohibiting such transactions at the identical level of generality.¹⁷¹ The same would be true if the facts initially were in dispute, but the agency concluded, pursuant to fact-finding otherwise entitled to deference, that the facts were one thing as opposed to another.¹⁷²

In such circumstances, it would appear freakish to condemn an agency explanation for operating at too high a level of generality. To say that an agency should have resolved a case in a way more particular to the parties—if that is even possible—is to say that the agency should have evaded its duty to resolve the case on the grounds it understood to be the correct ones and embraced a result contrary to its expert judgment, which is something administrative law typically discourages. Alternatively, courts might hold agencies liable for failing to stay proceedings in the adjudication until a rulemaking can be concluded, in effect forestalling agencies from employing certain grounds for their decision but not requiring agencies to provide contrived reasoning.¹⁷³ But that is an option that may not often be practically or procedurally available, particularly in light of the extended time it takes to conclude

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* (“The Board examined no specific facts as to the potential adverse effects of unregulated Foothill NOW accounts.”).

¹⁷⁰ *Chenery II*, 332 U.S. 194, 207 (1947).

¹⁷¹ See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969) (plurality opinion) (“Subject to the qualified role of stare decisis in the administrative process, [adjudicated cases] may serve as precedents.”).

¹⁷² See, e.g., *Tex. Tech Physicians Assocs. v. Dep’t of Health & Hum. Servs.*, 917 F.3d 837, 844 (5th Cir. 2019) (“We defer to the agency’s findings of fact if they are supported by substantial evidence.”).

¹⁷³ Cf. *Bauer v. DeVos*, 325 F. Supp. 3d 74, 108, 110 (D.D.C. 2018) (concluding that agency’s decision “to stay twenty-two sections of [a] final rule” pending judicial review was arbitrary and capricious because it “offer[ed] no explanation”).

a rulemaking proceeding.¹⁷⁴ It invites an impossible guessing game by agencies concerning what kinds of reasoning will be judged too general and thus require the stay of an adjudication. And it threatens to judicially reorient agency resources in a way that administrative law doctrines seek to avoid.¹⁷⁵ In short, it is not an attractive or viable option.

A second potential, and related, limit would task courts with deciding whether a given agency pronouncement was too command-like to have been issued via adjudication—commands, after all, are the classic stuff of rules. Apart from the fact that the policy announced by the NLRB in the *Excelsior* case was not applied to the parties at hand, some Justices seemed additionally perturbed that the addresses-and-names policy was described as “a requirement” such that “[f]ailure to comply . . . shall be grounds for setting aside” elections.¹⁷⁶ But because policies announced in the course of adjudications are never binding in the way regulations are¹⁷⁷—because, in other words, the agency may always depart from them in the next adjudication¹⁷⁸—and to say that an agency’s policy too closely resembles a command is to fault it for its choice of wording when that choice has no practical consequence. An agency pronouncement that, for example, a given advertising practice is unfair or deceptive in the context of a particular adjudication *is* to announce that the same practice is, from the agency’s present point of view, prohibited going forward. Whether the agency states that implication forthrightly or not may affect how “command-like” the agency’s pronouncement appears, but it does nothing to change how free the agency is to depart from its position in a subsequent adjudication, how free future parties are to urge the agency distinguish or make an exception for their case, and the like. All that a limitation on “command-like” policies would do, potentially, is require the agency to more carefully

¹⁷⁴ See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-205, FEDERAL RULEMAKING 5 (2009) (“[T]he average time needed to complete a rulemaking across our 16 case-study rules was about 4 years, with a range from about 1 year to nearly 14 years . . .”).

¹⁷⁵ On such considerations barring or severely limiting review in other contexts, see, e.g., *WildEarth Guardians v. U.S. EPA*, 751 F.3d 649, 656 (D.C. Cir. 2014) (upholding EPA’s denial of a petition for rulemaking under the “extremely limited and ‘highly deferential standard that governs our review of an agency’s denial of a rulemaking petition” and “declin[ing] to second-guess EPA’s decision to prioritize regulatory actions in a way that best achieves” statutory objectives); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990) (“[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.”).

¹⁷⁶ *Wyman-Gordon*, 394 U.S. at 763 (plurality opinion) (quoting *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966)).

¹⁷⁷ See *infra* note 390 and accompanying text.

¹⁷⁸ See, e.g., *United Student Aid Funds, Inc. v. King*, 200 F. Supp. 3d 163, 170 (D.D.C. 2016) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016))).

hide its views on the future-oriented effects that adjudication always has, undermining rather than serving notice values.¹⁷⁹

Next possibility: a court might inquire into whether an agency has transgressed the bounds of its discretion by announcing a policy via adjudication that is not sufficiently rooted in “preexisting legal norms,” such that it appears to come “out of thin air.”¹⁸⁰ Another way to put the concern is that when an agency acts in a way that cannot really be described as involving interpretation but rather constitutes pure policymaking, the agency is not really acting as a court and should choose to employ processes suited to legislative as opposed to judicial decision-making.¹⁸¹ And here is one circumstance where due-process-infused notice considerations might point most strongly toward notice-and-comment rulemaking.¹⁸²

Again, however, things begin to break down once you consider how to implement an administrable limitation based on such worries. All agency decision-making, including in adjudications, must be rooted at some level in “preexisting legal norms.”¹⁸³ Congress must supply such norms, although they can be fairly broad under current caselaw, according to the nondelegation doctrine.¹⁸⁴ Agencies must apply those norms,¹⁸⁵ and they must do so in ways that respect the limits of the statute in question.¹⁸⁶

In an important sense, then, the “out of thin air” limitation is a real one.¹⁸⁷ If an agency policy is not legally supportable under the statute in question, the agency cannot apply it in an adjudication, just as it could not through rulemaking.¹⁸⁸ There are parts of Justice Jackson’s dissent in *Chenery II* that read as if he is making this point, and, if that is the case, any disagreement I have with him may be thinner than first imagined: while I might disagree with the conclusion that the policy in *Chenery II* was insupportable under the statute in question, if it was in fact insupportable, I would have no problem with the courts setting it aside.¹⁸⁹

¹⁷⁹ See, e.g., *FCC v. Fox Television Stations (Fox Television II)*, 567 U.S. 239, 253 (2012) (recognizing that agencies are required “to provide a person of ordinary intelligence fair notice of what is prohibited” (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008))).

¹⁸⁰ *Lawson & Postell*, *supra* note 12, at 54, 66.

¹⁸¹ See *Wyman-Gordon Co.*, 394 U.S. at 765 (plurality opinion) (denouncing agency’s argument that it could formulate new policy through adjudication rather than “rule-making provisions of the Administrative Procedure Act” without applying the policy “therein”).

¹⁸² See *Lawson & Postell*, *supra* note 12, at 88–89.

¹⁸³ *Id.* at 54.

¹⁸⁴ See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472–75 (2001).

¹⁸⁵ See, e.g., *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410–13 (1971).

¹⁸⁶ See 5 U.S.C. § 706(2)(C) (agency action set aside if unlawful).

¹⁸⁷ See *Lawson & Postell*, *supra* note 12, at 66.

¹⁸⁸ See 5 U.S.C. § 706(2)(C) (agency action set aside if unlawful).

¹⁸⁹ *Chenery II*, 332 U.S. 194, 216 (1947) (Jackson, J., dissenting) (“The truth is that in this decision the Court approves the [agency]’s assertion of power to govern the matter *without* law”)

Such a limit would not be internal to the *Chenery II* doctrine, however. Agencies must follow their statutes in all contexts and when employing any procedure.

My understanding, however, is that proponents of limiting agency adjudicators to applying “preexisting legal norms”¹⁹⁰ mean something more than agencies must follow whatever statutory norms apply. Rather, the limit would prevent agencies from embracing policies through adjudication that, though supportable in the thin sense, cannot be described as genuinely *interpreting* those norms.¹⁹¹ Nothing in the dictionary is likely to give you much guidance on whether the transactions at issue in *Chenery* were “fair and equitable”¹⁹²—or so the critique would go.

The question then becomes whether courts can properly limit agency adjudicators to acting in ways that merely interpret such preexisting norms, as opposed to creating what might be deemed new policy pursuant to them.

Here, it is tempting to simply invoke authority. Decades of administrative law scholarship has questioned whether courts can draw a stable line between acts of interpretation and lawmaking in the context of the interpretive rules exception to notice-and-comment rulemaking.¹⁹³ I would add that, when it comes to agency adjudication, much decision-making occurs pursuant to statutory norms written in such a way that even those who hold a stronger-than-the-average-law-professor belief in the distinction between interpretation and lawmaking would concede that an act of policymaking discretion is inevitable. As Professor Jeffrey Pojanowski has written in an article otherwise defending a “neoclassical” view of interpretation, statutory standards invoking

(emphasis added)). There is another sense in which an agency policy, announced in an adjudication, might be insupportable under a statute. Some statutes merely prohibit actions that are made unlawful by agency rule or regulation. Section 10(b) of the Exchange Act is a prominent example. See 18 U.S.C. § 78j(b). In such cases, therefore, the result of an agency adjudication needs to draw support not only ultimately from the statute but also from a previously promulgated agency regulation. Cf. *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (holding that an agency cannot breathe life into an otherwise inoperative statute through an interpretive rule not issued via notice and comment). In such cases, the issue then becomes whether agency policies are supportable under both the underlying statute and some agency regulation. See A.C. PRITCHARD & ROBERT B. THOMPSON, *A HISTORY OF SECURITIES LAW IN THE SUPREME COURT* 137–40 (2023) (describing the courts’ reception to the SEC’s expanding use of § 10(b) and SEC Rule 10b-5 in order to prohibit insider trading); see also *infra* Part IV (arguing that courts may properly ask whether a policy adopted via adjudication violates a governing regulation).

¹⁹⁰ Lawson & Postell, *supra* note 12, at 54.

¹⁹¹ See Lawson & Postell, *supra* note 12, at 66 (“Everyone understood that the agency [in *Chenery II*] was creating a new norm of conduct out of thin air.”).

¹⁹² *Chenery II*, 332 U.S. 194, 204 (1947) (explaining SEC’s view of what “fair and equitable” meant under the statute).

¹⁹³ See Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 317–19 (2018) (summarizing scholarship).

reasonableness or the public interest present “cases in which there is no surface upon which traditional lawyers’ tools can have purchase.”¹⁹⁴ Applying such standards in the context of particular cases therefore requires recourse to considerations that will smack of policymaking, not the application of legal tools oriented to meaning. And indeed, turning to the judicial analogy, it may be the case that federal statutes primarily implemented by judges and not agencies may be less likely to contain such open-textured commands, but when they do, even courts rely on policy-laden determinations that cannot be cleanly tied to the “meaning” of the text.¹⁹⁵

Thus, whether an agency determination made during an adjudication appears like policymaking or interpretation may depend more on the underlying statutory standard than any choice the agency can be said to have made. Consider, again, the situation in *Chenery II*, where the question was whether a certain complex set of transactions resulted in a reorganization that was “fair and equitable.”¹⁹⁶ Or consider, to borrow from a well-known teaching case on the interpretive-rule exception, an agency determining how many feet high a fence must be to adequately contain certain dangerous animals.¹⁹⁷ Those questions cannot be answered “by a process reasonably described as interpretation.”¹⁹⁸ Agencies in such circumstances would therefore be hamstrung, effectively unable to reach determinations within their domain without risking condemnation for excessive policymaking by adjudication.

One response to the above may be to return to the agency’s antecedent failure to flesh out broad standards like those above *through rulemaking*, such that the agency ensures that all is left for its adjudicators to do is interpret—in some genuine sense—its own regulations. But that focus brings its own difficulties. The first is the classic justification for the *Chenery II* doctrine—namely agencies’ greater expertise when it comes to deciding how much fleshing out should be done through adjudication as opposed to rulemaking.¹⁹⁹ Another is the fact that agencies may often lack the practical ability to conduct a sufficient number of rulemakings to reduce their adjudicators’ task to mere interpretation.²⁰⁰ In light of the inevitable gaps and ambiguities in the agency’s own rules,

¹⁹⁴ Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 893–94 (2020).

¹⁹⁵ See, e.g., Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 431, 442 (2008) (characterizing the courts’ decision-making in antitrust cases).

¹⁹⁶ 332 U.S. 194, 204 (1947).

¹⁹⁷ See *Hector v. USDA*, 82 F.3d 165, 168 (7th Cir. 1996).

¹⁹⁸ *Id.* at 170.

¹⁹⁹ See *supra* note 19 and accompanying text.

²⁰⁰ See *Kisor v. Wilkie*, 588 U.S. 558, 566 (2019) (discussing “familiar” ambiguity in regulations “often” due to “the well-known limits of expression or knowledge”).

courts would still be confronted with deciding whether agency adjudications represent “genuine” interpretations of their regulations, triggering the set of concerns associated with the interpretive-rules exception.²⁰¹ And the process of deciding whether agencies had left statutory standards “too unclear” or whether more rulemaking is required implicates the kind of considerations that courts have traditionally invoked both to defer to agencies’ decisions not to launch rulemaking proceedings in response to a petition and to eschew “programmatic” challenges alleging agency failure to adequately implement a statutory scheme in a general sense.²⁰²

The fundamental problem with requiring agencies to settle all issues through rulemaking, however, is that it amounts to a demand not only that agencies promulgate some number more regulations but also that those regulations be of a certain kind. After all, if the agency regulations themselves are open-ended and call for the kind of policy determinations that are inevitable when a written law speaks in terms of fairness or reasonability or similar, that presumably would not solve the problem.²⁰³ But what that does is rob the agency of a policy judgment—to rely on standards instead of rules, for example—that would otherwise be open to it.²⁰⁴ Thus, it would transform what purports to be a procedural question regarding how agencies implement statutes into a substantive requirement that agencies settle matters in a particular way, contrary to how the agency would have done so, and without any statutory warrant in either the APA or the underlying statute.

Turn then to the final possibility. Perhaps the problem arises when an agency, in the adjudication under review, has departed from its prior precedent by contradicting its prior reasoning or even pulling a 180.²⁰⁵ In this view, it is not agency policymaking by adjudication per se that is the problem but agency *reversals* of policy through adjudication. Recall the facts of *Bell Aerospace*, where the NLRB determined that

²⁰¹ See *supra* note 189 and accompanying text.

²⁰² See, e.g., *WildEarth Guardians v. U.S. EPA*, 751 F.3d 649, 656 (D.C. Cir. 2014) (upholding EPA’s denial of a petition for rulemaking under the “extremely limited and highly deferential standard that governs our review of an agency’s denial of a rulemaking petition” and “declin[ing] to second-guess EPA’s decision to prioritize regulatory actions in a way that best achieves” statutory “objectives”); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990) (“[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.”).

²⁰³ See *Kisor*, 588 U.S. at 566.

²⁰⁴ See *Chenery II*, 332 U.S. 194, 203 (1947) (explaining that some “problem[s] may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule”); cf. Vincy Fon & Francesco Parisi, *On the Optimal Specificity of Legal Rules*, 3 J. INSTITUTIONAL ECON. 147, 147 (2007) (“Incomplete legal precepts can be purposefully enacted as a way to optimize the lawmaking and adjudication functions.”).

²⁰⁵ See, e.g., *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 495 (2d Cir. 1973), *aff’d in part and rev’d in part*, 416 U.S. 267 (1974).

certain workers were nonmanagement in an alleged reversal of its prior stance.²⁰⁶ Or imagine that, prior to the transaction at issue in *Chenery II*, the agency had determined that there was nothing wrong with the kind of transactions engaged in by the insiders in that case.²⁰⁷ Here, concerns of notice or fairness tied to the retroactive effect of the agency's determination may point toward the desirability of notice and the kind of purely prospective resolution that comes with rulemaking.²⁰⁸

Again, however, serious administrability problems present themselves. It cannot be that *every* agency position taken in an adjudication can only be reversed (or revised?) through rulemaking. Indeed, that would seem perverse from the standpoint of those who favor limits on policymaking by adjudication. It would transform every agency adjudication of first impression into a forum for the agency to announce not only principles that apply prospectively through the workings of agency stare decisis but true substantive rules that are binding in future agency adjudications unless and until they are changed through rulemaking.²⁰⁹ There are good reasons, however, for the traditional view that regulations are binding in adjudications whereas adjudicative precedents are just that—precedents which can be departed from using the same process by which they were created,²¹⁰ a kind of symmetry-of-procedure rule that is also reflected in other contexts.²¹¹

So, it must be that a limitation on agency reversals of policy would only apply to some subset of reversals that would be deemed too dramatic, too consequential, or too unexpected to be done by anything other than rulemaking. This provides a nice segue to the next Part. That is because the problem posed by agency reversals, thus conceptualized, is just one instantiation of the general problem raised when agencies apply policies in circumstances where the parties' reliance interests may be upset by the application of the policy. What I argue is that courts should recognize such situations as involving policy questions, not legal or procedural ones, and therefore, agencies should shoulder an explanatory burden when applying policies with such retroactive effects, but the resulting explanations should be upheld if reasonable.

²⁰⁶ See *id.*

²⁰⁷ *Contra Chenery II*, 332 U.S. 194, 198 (1947) (“[N]either Congress nor the [agency] had promulgated any general rule proscribing [the] action [in question] . . .”).

²⁰⁸ See *Weaver*, *supra* note 18, at 197 (noting special concern with “second impression rules” issued via adjudication); see also *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).

²⁰⁹ See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969) (plurality opinion) (“Subject to the qualified role of stare decisis in the administrative process, [adjudicated cases] *may* serve as precedents.” (emphasis added)).

²¹⁰ See *infra* notes 390–99 and accompanying text (setting forth such reasons).

²¹¹ See *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 102 (2015) (rejecting view that interpretive rules may become ingrained such that their revision requires notice-and-comment rulemaking).

III. RETROACTIVITY, ANTIRETROACTIVITY, AND FAIR NOTICE

This Part confronts the fact that policies announced via adjudication are typically applied “retroactively” to the parties to the proceeding in which they are announced. The retroactive aspect of agency policymaking by adjudication, and not the announcement of a policy per se, is what many critics fasten on when articulating what it is about agency policymaking by adjudication that most is most “Orwellian”—or similar.²¹² The dominant judicial approaches, at least as articulated, have treated questions of retroactivity as requiring exceptional treatment. Because retroactivity is viewed as a necessary aspect of adjudication, or because it is seen to raise fairness concerns of a particular kind, normal administrative law principles have given way to special judicial policing of administrative retroactivity.

This Part argues against such retroactivity exceptionalism and in favor of subjecting the retroactivity question to normal principles of administrative law. In particular, courts should recognize that agencies may have a choice when it comes to whether to apply the rule announced to the parties at hand or to grant a kind of exception with respect to them, and a majority of the Supreme Court was wrong in *Wyman-Gordon* to the extent it indicated otherwise. Given that, courts should approach issues of retroactivity along similar lines as they treat other issues where agencies have a choice: by requiring agencies to shoulder a—usually modest—explanatory burden. As long as agencies provide a valid explanation, their decision to apply a policy to the parties at hand, or not, should generally stand as a matter of the APA. Apart from the APA, the Constitution may place some limitations on agencies when it comes to applying policies retroactively. But current constitutional constraints cover a much smaller terrain than the courts’ jurisprudence on administrative retroactivity, and any further limitations imposed by the Constitution should be defended forthrightly as a matter of constitutional law and be backed by some constitutional theory sufficient to allocate ultimate decision-making authority to the courts.

Though, in some ways, calling for a reconceptualization of the caselaw on retroactivity is not radical. In fact, the Supreme Court has more or less embraced my framework—but perhaps because the Court’s more recent cases have not used the language of “retroactivity,” no one, including the lower courts, seems to have noticed. In *FCC v. Fox Television Stations, Inc.* (“*Fox Television I*”),²¹³ the Court faced an agency change in policy, announced in an adjudication, and held that,

²¹² See, e.g., Hickman & Nielson, *supra* note 11, at 974.

²¹³ 556 U.S. 502 (2009).

for APA purposes, the agency need only satisfy its normal *State Farm*²¹⁴ burden, including by addressing relevant reliance interests.²¹⁵ Three years later, in *FCC v. Fox Television Stations, Inc.* (“*Fox Television II*”),²¹⁶ the Court faced the constitutional questions not before it in the prior round and recognized that the Constitution places some limits on agencies when they levy sanctions on the basis of past conduct.²¹⁷ For their part, the lower courts have continued to hew to administrative retroactivity exceptionalism as a matter of rhetoric.²¹⁸ But the bonds imposed by *Wyman-Gordon* have been loose in practice,²¹⁹ and agencies’ retroactivity determinations usually stand. Rhetoric should conform to reality, and the balance of this Part sketches out how.

A. *The Limitations of Analogy*

First, a bit about what courts mean when speaking of agency policymaking by adjudication being “retroactive.” Courts and scholars sometimes draw a distinction between “primary” and “secondary” forms of retroactivity.²²⁰ Primary retroactivity involves “chang[ing] what was the law in the past,”²²¹ or applying a new rule of decision to “past conduct or prior events.”²²² A decision attaching a new liability based on wholly past conduct is probably the classic example.²²³ Secondary retroactivity involves facially prospective changes that have “retroactive effects” in that they unsettle investment-backed expectations and the like.²²⁴ A decision to place new conditions on the renewal of a party’s government-granted license to engage in certain activities, substantially limiting the forward-looking profits the party expects to enjoy, may fall in this bucket. Perhaps sensing the conceptual and normative slipperiness of the distinction between primary and secondary retroactivity,²²⁵

²¹⁴ 463 U.S. 29 (1983).

²¹⁵ See *Fox Television I*, 556 U.S. at 515, 530.

²¹⁶ 567 U.S. 239 (2012).

²¹⁷ See *id.* at 253.

²¹⁸ See, e.g., *Reyes v. Garland*, 11 F.4th 985, 992 (9th Cir. 2021).

²¹⁹ See, e.g., *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 391 (D.C. Cir. 1972) (noting limit on “[w]hatever may be the precise reach of *Wyman-Gordon*”).

²²⁰ See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring).

²²¹ Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1068 (1997) (“Primary retroactivity describes rules that ‘change what was the law in the past’; secondary retroactivity describes nominally prospective rules with retroactive effects.” (quoting *Bowen*, 488 U.S. at 220 (Scalia, J., concurring))).

²²² *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc).

²²³ See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 761–64 (1969).

²²⁴ Fisch, *supra* note 221.

²²⁵ See *id.* (noting that “the scholars who initially drew this distinction recognized that both types of retroactivity present similar concerns and should be analyzed similarly”).

however, courts have not been particularly attentive to it in the context of agency policymaking by adjudication. Indeed, the D.C. Circuit has suggested that every instance of policymaking by adjudication is in some sense retroactive in that it binds parties to a result using principles not previously announced,²²⁶ and it has used the fact that “primary” retroactivity is not at play as just one consideration bearing on whether the agency’s retroactive application of a policy was unjust.²²⁷

This Section proceeds, then, with a somewhat loose conception of what it means to be retroactive in mind—every policy not previously announced can, when applied in the course of the adjudication in question, be subject to challenge for being unduly retroactive. That capaciousness is, in part, to remain faithful to the caselaw and, in part, because deciding whether a particular agency action is retroactive in some narrower sense is a conceptually fraught enterprise.

With that in mind, one tempting place to begin an analysis of the permissibility of administrative retroactivity—or nonretroactivity—would be by analogy.²²⁸ In announcing policies by adjudication, are agencies similar to legislatures or courts? To the extent they are like courts, retroactivity would be nothing special, and making policies or principles announced via adjudication nonretroactive is what would require special justification.²²⁹ Historically, judicial retroactivity—using principles announced in the case at hand to resolve it and other non-final cases regardless of when they were initiated—has been the norm.²³⁰ The Supreme Court once experimented with allowing federal courts to make their decisions nonretroactive, but that experiment, if not wholly concluded, has not garnered much interest in recent decades.²³¹ The thinking, it seems, is that required retroactivity keeps judges in their lane—courts announce principles or “policies” because doing so is necessary to decide the case at hand and pursuant to the historical understanding that judges are doing something more like law-divination than law-making.²³²

In some ways, of course, agencies are acting just like courts when they adjudicate cases and announce their reasons for doing so,²³³ reasons that often resemble policies or principles that then must be honored

²²⁶ See *Safari Club Int’l v. Zinke*, 878 F.3d 316, 332–33 (D.C. Cir. 2017).

²²⁷ See *Clark-Cowlitz*, 826 F.2d at 1084–85.

²²⁸ See *De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015).

²²⁹ See *id.* (“[T]he more an agency acts like a judge . . . the stronger the case may be for retroactive application of the agency’s decision.”).

²³⁰ See, e.g., *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) (noting that “[j]udicial decisions have had retrospective operation for near a thousand years”).

²³¹ See generally Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276, 293–98 (2020) (summarizing the history of judicial nonretroactivity).

²³² See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

²³³ See *De Niz Robles*, 803 F.3d at 1172.

as a matter of precedent going forward.²³⁴ Indeed, that is the thrust of much of the argument pursued in Part II. So, perhaps, as a majority of Justices appeared to agree in *Wyman-Gordon*, policies announced via agency adjudication must be made retroactive.²³⁵

But the judicial analogy breaks down in other respects. Unlike the Article III federal courts, agency officials are not granted life tenure and are thought of as being closer to the push and pull of partisan politics—raising a concern that agencies will single out the disfavored and use retroactivity as a particularly heavy cudgel.²³⁶ Agency adjudication often occurs against the backdrop of rather more open-ended statutory language than the federal courts face,²³⁷ and the category of agency adjudication includes things like licensing that look less like what courts typically do.²³⁸ Add to that the fact that policies articulated by agencies in the course of adjudications often have a greater degree of specificity than what we typically see from courts,²³⁹ and one may worry that agency policies are more likely to be out of the blue than principles espoused by courts.

Further, as a matter of norms, agencies tend to view themselves as less bound by notions of stare decisis than courts, so that policies announced via adjudication are less likely to be sticky than judicial pronouncements.²⁴⁰ Formally, agencies are not subject to Article III and, along with that, historical notions of what comes part and parcel with the “judicial power.”²⁴¹ All added together, the above gives lie to what might already be considered, in the judicial context, a kind of useful fiction that adjudicators are merely finding the law as opposed to making it.

²³⁴ See *supra* Part II.

²³⁵ See *supra* note 70 and accompanying text.

²³⁶ See *De Niz Robles*, 803 F.3d at 1169.

²³⁷ See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474–76 (2001) (referencing open-ended phrases like “in the ‘public interest’” that agencies, despite nondelegation doctrine, are lawfully empowered to interpret (quoting *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943))).

²³⁸ See, e.g., *Clair Aero, Inc. v. Nat’l Transp. Bd.*, 223 Fed. App’x 1, 2 (D.C. Cir. 2007) (addressing agency’s licensing decision under arbitrary and capricious standard of judicial review).

²³⁹ See Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference’s Effects on Agency Rules*, 119 COLUM. L. REV. 85, 95 (2019) (“After all, an extensive body of social science research points to cognitive and institutional tendencies that lead administrative agencies to give primacy to providing clarity and specificity in the here and now and to ignore any future purported benefits to the agency that might come from crafting vague rules.”); cf. *supra* notes 160–61 and accompanying text (arguing that agencies’ duty to explain their adjudicative decisions in light of the facts at hand, which is subject to judicial review, results in greater specificity).

²⁴⁰ See Daniel M. Tracer, *Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute*, 12 DEPAUL BUS. & COM. L.J. 1, 12 (2013).

²⁴¹ See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (rooting restrictions on judicial nonretroactivity in Article III).

As more open practitioners of lawmaking, then, perhaps agencies should be treated as akin to legislatures when it comes to the retroactivity of policies announced via adjudication. And at least some kinds of legislative retroactivity are, if not disallowed, disfavored.²⁴² When Congress is clear about its intention to make legislation retroactive, Congress's determination is typically subject only to rational basis review.²⁴³ But courts hesitate to conclude that Congress intends such retroactivity—a clear statement rule requires a statute to be especially lucid about its retroactive effect, though typically only when it comes to “genuine[],” meaning something like “primary,” retroactivity.²⁴⁴ That is because things like “fair notice, reasonable reliance, and settled expectations” are thought threatened by legislative retroactivity,²⁴⁵ which may also allow the state to “singl[e] out disfavored individuals or groups and condemn[] them for past conduct they are now powerless to change.”²⁴⁶ For similar reasons, then, perhaps agencies should be deterred from retroactive policymaking, whether through adjudication or rulemaking. Indeed, a clear statement principle already disallows agencies from making their regulations, announced via notice and comment, retroactive—again, at least in the “genuine” sense—unless Congress expressly invests them with such authority.²⁴⁷

Once the legislative analogy is considered, however, several disanalogies immediately come to mind, and agencies-as-adjudicators begin looking again like courts. Unlike legislatures, agencies-as-adjudicators are engaged in resolving particular matters presented to them involving parties whose “case”—whether it resembles a judicial-type dispute or something like a license or benefits application—requires resolution. In *Chenery II*, the agency needed a policy, at least with respect to the kind of transaction in question, in order to resolve whether Federal's reorganization should be allowed to proceed.²⁴⁸ Nonretroactivity may therefore be impossible. What is more, agencies are subject to statutory

²⁴² See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 272 (1994) (“[W]hile the constitutional impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule.”).

²⁴³ See *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984).

²⁴⁴ See *Landgraf*, 511 U.S. at 265, 277. In *Landgraf*, the Court indicated that such genuine retroactivity would attach depending on “whether [the statute] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.” *Id.* at 280.

²⁴⁵ *Id.* at 270.

²⁴⁶ *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169 (10th Cir. 2015).

²⁴⁷ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

²⁴⁸ As I will argue below, the agency might explain that, although reorganizations of the kind in question are generally disfavored, exceptions should be made for reorganizations proposed before the agency's pronouncement. But that, too, is a kind of policy, applied to resolve the case at hand and so “retroactive” in that sense. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 762 (1969) (considering whether agency acted properly in applying policy it had announced but—due

constraints—and guidance—when applying statutes to the case at hand in a way that legislatures are not.²⁴⁹ And as a matter of administrative law, agencies shoulder explanatory burdens that legislatures do not.²⁵⁰

Plus, perhaps the differences between agencies and courts are overstated—the picture painted above may be too simplistic. State common law courts often engage in more open acts of lawmaking than do their federal counterparts, and they are often composed of elected officials.²⁵¹ Though decisions by such courts are often retroactive,²⁵² I have not heard such lawmaking described as involving acts of “authoritarianism”—or Orwellianism. Even in the federal system, one can find pockets of federal common law where judicial lawmaking is more openly performed. Such pockets include situations where courts must, in the course of deciding cases, work out the details of what looks like rather open-ended statutory language. The Sherman Act²⁵³ is a prominent example.²⁵⁴ There, judicial decision-making more closely resembles that performed by agencies, and it is typically thought to be subject to weaker stare decisis norms.²⁵⁵ Under what conditions is such decision-making legitimate? Perhaps the most persuasive answer is that such policymaking is legitimate when authorized by Congress,²⁵⁶ in the same way that Congress authorizes an agency to decide cases pursuant to statutory standards, invoking fairness, reasonability, and the like.²⁵⁷

The Sections that follow make the case for treating agencies neither like courts nor like legislatures when it comes to the permissible retroactivity of policies announced via adjudication. Rather, it advocates for treating them as agencies. This means subjecting their determinations regarding “retroactivity” to the same requirements that apply to agencies’ discretionary choices generally, requirements that are thought to

to reliance interests—did not apply in prior adjudication). It is just a policy with a certain kind of exception designed to protect reliance interests. *See id.*

²⁴⁹ *See* 5 U.S.C. § 706(2)(C).

²⁵⁰ *See* Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43, 43 n.9 (1983).

²⁵¹ *See, e.g.,* Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243, 2246 (2017) (explaining that because “[s]tate courts are not subject to Article III’s case or controversy limitations,” they are not barred under the Federal Constitution from issuing prospective advisory opinions).

²⁵² *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 519 n.17 (1986) (noting that “retroactive application has generally been accepted in the common law evolution of tort doctrine”).

²⁵³ 15 U.S.C. §§ 1–7.

²⁵⁴ *E.g.,* Lemos, *supra* note 195, at 431.

²⁵⁵ *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461–62 (2015).

²⁵⁶ *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 40–48 (1985).

²⁵⁷ *See* Nat’l Broad. Co. v. United States, 319 U.S. 190, 225 (1943) (discussing agency’s “statutory obligation[]” to regulate according to the “public interest”).

address concerns such as the possibility of arbitrariness, favoritism, and tunnel vision. At the same time, it would treat the question whether to apply a rule in a way that might be considered retroactive within the primary control of the agency, recognizing that such questions involve tradeoffs among different values best performed by the agency itself, within broad bounds set by the Constitution.

B. Normalizing the Law of Administrative Retroactivity

1. The Tension

There is a seeming tension in the Supreme Court's caselaw on retroactivity. In *Wyman-Gordon*, a majority of the Court appeared to conclude that policies announced in the course of an adjudication must be applied to the parties at hand.²⁵⁸ In *Chenery II* and *Bell Aerospace*, the Court indicated that, in certain circumstances, applying a policy to the parties at hand may work an undue burden and thus render the agency's order illegal.²⁵⁹ Faced with such circumstances, the agency seemingly must either transgress the bounds set by *Wyman-Gordon* by making its policy nonretroactive, or it must undertake a rulemaking to announce the policy it desires, meanwhile deciding the case in hand on other grounds—or staying it indefinitely.²⁶⁰

To see how this judicial posture toward retroactivity diverges from the normal administrative law rules of the road, consider the following scenarios.

Imagine that in *Chenery II*, the SEC had said the following: “Although we think that reorganizations of this kind should, as a general matter, not be permitted, we will approve the application in this case and any other case where the application was filed prior to today because fair notice and associated concerns justify an exception regarding such applications.”

Under normal principles of administrative law, and viewing the situation anachronistically under present-day law, courts would examine whether the agency policy—including its “exception”—comports with the statute.²⁶¹ They would ask whether the agency pointed to the right

²⁵⁸ See *supra* notes 64–72 and accompanying text.

²⁵⁹ See *Chenery II*, 332 U.S. 194, 203 (1947) (declining to forbid retroactive policymaking by adjudication but determining that “such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles”); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1973) (“[T]here may be situations where the Board’s reliance on adjudication would amount to an abuse of discretion or a violation of the Act . . .”).

²⁶⁰ See Levin, *supra* note 5, at 1090–91 (2004) (noting similar tension); Araiza, *Agency Adjudication*, *supra* note 18, at 362 (same).

²⁶¹ See, e.g., *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) (describing “arbitrary and capricious” review).

factors in determining the scope of the rule.²⁶² They would determine whether the agency attended to alternatives to the policy it adopted, including most likely the alternative of adopting a stricter rule that did not include the exception.²⁶³ But as long as the agency gave a satisfactory enough explanation for why it chose the policy it did, it would survive review.²⁶⁴

Under the logic of a majority of Justices in *Wyman-Gordon*, by contrast, it is likely that the agency order is simply invalid, no questions asked, for announcing a “purely prospective” policy.²⁶⁵ Indeed, the hypothetical is quite similar to the NLRB’s decision in *Excelsior*, the adjudication found invalid in *Wyman-Gordon*.²⁶⁶ There, the union had objected to the results of a union election because the employer had refused to supply the union with a list of the names and addresses of its employees.²⁶⁷ The Board found itself “persuaded” by the union’s submission and established a “requirement” that such lists should be provided.²⁶⁸ The Board then stated, in a footnote, that the “rule” “will not apply in the instant cases but only in those elections that are directed, or consented to, subsequent to 30 days from the date of this Decision.”²⁶⁹

Both the Board and the Supreme Court seemed to think that the reasoning given made the agency’s policy one with purely prospective effect—and the majority of the Supreme Court condemned it on that basis.²⁷⁰ The premise is somewhat questionable. If the “rule” considered along with its “exception” amounts to singular policy, the agency *was* applying the policy to the case at hand, it is just that the exception excused the employer from having followed the “rule” in question. More fundamentally, however, there is something odd about barring agencies from announcing their full view in the way seemingly disallowed by *Wyman-Gordon*. In both the *Chenery II* hypothetical above and in *Excelsior*, the agency was simply explaining that, although there were good reasons for a particular rule of decision as a general matter, those reasons were outweighed in the context of the particular case. That is simply the announcement of a result—“merger is approved” or “no list required”—and a full accounting of the rationale for that result—general reasons in favor of a contrary result outweighed in particular context. It would be strange if the full accounting somehow

²⁶² See *id.* at 43.

²⁶³ See *id.* at 51.

²⁶⁴ See *id.* at 42–43.

²⁶⁵ See *supra* notes 69–73 and accompanying text.

²⁶⁶ See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion); see also *supra* notes 69–73 and accompanying text.

²⁶⁷ *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1236 (1966).

²⁶⁸ *Id.* at 1239–40.

²⁶⁹ *Id.* at 1240 n.5.

²⁷⁰ *Id.* at 1246; see *supra* notes 69–73 and accompanying text.

rendered the adjudication an invalid one.²⁷¹ Indeed, it is asking—actually demanding—that the agency play coy with us. In *Excelsior*, the Board, faced with a union’s demand for a list, as assuming it was under an obligation to decide the matter one way or another, would presumably have had to say “even assuming, which we do not hold, that lists should be required, the employer would be excused from providing one under the circumstances.” That would seem to achieve little other than less clarity about the agency’s position.

Putting that to the side, let us take a look at the Supreme Court’s caselaw pulling in the other direction. Imagine that in *Chenery II* the agency had said, similarly to what it did say: “We think that reorganizations of this kind should, as a general matter, not be permitted, and we are applying that ‘policy’ to reject the reorganization as proposed.”

Under normal principles of administrative law, review would look similar to the first hypothetical. Courts would ask whether the policy was allowable under the statute and whether the agency’s reasoning was sound, including with respect to whether it considered various forms of transition relief, such as the “exception” described in the first policy, designed to blunt the impact of the policy on parties who were not in a position to anticipate it. But such review would ultimately be deferential.

Under *Chenery II* and *Bell Aerospace*, things are less clear. *Chenery II* announced that adopting a policy via adjudication might be illegal when the “ill effect of the retroactive application of [the] new standard” outweighs the “the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.”²⁷² *Bell Aerospace*—in the context of an agency flip-flop—likewise indicated that policymaking by adjudication might be invalid where reliance concerns are particularly substantial, where liability is imposed for past conduct, or where fines or penalties are involved.²⁷³ But both discussions of retroactivity are quite cryptic. Neither explicitly answers whether the retroactivity question is something on which the agency receives deference, though *Chenery II* went on to review the agency’s policymaking deferentially.²⁷⁴ The implication of finding undue retroactivity is also left unclear. When an agency is faced with a situation where the effects of retroactivity are particularly grave, must it resort

²⁷¹ See *Wyman-Gordon*, 394 U.S. at 774 (Black, J., concurring) (“The Board’s opinion should not be regarded as any less an appropriate part of the adjudicatory process merely because the reason it gave for rejecting the unions’ position was not that the Board disagreed with them as to the merits of the disclosure procedure but rather that while fully agreeing that disclosure should be required, the Board did not feel that it should upset the *Excelsior* Company’s justified reliance on previous refusals to compel disclosure by setting aside this particular election.” (citation omitted)).

²⁷² *Chenery II*, 332 U.S. 194, 203 (1947).

²⁷³ See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974).

²⁷⁴ See *Chenery II*, 332 U.S. at 204–09.

to rulemaking if it wishes to announce the policy in question? Or may it announce such a policy in the course of an adjudication but make it nonretroactive, creating a kind of exception to the *Wyman-Gordon* rule for extreme cases? Alternatively, is it that *courts*, as a matter of judicial review, are empowered to relieve agency orders of their retroactive effect even while blessing the underlying policy going forward? Around the time of *Bell Aerospace*, the D.C. Circuit began supplying answers to such questions, and it is to those answers we will now turn.

2. *The D.C. Circuit's Resolution*

I will refer to the D.C. Circuit's body of case law on administrative adjudicative retroactivity as the *Retail, Wholesale* doctrine, originated from *Retail, Wholesale & Department Store Union v. NLRB*.²⁷⁵ Under that doctrine, which has been widely embraced outside the Circuit,²⁷⁶ the courts typically apply a “non-exhaustive list of five factors” in deciding whether an agency's retroactive application of a policy works a “manifest injustice” and is therefore invalid.²⁷⁷ Those factors are

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.²⁷⁸

The D.C. Circuit has admitted that “[t]he precise statement of the factors to be considered has . . . varied from case to case.”²⁷⁹ And in spots it has stated that of “primary importance” is whether the policy in question represents a truly new rule—as in a case where the agency overrules a prior decision—or is merely a clarification.²⁸⁰

When an agency applies a policy to the parties at hand and the factors indicate that a “manifest injustice” has resulted from that application, courts invalidate the retroactive aspects of the order in question, giving the order in question “prospectively-only effect.”²⁸¹ They do not,

²⁷⁵ 466 F.2d 380 (D.C. Cir. 1972).

²⁷⁶ Araiza, *Agency Adjudication*, *supra* note 18, at 374–75.

²⁷⁷ *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc).

²⁷⁸ *Retail, Wholesale*, 466 F.2d at 390.

²⁷⁹ *Williams Nat. Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993).

²⁸⁰ *E.g.*, *United Food & Com. Workers Int'l Union v. NLRB*, 1 F.3d 24, 34–35 (D.C. Cir. 1993).

²⁸¹ *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (quoting *Clark-Cowlitz*, 862 F.2d at 1081); *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1097, 1102 (D.C. Cir. 2001) (upholding underlying Board policy but denying it retroactive effect).

at least in the cases I have uncovered, require rulemaking.²⁸² Perhaps in light of *Wyman-Gordon*, courts have been somewhat cagier about whether agencies can deny their own orders' retroactive effect when the *Retail, Wholesale* factors demonstrate manifest injustice, but the answer seems to be that they can and, indeed, must.²⁸³ In one case, the D.C. Circuit reviewed an agency decision to deny its order retroactive effect by asking whether such denial was adequately justified, without indicating that prospective-only orders are per se invalid.²⁸⁴ When the D.C. Circuit has confronted *Wyman-Gordon* head-on, it has most often tended to reduce it to a presumption that agency orders be retroactive, which can be overcome through a demonstration of manifest injustice.²⁸⁵

Courts have largely conceptualized the *Retail, Wholesale* doctrine as imposing a legal restriction on agency action, with the result that agencies do not receive deference on whether a policy should be made retroactive.²⁸⁶ *Retail, Wholesale* itself stated that "[w]hich side of th[e] balance preponderates is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision."²⁸⁷ Subsequent decisions in the D.C. Circuit have stuck to the no-deference view,²⁸⁸ though with some equivocation and not without provoking both agreement and disagreement from other circuits.²⁸⁹ As an extension of the no-deference position, some courts have

²⁸² See *Verizon Tel. Cos.*, 269 F.3d at 1109; *Epilepsy Found.*, 268 F.3d at 1097, 1102–03 (upholding underlying Board policy but denying it retroactive effect).

²⁸³ See *United Food*, 1 F.3d at 34–35 (conceptualizing question as whether the agency "erred by 'retroactively' employing its new test in this case"); *Clark-Cowlitz*, 826 F.2d at 1081; *McDonald v. Watt*, 653 F.2d 1035, 1042 (5th Cir. 1981) ("Having concluded that the legal rule followed in this case was properly established through adjudication, we turn to the related but separate question whether the agency should have applied the rule to this case.").

²⁸⁴ See *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539–41 (D.C. Cir. 2007) (invalidating, as inadequately justified, agency decision to make aspects of its order prospective-only).

²⁸⁵ See *Gen. Am. Transp. Corp. v. Interstate Com. Comm'n*, 872 F.2d 1048, 1060–61 (D.C. Cir. 1989), *reh'g denied* 833 F.2d 1029 (D.C. Cir. 1989), *cert. denied* 493 U.S. 1069 (1990); see also *Qwest*, 509 F.3d at 539 (invoking "the presumption of retroactivity").

²⁸⁶ See, e.g., *Clark-Cowlitz*, 826 F.2d at 1094 ("Agencies possess no particular expertise on the issue of retroactivity, and reviewing courts in turn have 'no overriding obligation of deference' to an agency's decision to give retroactive effect to a new rule." (quoting *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972))).

²⁸⁷ *Retail, Wholesale*, 466 F.2d at 390.

²⁸⁸ See, e.g., *Qwest*, 509 F.3d at 536–37 ("proceeding without deference to the Commission's determination . . . [on the] retroactive application" of the policy); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987).

²⁸⁹ See, e.g., *Qwest*, 509 F.3d at 539 ("In reviewing agency decisions on retroactivity, it appears that we have generally shown little or no deference to agencies' rejection of claims that retroactivity produced manifest injustice but have been quite deferential to decisions regarding the retroactive effect of agency action where retroactivity would not work a manifest injustice." (citations omitted)); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015) (retroactivity "raises a pure question of law we may assess de novo"); *McDonald v. Watt*, 653 F.2d 1035, 1042–46 (5th Cir. 1981) (stating that "[i]t may be that an agency's decision concerning retroactivity is entitled to

held that it is unnecessary for courts to have the benefit of an agency explanation regarding retroactivity.²⁹⁰

3. *A Better Way?*

This Section makes the case for reconstructing the courts' caselaw on retroactivity. The upshot is the following: bracketing actual constitutional limits that may be relevant, which I turn to next,²⁹¹ whether to make a policy retroactive or not should be viewed as a policy question akin to those posed whenever an agency makes a given policy more or less stringent along some dimension. The same should be true for questions such as whether to levy a fine for a statutory violation or order only prospective relief. When the statute does not tie the agency's hands, such questions present issues concerning the proper degree of transition relief that are best left to agency resolution, provided the agency has reasonably explained its choice.

As an initial matter, the courts have rooted the *Retail, Wholesale* doctrine in the APA²⁹² and, seemingly, in the part of the APA that allows courts to set aside agency actions that are "arbitrary and capricious."²⁹³ It is not a constitutional doctrine, though there are related constitutional doctrines with which it is sometimes conflated and with which it partially overlaps.²⁹⁴ Courts do not treat retroactivity under normal principles of arbitrary and capricious review, however, with most holding the level of permitted retroactivity to be a legal question decided without deference to the agency's views.²⁹⁵

The case for the contrary position, which would conceptualize whether to apply the policy to the parties at hand as a policy question, begins with the observation that adjudicative retroactivity questions are similar in form to other questions that are typically treated as straightforward policy issues under the APA. That conclusion builds on the insight, well-developed in the literature, that retroactivity problems are

some deference," but that "[w]e need not resolve the question of the precise standard of review, however, because we believe that the Department abused its discretion by applying [the policy in question] to this case"); *NLRB v. W.L. Miller Co.*, 871 F.2d 745, 748 & n.2 (8th Cir. 1989) (noting disagreement).

²⁹⁰ See, e.g., *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 515 (9th Cir. 2012) ("If there is no need to defer to an agency's position on the issue, there is no particular reason to remand to allow the agency to consider in the first instance whether the rule should be applied retroactively."). Again, there is some confusion on the matter. See *Gilbert v. Fed. Mine Safety & Health Rev. Comm'n*, 866 F.2d 1433, 1441–43 (D.C. Cir. 1989) (remanding to the agency to explain its position at least on whether the statutory interests involved were sufficient to overcome the ill effects of retroactivity).

²⁹¹ See *infra* Section III.B.4.

²⁹² See, e.g., *Cassell v. FCC*, 154 F.3d 478, 483 n.4, 486 n.6 (D.C. Cir. 1998).

²⁹³ See *Gilbert*, 866 F.2d at 1443.

²⁹⁴ See *infra* Section III.B.4.

²⁹⁵ See *supra* notes 285–88 and accompanying text.

akin to, and may be indistinguishable from, the general problem of allocating the benefits and burdens that inevitably flow from legal change.²⁹⁶ The effects of legal change may be managed in various ways: by grandfathering, by phase-ins, or, on the other side of the spectrum, by applying new rules rather more rigidly to present or even past conduct.²⁹⁷

In the nonadjudicative context, whether or not to grant such forms of relief would be a policy question for the agency, provided the statute does not require a particular result.²⁹⁸ Imagine, for example, that an agency imposes a facially prospective rule, following notice and comment, severely limiting power plants from emitting a certain common pollutant—it has “retroactive effects.”²⁹⁹ The agency may decide to apply those limits to all sources, regardless of when they were built, potentially substantially affecting investments already made in existing sources. Or it may choose to apply the new limits only to new sources, or to apply them to existing sources after a phase-in period, thus managing the effects of the new rule on past investments. Assuming that the statute in question has not made the choice for the agency, there is no doubt that courts would review the issues presented as policy matters on which the agency receives deference.³⁰⁰ And that is so even if the agency had previously rejected the very limits it was now embracing—i.e., in cases of flip-flops.³⁰¹

Now return to the *Chenery II* scenarios described above. Presented with a party’s application, the agency has come to the view that, as a general matter, a given reorganization should not be allowed under the statute in question. Applying that “policy” to the parties before it may limit the value of past investments made by those parties, as seemed to be the case in *Chenery II* itself.³⁰² The agency may manage the effects on past investment by fashioning an exception to the general policy with respect to the parties at hand—and presumably similarly situated parties. Or it may choose not to by making the policy “retroactive” with respect to those parties. Under the law described above, the correctness of that choice would ultimately be considered one for the courts—to be

²⁹⁶ See Fisch, *supra* note 221, at 1090; Kaplow, *supra* note 252, at 518.

²⁹⁷ Kaplow, *supra* note 252, at 511.

²⁹⁸ The caveat, of course, is that under *Bowen*, an agency may not make a rule retroactive in the primary sense without special authorization. See 488 U.S. 204, 213–16 (1988); *supra* note 247 and accompanying text (discussing *Bowen*). Some of the discussion below may cast doubt on the Supreme Court’s decision in *Bowen*, but a full analysis of retroactivity in rulemaking is outside the scope of this Article.

²⁹⁹ Fisch, *supra* note 221, at 1068.

³⁰⁰ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

³⁰¹ See, e.g., *id.* (employing deferential arbitrary and capricious review where “agency chang[ed] its course by rescinding a[n existing] rule”).

³⁰² See *Chenery II*, 332 U.S. 194, 206 (1947) (“[P]rimary object of [company’s plan] . . . was admittedly to obtain the voting power that was accruing to that stock through the reorganization and to profit from the investment therein.”).

decided according to a predescribed set of factors and with, according to some courts, a presumption in favor of retroactivity.³⁰³ But the issues involved are fundamentally similar to that involving our power plant owner. The question is whether the immediate imposition of the new policy is justified given its effects on past investments or whether a form of transition relief should be granted.

Nor does the analysis change if we are dealing with something that looks more akin to “primary” retroactivity—in which the new policy is applied in a way that appears to more directly affect obligations related to something that happened in the past.³⁰⁴ As Professor Jill Fisch has pointed out, “[a] rule that retroactively imposes a million dollars in liability on a manufacturer for past pollution activities has the same wealth effect as the nominally prospective adoption of stricter emissions controls that reduce the value of the manufacturer’s factory by a million dollars.”³⁰⁵ Or consider an agency’s decision, in an adjudication, to order that certain workers receive back pay for overtime already accrued and not paid out or to order only that the employer pay such overtime going forward. In either case, the employer may be equally caught off guard by the agency’s decision to award overtime at all. The difference in the two scenarios is just the size of the new liability—a difference in degree not kind.³⁰⁶

Of course, to say that retroactivity in the adjudicative context poses problems similar to that faced whenever legal actors alter legal rights and obligations, including when agencies promulgate regulations via notice and comment, is not necessarily to establish that they are policy problems on which courts should defer. Perhaps, instead, courts should go in the opposite direction and extend *de novo* review to all questions of appropriate transition relief.³⁰⁷

³⁰³ See *supra* Section II.B.2.

³⁰⁴ Fisch, *supra* note 221. The analysis may change, at least as a doctrinal matter, when the government penalizes past conduct. See *infra* notes 344–52 and accompanying text.

³⁰⁵ Fisch, *supra* note 221, at 1069.

³⁰⁶ In the tax context, a similar point has been made by use of a hypothetical first introduced by Michael Graetz, and here summarized by Louis Kaplow:

Consider the example of a 30-year municipal bond. Five years into the life of the bond, Congress decides to repeal the tax exemption. A nominally prospective repeal would cost the bondholder the value of the tax exemption for the remaining 25 years, which would probably constitute a significant portion of the bond’s value. If Congress instead chose a nominally retroactive effective date, applying the repeal to the previous tax year as well, the loss to the bondholder would be the value of the exemption for 26 years rather than 25. Such a modest additional decrease in value surely amounts to a minor difference in degree rather than a major difference in kind.

Kaplow, *supra* note 252, at 516.

³⁰⁷ See, e.g., *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015) (retroactivity “raises a pure question of law we may assess *de novo*”).

A moment's reflection reveals why, as an institutional matter, agencies are the better actors to make such decisions. For one, going down the other road would open potentially all agency decision-making to *de novo* review, since commonplace agency decisions, including decisions such as whether to move a pollution standard from 9 parts per million of a given pollutant allowed to 8 parts per million, affect past investments.³⁰⁸ Even our current Supreme Court, however, continues to favor deference to agencies on matters properly conceived of as involving policy.³⁰⁹

More broadly, the considerations generally thought relevant when allocating decision-making authority between agencies and courts support allocating decisions over retroactivity to agencies. During the Supreme Court's experiment with judicial nonretroactivity, the Court itself conceived of the issue in largely prudential terms—as involving a mix of different considerations requiring a kind of balancing.³¹⁰ Typical lawyers' tools, involving the meaning of texts and the like, have little purchase.³¹¹ Of course, it is not the case that courts are never called on to answer such questions—but their presence counsels deference when there is another institutional actor in a superior position to address them.

Here, agencies are such an actor. The questions presented, even under the courts' view of retroactivity, involve determining whether imposition of a new policy on present parties is worth it given the statutory interests involved.³¹² Those determinations, which are deeply enmeshed with the particular statutory scheme at issue, involve the kind of considerations for which agencies will have superior information and expertise.³¹³ Just what are the burdens involved, exactly? And how much will applying the policy in question advance the interests the statute protects? After answering those and similar questions, the

³⁰⁸ See Kaplow, *supra* note 252, at 518 (observing that “[m]any of the concerns raised by retroactive application of a new policy relate to all policy changes”).

³⁰⁹ See *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (explaining that when it comes to policy courts only examine whether the agency “has reasonably considered the relevant issues and reasonably explained the decision”); *Dep’t of Com. v. New York*, 588 U.S. 752, 777 (2019) (agencies are required only “to consider the evidence and give reasons for [their] chosen course of action,” and courts should not “ask whether [the agencies’] decision was ‘the best one possible’ or even whether it was ‘better than the alternatives’” (quoting *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292 (2016))).

³¹⁰ See Fisch, *supra* note 221, at 1073.

³¹¹ See Pojanowski, *supra* note 194, at 893 (distinguishing between questions “upon which traditional lawyers’ tools can have purchase” and those that cannot and favoring deference for the latter).

³¹² See *Chenery II*, 332 U.S. 194, 203 (1947).

³¹³ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting potential for even Administrator with nonbinding authority to accumulate “experience and informed judgment” worthy of deference).

issue is which side of the ledger prevails. Regardless of whether that is conceived of as involving a kind of balancing of benefits and burdens or a choice among incommensurable values, agencies are the more accountable decisionmakers when it comes to supplying that necessarily value-laden answer.³¹⁴ Thus, considerations related to both expertise and accountability justify lodging retroactivity determinations in agencies, not courts.³¹⁵

So why have the courts, by and large, stated that *de novo* review is required for retroactivity questions?³¹⁶ One answer is that retroactivity is seen to present fairness concerns that justify special judicial involvement.³¹⁷ To return to the point above, however, it is difficult to see why adjudicative retroactivity presents fairness concerns different from other kinds of agency decisions that may have equally unexpected effects in undoing the benefits of past actions.³¹⁸ Moreover, as Fisch has argued, fairness concerns might cut both for and against retroactivity to the extent that it may properly be deemed unfair to deny the benefits of a new legal rule—and one that the relevant decisionmaker believes to be superior—to the party urging its adoption.³¹⁹ And in any event, courts have not taken the position that agencies may *never* apply policies retroactively in adjudications,³²⁰ presumably because it is understood that concerns about unfairness may properly be eclipsed by other considerations—such as efficiency.³²¹ Indeed, courts have more commonly stated that there is a presumption *in favor* of adjudicative retroactivity that is only overcome where the balance of considerations tips most strongly against immediate application of the policy.³²² The question is which actor is the correct one to strike the balance between fairness and other values—for the reasons above, it is agencies.

³¹⁴ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2294, 2299 (2024) (Kagan, J., dissenting) (noting “politically accountable” nature of agencies).

³¹⁵ The greater expertise and accountability of agencies were often identified as the primary rationales for *Chevron* deference, but they provide an even more powerful justification for allocating pure policy questions to agencies, which agency determinations made in the course of policy-making by adjudication often involve. See Pojanowski, *supra* note 194, at 893 (“[Courts] lack the capacity and accountability to do more than patrol the outer bounds of reasonableness when it comes to agency policymaking.”); see also *Loper Bright*, 144 S. Ct. at 2263 (stating that agencies will continue to receive policy-style deference when “the statute’s meaning [is] that the agency is authorized to exercise a degree of discretion,” such as when the statute uses open-ended terms “such as ‘appropriate’ or ‘reasonable’”).

³¹⁶ See *supra* notes 286–90.

³¹⁷ See Fisch, *supra* note 221, at 1084–85.

³¹⁸ See *supra* notes 304–06 and accompanying text.

³¹⁹ See Fisch, *supra* note 221, at 1084–86.

³²⁰ See, e.g., *Chenery II*, 332 U.S. 194, 203 (1947).

³²¹ See Fisch, *supra* note 221, at 1084–94 (discussing the tradeoff between fairness and efficiency in the context of retroactive policies).

³²² See *supra* note 285 and accompanying text.

The other answer would point to the lingering effects of *Wyman-Gordon*, which seemed to deny agencies the choice whether to impose policies nonretroactively.³²³ In this telling, the *Retail, Wholesale* factors provide the agency with a kind of legal excuse for nonretroactivity in cases of true “manifest injustice” but not otherwise as a matter of discretion.³²⁴ As discussed above, the majority of Justices in *Wyman-Gordon* were wrong to the extent they claimed that an agency cannot announce a policy of the kind they did in an adjudication.³²⁵ The agency in *Excelsior* just gave a complete explanation for its result—that the employer need not have provided a list of employees—in light of a demand made by one of the parties for such a list.³²⁶ That the agency felt, and put on the record, that such lists should be provided going forward merely filled in its full rationale and gave notice to parties.³²⁷ The agency remained perfectly free to alter or even abolish the list requirement in future adjudications because nothing an agency says in an adjudication is binding on it the way a legislative rule is.³²⁸ Such an explanation need not be seen as transforming the agency order in question into an invalid “rule” as opposed to simply providing a full rationale for the result the agency reached, and the contrary view has led to deleterious consequences to the extent it has led courts down the path of thinking about retroactivity as something other than a policy question for agencies.

That leads to a final point: to the extent this Article advocates for a more deferential posture toward agencies’ retroactivity determinations, critics of policymaking by adjudication may fear that the proposal is only making the problem worse from their perspective. The opposite is true. By loosening the bonds of *Wyman-Gordon*, agencies would be freer to provide exceptions to new policies with respect to the parties before them—and those similarly situated. Correspondingly, parties would be freer to ask for such exceptions. Agencies should, in many cases, be required to consider and respond to such requests under their general obligation to respond to significant alternatives raised by parties.³²⁹ The same would be true of requests for other kinds of transition relief, such as requests to levy prospective-only relief as opposed to a fine.

³²³ See *supra* note 70 and accompanying text.

³²⁴ See *supra* Section III.B.2.

³²⁵ See *supra* notes 270–71 and accompanying text. Much of my thinking tracks that of Justice Black’s concurrence in *Wyman-Gordon*. See 394 U.S. 759, 769–75 (1969) (Black, J., concurring); see also Levin, *supra* note 5, at 1090–91 (criticizing Justice Harlan’s reasoning).

³²⁶ See 156 N.L.R.B. 1236, 1239, 1240 & n.5 (1966).

³²⁷ See *supra* text accompanying notes 268–69.

³²⁸ See *infra* note 399 and accompanying text.

³²⁹ See Deacon, *supra* note 27, at 692–96.

Agencies' explanations for its resulting choice should be couched in the kind of considerations made relevant by the statute.³³⁰ And in crafting such explanations, agencies would have to more forthrightly explain why, in cases where new policies are applied to the parties at hand, the tradeoffs or values at play justify such a decision.³³¹ In other words, they would have to explain, "why *you*?" To the extent critics worry about retroactivity as a locus for administrative arbitrariness,³³² such requirements should provide succor. But when an agency has given such an explanation and that explanation comports with the statute in question, courts should be hands off and not attempt to rebalance the relevant considerations along the lines the court believes to be "correct."

4. *The Constitutional Backstop*

For the reasons above, agency retroactivity determinations should generally be given deference. However, there may be certain constitutional bounds that agencies cannot transgress and that may be relevant when an agency makes a policy retroactive to the parties in question. A full consideration of these bounds would require another article, and I suspect that such bounds, at least on the more substantive end of the spectrum, may themselves be elusive. My modest purpose here is to engage in a bit of burden shifting. Because, as I have argued, determining the degree of permitted retroactivity is appropriately viewed as a policy question under the APA,³³³ proponents of hard limits on adjudicative retroactivity are obligated to articulate limitations backed by a constitutional theory sufficient to justify judicial intervention in the face of action by the political branches.

The first set of possible limits, less controversial in practice, sound in the essentially procedural concern regarding parties' ability to make their case, which requires those parties know what standards may be applied. Two oft-cited cases arose in the context of constitutional challenges to state benefits programs. In *Holmes v. New York City Housing Authority*,³³⁴ the Second Circuit confronted allegations that applications for admission to public housing were not being "processed chronologically, or in accordance with ascertainable standards, or in any other

³³⁰ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

³³¹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agencies to provide satisfactory explanations for their actions that, among other things, show that the agency considered "important aspect[s] of the problem").

³³² See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 778 (1969) (Douglas, J., dissenting) (raising "arbitrary exercise of [agency] power" as reason to prefer rulemaking, which allows public input).

³³³ See *supra* Section III.B.3.

³³⁴ 398 F.2d 262 (2d Cir. 1968).

reasonable and systematic manner.”³³⁵ In *White v. Roughton*,³³⁶ the court considered a complaint alleging, among other things, that a state assistance program was being operated “without published standards for eligibility.”³³⁷ Both courts found that the allegations amounted to federal constitutional violations under the Due Process Clause of the Fourteenth Amendment.³³⁸ As the *Holmes* court put it, “due process requires that selections among applicants be made in accordance with ‘ascertainable standards.’”³³⁹

These cases comport with cases in the federal context holding that when an agency changes “a controlling standard of law,” the affected party “must be given notice and an opportunity to introduce evidence bearing on the new standard.”³⁴⁰ The issue in such situations is a procedural-due-process-type worry that the parties do not know how to satisfy the relevant standards because the standard that will be applied by the agency is, in one way or another, unknown.³⁴¹ Some courts have suggested that the solution requires something like a rulemaking.³⁴² The better cases hold that as long as the parties have notice of the standards that may be applied in advance, whether via a rulemaking or otherwise, and including by way of the adjudication in question, due process is satisfied.³⁴³ Procedural due process is properly concerned with obtaining the relevant goals—a party’s ability to make their case, the reduction of error, et cetera—and not with prescribing the exclusive means to do so.³⁴⁴

³³⁵ *Id.* at 264.

³³⁶ 530 F.2d 750 (7th Cir. 1976).

³³⁷ *Id.* at 751.

³³⁸ *See id.* at 754; *Holmes*, 398 F.2d at 265.

³³⁹ *Holmes*, 398 F.2d at 265 (quoting *Hornsby v. Allen*, 326 F.2d 605, 609–10 (5th Cir. 1964)).

³⁴⁰ *See, e.g., Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981).

³⁴¹ *See, e.g., id.*

³⁴² *See White*, 530 F.2d at 754 (finding that “written standards and regulations” were necessary to ensure that the program in question was administered in a “fair and consistent” manner). A federal district court in D.C. similarly concluded that the development of written standards was required for the administration of a benefits program run by the District of Columbia. *See Lightfoot v. District of Columbia*, 339 F. Supp. 2d 78, 89–92 (D.D.C. 2004), *rev’d and remanded*, 448 F.3d 392 (D.C. Cir. 2006). Neither case, it should be noted, quite held that the equivalent of notice-and-comment rulemaking must be used to promulgate such standards. *See id.* (recognizing need for only “ascertainable, written standards”); *White*, 530 F.2d at 754 (same). In the federal context, two other cases have relied on similar reasoning in concluding that a federal statute required the Secretary of Agriculture to conduct a rulemaking proceeding. *See Matze v. Block*, 732 F.2d 799, 803 (10th Cir. 1984); *Curry v. Block*, 738 F.2d 1556, 1564 (11th Cir. 1984).

³⁴³ *See Lightfoot*, 448 F.3d 392, 398 (D.C. Cir. 2006) (“There is certainly no conceivable due process claim that could be predicated on the notion that an agency must proceed to establish such standards through rulemaking rather than case-by-case determinations.”).

³⁴⁴ *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1895, 1903–04 (2016).

The second set of limits are more substantive in nature. Courts have found it particularly constitutionally troublesome when agencies attempt to *sanction* past conduct without providing a requisite degree of fair notice.³⁴⁵ The Supreme Court reaffirmed the constitutional requirement of fair notice in the second *FCC v. Fox Television* case.³⁴⁶ The Fifth Amendment, the Court explained, “requires the invalidation of laws that are impermissibly vague,” such as when “the statute or regulation under which it is obtained ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited.’”³⁴⁷ In *Fox Television II*, the Court invalidated the sanctions applied to television stations, in various administrative adjudications, for violations of the FCC’s “fleeting expletives” policy, a policy that the Court found had not been adequately spelled out at the time of the conduct in question.³⁴⁸ A large body of caselaw in the lower courts has also applied fair notice in order to constrain results in agency adjudications.³⁴⁹ Those courts have consistently looked outside of the statute or regulation being applied to determine whether constitutionally adequate fair notice has been provided.³⁵⁰

³⁴⁵ See, e.g., *Fox Television II*, 567 U.S. 239, 253 (2012).

³⁴⁶ *Id.*

³⁴⁷ *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

³⁴⁸ See *id.* at 254–58.

³⁴⁹ See, e.g., *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1325 (D.C. Cir. 1995) (as corrected June 19, 1995). The D.C. Circuit has occasionally intimated that fair notice has a purely constitutional dimension but that “normal” administrative law also provides a—presumably broader—set of protections from sanctions based on unclear law—protections that are sometimes conflated with the *Retail, Wholesale* doctrine and sometimes not. See *id.* at 1329; *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *Rollins Env’t Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 655 (D.C. Cir. 1991); see also Hickman & Nielson, *supra* note 11, at 974 (distinguishing between “Due Process” and “due process” and arguing that “even if these retroactivity concerns do not rise to the level of outright unconstitutionality, they nonetheless affect perceptions regarding the fairness and political legitimacy of agency actions”). Again, my preference would be for courts to more carefully delineate between constitutional and nonconstitutional concerns, leaving the balancing of nonconstitutional considerations to agencies because of their superior institutional capabilities in weighing various policy factors. See *supra* Section III.B.3.

³⁵⁰ See *Gen. Elec. Co.*, 53 F.3d at 1333; *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1559 (D.C. Cir. 1987). Note that constitutional fair notice, properly conceptualized, does not actually restrain agencies from announcing new policies in the course of adjudications. See, e.g., *Chenery II*, 332 U.S. 194, 203 (1947) (“refus[ing] to say that the [SEC] . . . was forbidden from . . . announcing and applying a new standard of conduct” in adjudication). It constrains agencies from using such policies as the basis for sanctioning past conduct. See, e.g., *Fox Television II*, 567 U.S. at 258. Thus, courts have upheld as permissible agency interpretations announced in the course of adjudications, even while vacating sanctions based on the same interpretation. See *Gen. Elec. Co.*, 53 F.3d at 1333–34. For that reason, fair notice concerns are absent where an agency announces a new policy in an adjudication—or completely reverses course from a previously announced policy—but declines to sanction conduct occurring prior to the adjudication in question. Such an action might raise an issue under *Wyman-Gordon*, though I have argued that *Wyman-Gordon* should be abandoned in the relevant respect.

Perhaps owing to its origins in the criminal law context, constitutional fair notice principles are concerned with the sanctioning of past conduct.³⁵¹ Fines or penalties for past behavior present the most obvious candidates for review. In both focusing on sanctions and on penalizing wholly past conduct, the constitutional limit, therefore, covers much less terrain than that which is covered by the *Retail, Wholesale* doctrine, though courts have occasionally stretched what it means for an agency to levy sanctions.³⁵² The precise boundaries of that terrain are beyond the scope of this Article. The point I would underscore, however, is that if managing the effects of legal change involves, as a general matter, policy-type questions on which agencies are, because of their superior expertise and accountability, better positioned to answer, then it should be the burden of those advocating for greater judicial intervention to articulate a sound constitutional basis for disallowing particular results.³⁵³ Thus, it would be preferable that such bounds, whatever their precise scope, be clearly articulated as constitutional limits and be defended by a sound constitutional theory sufficient to justify allocating ultimate decision-making authority to the courts, notwithstanding the justifications for agency deference articulated above. Such a posture would recognize that agencies may properly trade off nonconstitutional fairness concerns against other policy objectives.

IV. AMENDING, CIRCUMVENTING, AND VIOLATING REGULATIONS

This Part focuses on the second substantive limit on agencies' ability to make policy via adjudication: such policies must comport with—not violate—existing agency regulations, promulgated via notice and comment, just as they must comport with governing statutory law. That limit is uncontroversial, in a black-letter sense.³⁵⁴ However, particularly in the Ninth Circuit, a failure to fully appreciate it has spawned a series of more penumbral limitations on agencies' ability to “evade” rulemaking procedures. I argue that everything in this area should be reduced to whether the agency has violated or failed to follow on-the-book regulations, judged according to the applicable deference framework, and that the more penumbral limitations should be abandoned.

³⁵¹ See, e.g., *Fox Television II*, 567 U.S. at 253.

³⁵² See, e.g., *id.* at 255 (finding that although the agency declined to levy fines against one broadcaster, the other consequences attaching to the agency's order amounted to a sanction); *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968).

³⁵³ For such an articulation, see, for example, *Fox Television II*, 567 U.S. at 258 (setting aside agency orders after agency “failed to give [parties] fair notice”). See also *supra* notes 345–50 (analyzing examples of courts articulating due process constraints on agency action).

³⁵⁴ See *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 690 (D.C. Cir. 1973); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411, 416 (2010); Weaver, *supra* note 18, at 201–03.

In the Ninth Circuit, the story begins with *Ruangswang v. INS*.³⁵⁵ The Ruangswangs were an immigrant couple seeking status adjustments in order to stay in the country.³⁵⁶ Mrs. Ruangswang, as the court referred to her, claimed that she was exempt from an otherwise applicable requirement to obtain a certification from the Secretary of Labor regarding the effect of her employment on the American labor force.³⁵⁷ The stated basis for her exemption was that she was an “investor” as defined by then-existing Immigration and Naturalization Service (“INS”) regulations.³⁵⁸ INS conceded that Mrs. Ruangswang met the “objective requirements” of the investor-exemption regulation.³⁵⁹ The Board of Immigration Appeals (“BIA”) nevertheless denied her relief after applying an additional requirement, not reflected in the regulations, that the investment in question “tend to expand job opportunities” or otherwise ensure that the noncitizen’s function will “not be as a skilled or unskilled laborer.”³⁶⁰

On appeal, the Ninth Circuit invalidated the BIA’s denial.³⁶¹ Applying deferential review to the agency’s construction of its own regulations, the court held that “[t]here simply is no room for the agency to interpret the regulation so as to add another requirement.”³⁶² Therefore, the BIA had not “applied the correct law.”³⁶³ The court should have ended there. Somewhat curiously, however, the court went on to ask whether the BIA nevertheless could have validly established the new standard through an adjudication—notwithstanding the fact that it was not reflected in the regulations.³⁶⁴ Viewing this as a *Chenery II* issue, the court concluded that Mrs. Ruangswang lacked notice that the new requirement would be applied to her at the time she made the relevant investment and that, therefore, under *Bell Aerospace*, it was an abuse of discretion to apply it to her.³⁶⁵

In *Patel v. INS*,³⁶⁶ the Ninth Circuit followed a similar pattern.³⁶⁷ *Patel* had the same set of facts as *Ruangswang*, but Patel arguably did have notice that the BIA would apply the relevant additional requirement when he made his investment.³⁶⁸ The court nevertheless found

³⁵⁵ 591 F.2d 39 (9th Cir. 1978).

³⁵⁶ *Id.* at 41.

³⁵⁷ *Id.* at 41–42, 42 n.2.

³⁵⁸ *Id.* at 41–42.

³⁵⁹ *Id.* at 42.

³⁶⁰ *Id.* at 43 (quoting *In re Heitland*, 14 I. & N. Dec. 563, 567 (B.I.A. 1975)).

³⁶¹ *See id.* at 46.

³⁶² *Id.* at 43–44.

³⁶³ *Id.* at 43.

³⁶⁴ *See id.* at 44.

³⁶⁵ *See id.* at 45–46.

³⁶⁶ 638 F.2d 1199 (9th Cir. 1980).

³⁶⁷ *See id.*

³⁶⁸ *See id.* at 1200–03.

that, under the *Chenery II* line of cases, the agency could not apply the additional requirement in Patel's case.³⁶⁹ It variously invoked the fact that the additional requirement was "a broad requirement of prospective application," that the INS "itself had recognized the desirability of establishing" a similar requirement by regulation when it had proposed such a requirement through a notice of proposed rulemaking, and that the agency "eventually failed to include the job-creation standard in its rule."³⁷⁰ The BIA had thus "circumvent[ed] the rulemaking procedures of the APA" in adding the requirement through adjudication.³⁷¹

That brings us to *Ford Motor Co. v. FTC*.³⁷² In an administrative adjudication, the FTC charged Francis Ford, Inc., an auto dealership, and various affiliates with violating section 5 of the FTC Act by engaging in certain practices related to the provisioning of consumer credit.³⁷³ In an administrative appeal, the full Commission decided that the relevant practices did violate the Act.³⁷⁴ The Ninth Circuit vacated.³⁷⁵ Unlike in the immigration cases, there were no regulations on point.³⁷⁶ But expanding on *Patel*, the court held that the FTC had abused its discretion in condemning the practices in question via adjudication.³⁷⁷ The court expressed concern that the "adjudication changes existing law, and has widespread application."³⁷⁸ It further pointed to the fact that the FTC had initiated a still-pending rulemaking on related credit practices.³⁷⁹ Viewing this as evidence that the FTC itself thought rulemaking in the area to be desirable, the court concluded that the issues addressed by the adjudication should also be addressed by rulemaking.³⁸⁰ Because of the considerable tension between the court's invocation of the generality of the FTC's order and the Supreme Court's *Chenery II* caselaw, subsequent courts and commentators have generally understood *Ford Motor Co.* to stand for the idea that agencies may not "circumvent"

³⁶⁹ See *id.* at 1204–05.

³⁷⁰ *Id.* at 1203–04.

³⁷¹ *Id.* at 1204.

³⁷² 673 F.2d 1008 (9th Cir. 1981).

³⁷³ *Id.* at 1008–09.

³⁷⁴ *Id.* at 1009.

³⁷⁵ See *id.* at 1010.

³⁷⁶ Compare *Ruangswang v. INS*, 591 F.2d 39, 41–42 (9th Cir. 1978) (discussing immigration claimant's argument that she qualified for an exemption to existing regulation), with *Ford Motor*, 673 F.2d at 1009 (considering whether FTC was permitted to announce new policy in adjudication rather than rulemaking).

³⁷⁷ *Ford Motor*, 673 F.2d at 1009–10.

³⁷⁸ *Id.* at 1010.

³⁷⁹ See *id.*

³⁸⁰ See *id.*

pending rulemaking proceedings by resolving related issues through adjudication.³⁸¹

The final case in the series is *Montgomery Ward & Co. v. FTC*.³⁸² In broad strokes, the facts in *Montgomery Ward* were similar to those in *Ruangswang* and *Patel*. The FTC had previously promulgated regulations with which *Montgomery Ward* had seemed to comply.³⁸³ In the adjudication in question, however, the FTC determined that *Montgomery Ward* had failed to satisfy additional requirements that it now deemed appropriate.³⁸⁴ The Ninth Circuit conceptualized the question on appeal as whether the FTC had merely interpreted the existing regulations or had functionally amended them.³⁸⁵ Putting the question in terms of notice, the court wrote that “[a]n adjudicatory restatement of the rule becomes an amendment . . . if the restatement so alters the requirements of the rule that the regulated party had inadequate notice of the required conduct.”³⁸⁶ And pointing to the definition of “rulemaking” in the APA, which references amendments to rules, the court held that amendments to regulations must be done through rulemaking processes.³⁸⁷ On that basis, the Court held that at least certain of the FTC’s new requirements could not be applied.³⁸⁸

The Ninth Circuit should have resolved all of these cases using its initial insight from *Ruangswang*: where regulations apply, agency adjudicators must decide cases according to those regulations and, where they do not, they have acted contrary to law.³⁸⁹ It is black-letter administrative law that validly promulgated regulations are legally binding and cannot be altered in subsequent adjudications, whereas policies announced in adjudications may be.³⁹⁰ Cases such as *Ruangswang*, *Patel*, and *Montgomery Ward* all involve situations where certain requirements were spelled out in regulations, and the agency attempted to add certain other requirements in a subsequent adjudication.³⁹¹ The interpretive question is thus whether the regulations are properly read to preclude the application of the additional requirement the agency now

³⁸¹ See, e.g., *Union Flights, Inc. v. Adm’r, FAA*, 957 F.2d 685, 688–89 (9th Cir. 1992) (reading *Ford Motor Co.* for the proposition that agency may not use adjudication to “bypass a pending rulemaking proceeding”); see also Araiza, *Limits*, *supra* note 18, at 907 (explaining Ninth Circuit’s potential move away from *Ford Motor Co.*’s holding).

³⁸² 691 F.2d 1322 (9th Cir. 1982).

³⁸³ *Id.* at 1324–25.

³⁸⁴ See *id.* at 1326–27.

³⁸⁵ *Id.* at 1329.

³⁸⁶ *Id.*

³⁸⁷ See *id.*

³⁸⁸ *Id.* at 1332.

³⁸⁹ See *supra* notes 355–65 and accompanying text.

³⁹⁰ See *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 690 (D.C. Cir. 1973); Lubbers, *supra* note 354; Weaver, *supra* note 18, at 201–03.

³⁹¹ See *supra* notes 355–71, 382–88 and accompanying text.

seeks to impose. In many cases, principles such as *expressio unius est exclusio alterius* will provide an affirmative answer to that question and mean that the agency's addition of a new requirement is not so much an amendment as a violation of the regulation in question. Of course, the agency may argue that the "new" requirement is not so new and is merely an elaboration on an existing aspect of the regulation in question. That is again simply an interpretive question and the normal stuff of administrative law to be decided by whatever deference regime is appropriately applied to the interpretive question.

One might respond that I have been simply assuming the correctness of the background administrative law rule that regulations are binding on agency adjudicators in the sense that adjudicators cannot depart from these regulations in the same way they can from policies developed through prior adjudications.³⁹² Indeed, Russell Weaver has expressed some puzzlement about the consensus view that regulations are binding in such a way.³⁹³ It is true that nothing in the APA exactly says that rules promulgated via notice-and-comment processes bind adjudicators, whereas policies announced by the adjudicators themselves can be altered the next time around.³⁹⁴

On a textual level, perhaps here is where some use can be made of *Montgomery Ward's* observation that the definition of rulemaking includes actions that amend a rule, and therefore, the exclusive way to change the terms of regulations is through rulemaking processes.³⁹⁵ Or perhaps one might concoct a kind of structural argument drawn from the APA's division of agency functions between legislative and non-legislative modes³⁹⁶ and the background understanding that legislation binds courts.³⁹⁷

In any event, there are strong functional arguments in favor of retaining the traditional principle that agency regulations bind adjudicators, even at the top of the agency. I discuss below various incentives that the law may create for agencies to act through notice-and-comment processes—incentives that might be considered valuable to the extent that rulemaking is seen as preferable to adjudication as a mode for making policy.³⁹⁸ One simple incentive is granting legislative rules binding effect until altered through a subsequent rulemaking as it allows an agency to lock in a preferred policy with less risk that it will be altered as soon as

³⁹² See Weaver, *supra* note 18, at 201–07.

³⁹³ See *id.* at 205–07.

³⁹⁴ See 5 U.S.C. §§ 551–559, 701–706.

³⁹⁵ See *supra* notes 382–88.

³⁹⁶ See *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1329 (9th Cir. 1982) (drawing from the APA's definition of "rulemaking"); see also *supra* note 387 and accompanying text (noting structural argument).

³⁹⁷ See Weaver, *supra* note 18, at 205–07.

³⁹⁸ See *infra* Part V.

the agency changes hands. Moreover, much of what makes rulemaking preferable in most people's eyes—its settlement function, its ability to provide notice, et cetera—would be gone in a world where rules could be altered in subsequent adjudications. Indeed, doing rulemaking at all would lose much of its value. Under the current system, rules can be used to take matters off the table in subsequent adjudication so that agencies do not have to constantly redecide issues.³⁹⁹ Not so in a world where every agency rule is subject to contestation by the parties in an adjudication.⁴⁰⁰ For that simple reason, it would be preferable to keep to the standard position that rules promulgated via notice and comment bind agency adjudicators.

So, the Ninth Circuit was on the right track when it initially concluded that something is amiss when an agency departs from applicable regulations in deciding an adjudication.⁴⁰¹ Where the Ninth Circuit erred was in seeming to conclude—in contexts where the agency's resolution of a case seemed to diverge quite dramatically from what was envisioned by the regulations—that an agency might nevertheless have a *Chenery II* “power” to add to the requirements in question.⁴⁰² The court then concocted a set of ad hoc limitations on *Chenery II*, seemingly designed to disallow the agency from pulling off a fast one.⁴⁰³ In *Ford Motor Co.*, those limitations became unmoored when the court applied them where the agency adjudicators were not operating against the backdrop of existing regulations.⁴⁰⁴ The limitations that the Ninth Circuit reached for all suffer from serious problems.

First, the problems associated with basing limits around the “generality” of the agency's reasoning are discussed above.⁴⁰⁵ Those limits are also in serious tension with *Bell Aerospace*.⁴⁰⁶

Second, the real “notice” issue in *Ruangswang* was created by the agency violating regulations that it was bound to follow,⁴⁰⁷ a problem that holding agencies accountable for such violations would remedy. In a counterfactual world in which the requirement imposed by the BIA was an interpretively valid elaboration on existing regulations (or statute), any notice problem would simply reduce to the “retroactivity” issues addressed by the *Retail, Wholesale* line of cases.⁴⁰⁸ Indeed,

³⁹⁹ See *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 690 (D.C. Cir. 1973).

⁴⁰⁰ See Phillips, *supra* note 17, at 512 (noting stability in the law that rulemaking provides).

⁴⁰¹ See *supra* notes 355–65 and accompanying text.

⁴⁰² See *supra* notes 364–65 and accompanying text.

⁴⁰³ See *supra* notes 366–88 and accompanying text.

⁴⁰⁴ See 673 F.2d 1008, 1009–10 (9th Cir. 1981).

⁴⁰⁵ See *supra* notes 155–75 and accompanying text.

⁴⁰⁶ See *supra* note 164 and accompanying text (quoting *NLRB v. Bell Aerospace Co., Inc.*, 416 U.S. 267, 292 (1974)).

⁴⁰⁷ See 591 F.2d 39, 43–44 (9th Cir. 1978).

⁴⁰⁸ See *supra* Section III.B.2.

the Ninth Circuit has applied *Retail, Wholesale* in exactly such situations: the agency has imposed an arguably “new” requirement but one that appears allowable as an elaboration of existing regulations.⁴⁰⁹ As discussed, such cases should be dealt with using the normal reasoned decision-making requirements and not under a special separate test for retroactivity, and the same analysis would hold here.⁴¹⁰

Third, another set of limitations suggested by the Ninth Circuit involve “circumventing” the rulemaking process in a way other than violating a valid on-the-books regulation. The court has intimated, for example, that when an agency has demonstrated that a given requirement could have been imposed through rulemaking but was not, imposing it through adjudication might amount to illegal circumvention.⁴¹¹ It is also said that when an agency uses adjudication to resolve issues similar to those raised by a pending rulemaking, the agency may be guilty of illegally “bypassing” the regulatory process.⁴¹²

Any anticircumvention rule not tied to the violation of actual on-the-books regulations suffers from serious problems. For one, it would be hard to administer. Whether a rule is violated depends on traditional lawyers’ tools for determining meaning.⁴¹³ Whether the rulemaking process has been circumvented turns on difficult, policy-infused determinations regarding whether an agency’s past actions have demonstrated that the policy in question could have been adopted through rulemaking or whether pending rulemaking proceedings are sufficiently related to the policy in question that such policy should have been considered and accepted or rejected through rulemaking. Second, the anticircumvention cases have tended to focus on whether a certain policy *could* have been addressed through rulemaking,⁴¹⁴ but the relevant question is whether a policy *should* be adopted through rulemaking or whether the agency retains discretion to impose it instead in an adjudication. Third, allowing things like notices of proposed rulemaking to limit the ways in which an agency may decide future adjudications gives binding substantive effect to things that lack the force of law. Proposals are exactly that, and treating them as having the power to shape substantive outcomes would be to introduce a kind of procedural violation, not avoid one.

In addition, other doctrines can perform much of the work that the anticircumvention rule seeks to do. If, as in *Ruangswang* and *Patel*, the

⁴⁰⁹ In fact, it did so in another part of *Montgomery Ward* not discussed above. See 691 F.2d 1322, 1332–34 (9th Cir. 1982).

⁴¹⁰ See *supra* Section III.B.3.

⁴¹¹ See *supra* notes 366, 367, 371 and accompanying text.

⁴¹² See *supra* notes 372–81 and accompanying text.

⁴¹³ See, e.g., *Ruangswang v. INS*, 591 F.2d 39, 43–44 (9th Cir. 1978) (applying “principles of agency interpretation”).

⁴¹⁴ See *supra* notes 355–88 and accompanying text.

“legislative history” of applicable regulations reveals that the requirement the agency now seeks to impose was considered and rejected,⁴¹⁵ that may be relevant in deciding whether there has been an actual violation of those regulations—though as with statutes, the courts should be careful when making inferences from a history of failed amendments.⁴¹⁶ When it comes to “bypassing” ongoing rulemaking processes, the parties in ongoing adjudications are presumably free to reference comments, filings, and arguments made in related notice-and-comment proceedings. To the extent they are relevant, the agency in the adjudication may be under an obligation to respond to critiques or alternatives to the policy in question that have been brought to its attention as part of its obligation to engage in reasoned decision-making,⁴¹⁷ thus reducing the fear that agencies will resolve open issues in adjudications as a means of avoiding the analytical obligations typically associated with rulemaking.

A final limit discussed by the Ninth Circuit, most prominently in *Montgomery Ward*, involves adjudications that effectively “amend” existing regulations.⁴¹⁸ This limit is innocuous to the extent that it reduces to the question of whether existing regulations have been violated.⁴¹⁹ Professor William Araiza has argued that giving a procedural gloss to agencies’ obligation to follow their own regulations has benefits.⁴²⁰ Introducing the additional bit of nomenclature may have drawbacks as well, however. It invites questions about whether there is a different standard for determining whether an agency has “amended” a regulation as opposed to merely violating it.⁴²¹ In *Montgomery Ward*, the Ninth Circuit seemed to return once again to concerns about proper notice in discussing whether an agency has illegally amended its regulations via adjudication.⁴²² It would be preferable to focus on the more straightforwardly substantive inquiry regarding whether an existing regulation has been violated, using the typical lawyerly tools for answering that question. That mitigates notice problems but without having to orient the

⁴¹⁵ See *Patel v. INS*, 638 F.2d 1199, 1202 (9th Cir. 1980); *Ruangswang*, 591 F.2d at 43–44.

⁴¹⁶ See, e.g., *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“Congressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’” (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962))).

⁴¹⁷ See *Deacon*, *supra* note 27, at 692–96.

⁴¹⁸ See *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1329 (9th Cir. 1982).

⁴¹⁹ See *Ruangswang*, 591 F.2d at 43–44 (finding that agency did not apply “proper law” when it added to a rule during its adjudication in part because “[t]here simply [was] no room” in the regulation for the amendment).

⁴²⁰ See Araiza, *Limits*, *supra* note 18, at 910–13.

⁴²¹ See, e.g., *Montgomery Ward*, 691 F.2d at 1329.

⁴²² See *supra* notes 382–88 and accompanying text.

question around the more amorphous issue of whether a “reasonable person” would be on notice of this or that application of a regulation.

V. SOFT CONSTRAINTS ON POLICYMAKING BY ADJUDICATION

This final Part circles back, in light of all that has been said above, to the core procedural question raised by *Chenery II*: agencies’ use of adjudication as opposed to rulemaking in order to announce policies.⁴²³ In particular, I examine two sets of “soft” constraints on agencies’ ability to make policy through adjudication.⁴²⁴ These constraints do not result in courts effectively ordering agencies to use rulemaking as the vehicle for announcing certain kinds of policies, as would the constraints discussed in Part II, but they are designed to raise the costs of or influence agencies’ procedural decisions.

The first would impose a duty on agencies to explain why they have proceeded by adjudication as opposed to rulemaking—that is, agencies would have an explanatory burden not only with respect to the policy in question but also with respect to why the agency announced that policy through adjudication. Provided the agency gives a sufficient justification, however, the agency would still have the power to announce a given policy through adjudication.

The second category of constraint involves attempts to influence agency choice of policymaking form through manipulating the consequences of an agency’s decision to proceed via adjudication. For example, and most prominently, when agencies announce policies via adjudication they might be denied the deference they would normally receive had they gone through rulemaking.

I argue that, although such measures may be desirable because of the general advantages of rulemaking, among other reasons, the case for them is less straightforward than one might think, especially in a post-*Chevron*⁴²⁵ world. It is, at best, unclear whether the benefits of such soft constraints outweigh their potential cost.

A. Duty to Explain

Why should an agency have to explain its choice to make policy through adjudication versus rulemaking? If one thinks that rulemaking may often represent a superior option for the formulation of general policies, such a duty may have value. Going back to *Chenery II*’s observation that, though rulemaking is generally preferable, agencies may

⁴²³ See 332 U.S. 194, 203 (1947).

⁴²⁴ See *infra* Sections V.A–.B.

⁴²⁵ 467 U.S. 837 (1984), *overruled by* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

have valid reasons to act through adjudication,⁴²⁶ a duty to explain would allow courts to discern whether an agency has such reasons and, if not, to send agencies back to the procedural drawing board.⁴²⁷ More broadly, and as Professor Lisa Schultz Bressman has argued, a duty to explain may operate as a check on administrative arbitrariness.⁴²⁸ Indeed, in part as a check on such arbitrariness, agencies typically must give reasons, reviewable by courts, when they exercise their discretion in order to make particular choices.⁴²⁹ From this angle, it would appear anomalous for agencies to face no reason-giving requirement when they choose to make policy through adjudication as opposed to through some other form.

That courts have historically not required much by way of reason-giving⁴³⁰ when it comes to policymaking by adjudication thus stands as something of a puzzle. Magill has argued that the solution to the puzzle may lie in the observation that, though courts do not do much by way of directly reviewing agencies' choice of policymaking form, they do retain control over the consequences of agencies' choices.⁴³¹ I return to this mechanism of control in Section V.B. For now, let me suggest a few additional reasons that may caution against imposing upon agencies a duty to explain their decision to make policy through adjudication.⁴³²

⁴²⁶ See *Chenery II*, 332 U.S. 194, 202 (1947).

⁴²⁷ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴²⁸ See Bressman, *supra* note 10, at 555 (arguing that “a requirement that agencies supply the standards that guide and limit their discretion” would help combat concerns for arbitrariness).

⁴²⁹ See *id.* at 528.

⁴³⁰ Magill, *supra* note 10, at 1385.

⁴³¹ See *id.* at 1426–42.

⁴³² As an initial matter, the failure of courts to demand agencies account for their choice to make policy through means other than rulemaking may not actually be as anomalous as it might initially appear. The complaint at the heart of such cases is that the agency failed to act through a particular kind of procedure—typically notice-and-comment procedures. See *Chenery II*, 332 U.S. 194, 203 (1947). But when agencies' procedural options are not dictated by the APA, the lesson of *Vermont Yankee* is that courts cannot fault agencies for failing to act through certain kinds of procedure. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (“Absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965))). That is so even though agencies retain discretion to self-impose procedures in addition to those required by the APA. See *id.* at 524. See generally Merrill, *supra* note 34. An agency's failure to do so might well be considered a “choice” reviewable as a matter of arbitrary-and-capricious review or as an abuse of discretion. See, e.g., *State Farm*, 463 U.S. at 43. Indeed, in the years prior to *Vermont Yankee*, the D.C. Circuit repeatedly concluded that the nature of the agency's decision required the adoption of certain procedures. See, e.g., *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973) (“It is contemplated that, in the interest of providing a reasoned decision, the remand proceeding will involve some opportunity for cross-examination.”). But the practice of reviewing agencies' failure to adopt “gratuitous” procedures was decisively rejected by the Supreme Court, see *Vt. Yankee*, 435 U.S. at 543, and I am not aware of post-*Vermont Yankee* caselaw requiring agencies even to give reasons with respect to their procedural choices.

For one, under my reworking of the caselaw concerning retroactivity, which I have suggested is not terribly far from where courts stand today, agencies would have an explanatory burden with respect to their decisions concerning retroactivity.⁴³³ That is, agencies would have to defend their choice to apply the policy in question to the parties at hand, at least where the statute allows them that choice. Such a requirement would address some of the concerns that otherwise support an obligation to explain the agency's supposed procedural choice to proceed via adjudication by making the agency publicly articulate why statutory interests are best served by immediate application of the policy to these parties. Importantly, such an obligation would also provide a stable locus for judicial review. Because the agency has, by hypothesis, a choice over whether to make a certain policy retroactive in the very proceeding in question, such a decision can be considered in a similar manner to any other decision that the agency makes regarding the scope of the announced rule.

By contrast, as argued above, it may be difficult in many cases to isolate any choice that the agency actually made—with respect to the action under review—to proceed via adjudication as opposed to rulemaking.⁴³⁴ In such cases, it will, therefore, be unclear what exactly the agency must explain.⁴³⁵ Courts in APA cases sit in review of discrete agency actions—or failures to act—and not in judgment of an agency's overall course of conduct.⁴³⁶ When an agency makes policy in a particular action, the substantive contours of that policy are self-evident.⁴³⁷ But as suggested above, when it comes to the adjudication actually at issue, it may often not be very clear at all that the agency chose to make the policy in question through adjudication.⁴³⁸ And isolating when *any* such choice was made, and what the nature of the choice was, may involve a

Thus, the general rule would seem to be that, though agencies' substantive choices are reviewable for abuse of discretion, agency procedural choices, including but not limited to choices that can be characterized as about choice of policymaking form, are not. Perhaps it might be argued that the real anomaly is *Vermont Yankee* itself, but reversing from the course set by that decision would involve a more thorough reworking of administrative law doctrine that would not be limited to the traditional domain covered by the choice-of-policymaking-form literature. See Jack M. Beerman & Gary S. Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 858 (2007) ("*Vermont Yankee* is almost universally regarded as one of the most important administrative law decisions issued by the Supreme Court. And . . . the case has had a major doctrinal impact . . .").

⁴³³ See *supra* Section III.B.3.

⁴³⁴ See *supra* notes 144–53 and accompanying text.

⁴³⁵ See *supra* notes 144–47 and accompanying text.

⁴³⁶ Cf. Magill, *supra* note 10, at 1395 (arguing courts do not review the "basis for the agency's decision"). But see *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 372 (1998) (doing more searching review of agency's past course of decision-making).

⁴³⁷ See *supra* notes 160–61 and accompanying text (arguing that agencies' duty to explain their adjudicative decisions in light of the facts at hand results in greater specificity).

⁴³⁸ See *supra* notes 144–47 and accompanying text.

degree of messiness that review of agencies' substantive choices simply does not.⁴³⁹ Thus, it is not quite right to say that "[c]hoosing a policy-making tool is a discrete, affirmative act,"⁴⁴⁰ at least not in many cases. As argued, making policy by adjudication is the natural byproduct of a system in which agency adjudicators must decide cases in circumstances where the legal background involves no controlling regulation, a background that may be the product of a number of causes, only some of which—if any—may be described as involving an affirmative choice by the agency.

In addition, some of the justifications for imposing reason-giving requirements apply with less force in the context of agency choices—if they may be described as such—to make policy by adjudication. One of the primary reasons for requiring agencies to explain their discretionary choices is to ensure that agencies are operating according to their statutory mandates.⁴⁴¹ Agencies must make decisions according to the factors that the statute makes relevant,⁴⁴² and they must refrain from making decisions based on statutorily irrelevant factors.⁴⁴³ Requiring agencies to explain the basis for their decision-making reveals for reviewing courts whether or not agencies are fulfilling these obligations. However, there typically are no criteria supplied in a statute's text for determining whether to proceed by adjudication as opposed to rulemaking.

That means courts would largely be at sea in determining whether agencies' proffered reasons for proceeding via adjudication are acceptable. We can assume that a duty to explain would not be satisfied by an agency's stipulation that "all things considered, adjudication was the superior course."⁴⁴⁴ Thus, courts would need a way of determining when an agency's decision is adequately supported. What are agencies likely to say when required to explain why they have chosen to make policy through adjudication? They may well say they simply overlooked the issue and never really made a choice. Or they may select among *Chenery II*'s grab bag of reasons—plus likely others—for proceeding via adjudication, and in most if not all cases, some of those reasons will sound plausible. At that point, it is unclear what courts should do. As stated above, there will likely not be statutory grounds for reviewing the reasons given. And so the courts might simply accept agencies' reasons at face value or with a substantial helping of deference.⁴⁴⁵

⁴³⁹ See *supra* notes 144–53 and accompanying text.

⁴⁴⁰ Magill, *supra* note 10, at 1422.

⁴⁴¹ See Deacon, *supra* note 27, at 689.

⁴⁴² *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁴⁴³ See *id.*

⁴⁴⁴ See *supra* Section III.B.3.

⁴⁴⁵ See Bressman, *supra* note 10, at 544 (advocating for a reason-giving requirement but explaining that agencies' explanations should be provided deference).

My primary fear is that courts, without the benefit of statutory law to guide the inquiry, would go in the other direction by using the review of an agency's explanation for proceeding via adjudication as a springboard for a more thoroughgoing review of the agency's procedural decision. The agency's reasons for going with adjudication would be balanced against the court's estimation of the benefits of proceeding by rulemaking. At that point, the duty to explain really becomes simply another way to eliminate the core of *Chenery II* in favor of a more searching review of agency policymaking by adjudication.⁴⁴⁶ For reasons given in Part II, above, such a move would be mistaken.

B. Consequence-Manipulation

One of the more popular proposals to indirectly influence agencies' choice to make policy via means other than notice-and-comment rulemaking involves judicial manipulation of the consequences of the agency's decision, typically by denying the agency deference it would have in theory received had it proceeded through rulemaking. In her article on agency choice of policymaking form, Elizabeth Magill put forward the Supreme Court's decision in *United States v. Mead Corp.*⁴⁴⁷ as a possible example of such a strategy.⁴⁴⁸ In that case, the Court denied *Chevron* deference to certain customs rulings that were not produced through formal adjudication or notice-and-comment rulemaking.⁴⁴⁹ Another case that may be viewed in a similar light is *Christopher v. SmithKline Beecham Corp.*,⁴⁵⁰ where the court denied an agency the deference normally afforded to agency interpretations of their own regulations because the interpretation in question resulted in "unfair surprise" and indicated that proceeding through notice and comment would not have triggered such surprise.⁴⁵¹ More broadly, during the *Chevron* period, various scholars argued for denying agencies *Chevron* deference when the interpretation in question was the product of adjudication or a certain kind of adjudication, sometimes for the express purpose of influencing agencies to do more work through rulemaking.⁴⁵²

Such strategies raise two questions: will they work, and are they worth it? There may be reason for doubt on both scores.

⁴⁴⁶ See *Chenery II*, 332 U.S. 194, 203 (1947).

⁴⁴⁷ 533 U.S. 218, 221 (2001).

⁴⁴⁸ See Magill, *supra* note 10, at 1421.

⁴⁴⁹ See *Mead*, 533 U.S. at 221.

⁴⁵⁰ 567 U.S. 142 (2012).

⁴⁵¹ *Id.* at 156 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007)).

⁴⁵² See, e.g., Hickman & Nielson, *supra* note 11, at 964.

First, one might generally be skeptical that agencies respond in particularly predictable ways to the incentives created by the intricacies of various deference doctrines.⁴⁵³

Second, the viability of using deference-manipulation to influence agency choice of policymaking form took a hit with the Court's overruling of *Chevron*.⁴⁵⁴ If courts are to exercise their independent judgment in all categories of cases going forward, it is, of course, not possible to use *Chevron* as a kind of carrot designed to influence agencies' choice of procedural form.

One may wonder, however, how much of a sea change *Loper Bright Enterprises v. Raimondo*⁴⁵⁵ will represent when it comes to policymaking by adjudication. Recall that many cases involving agency policymaking by adjudication do not really involve interpretive issues of the sort that *Chevron* either did or did not apply to.⁴⁵⁶ An agency determination, made via adjudication, that a particular height of fence is "appropriate" for tiger enclosures is unlikely to trigger an interpretive question *Chevron* once governed.⁴⁵⁷ Rather, such cases are litigated as "pure policy" cases, with the applicable standards being supplied by *State Farm*.⁴⁵⁸ For its part, *Loper Bright* indicated that such policy determinations will still receive deferential, arbitrary-and-capricious-style review by the courts.⁴⁵⁹

If deference-manipulation is to be a viable strategy going forward, then, the question becomes whether we are comfortable turning off—or turning down—the deference owed to agencies on those types of policy determinations, a kind of deference that even skeptics of the administrative state seem uncomfortable jettisoning.⁴⁶⁰ After all, even in the adjudication context, where agencies may possess less information than they would have had they proceeded via rulemaking, agencies remain more expert *than courts*. And they remain more accountable *than courts*.⁴⁶¹ Thus, displacing agencies' policymaking authority via more stringent review has real costs.

Third, if it is correct that much agency policymaking by adjudication happens "accidentally," because the agency simply failed to foresee

⁴⁵³ Cf. Walters, *supra* note 239, at 92 ("My analysis reveals that agencies did not measurably increase the vagueness of their rules in response to *Auer*. If anything, rule writing became more specific over time despite *Auer*'s increasing prominence.").

⁴⁵⁴ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

⁴⁵⁵ 144 S. Ct. 2244 (2024).

⁴⁵⁶ See *supra* notes 193–94 and accompanying text.

⁴⁵⁷ See *supra* notes 195–98 and accompanying text.

⁴⁵⁸ See 463 U.S. 29, 43 (1983).

⁴⁵⁹ *Loper Bright*, 144 S. Ct. at 2263; see *supra* text accompanying note 194.

⁴⁶⁰ See *supra* note 309 and accompanying text.

⁴⁶¹ See *Loper Bright*, 144 S. Ct. at 2294, 2299 (Kagan, J., dissenting) (noting "politically accountable" nature of agencies).

an issue or because an issue comes before it prior to rulemaking being a practical possibility, efforts to incentivize agencies to settle more issues through rulemaking may not make much of a difference.⁴⁶² In addition, we might not be confident that, given their limited resources, agencies can really do much more rulemaking than they currently do.⁴⁶³ I do not have the sense that cutting back on policymaking by adjudication will really “create time” for the agency to engage in further rulemaking.⁴⁶⁴ Nor do I have the sense that agencies are currently operating with much excess capacity being left on the table. Plus, doing more rulemakings may not even predictably reduce the amount of policymaking by adjudication that agencies do. Rather, agency adjudicators would be deciding more cases that involve the inevitable ambiguities, lacunae, et cetera, in the regulations themselves.⁴⁶⁵

CONCLUSION

Administrative policymaking is facing challenges on multiple fronts. The major questions doctrine has been applied to limit agency policymaking when it comes to rulemaking in particular. Recent litigation threatens to take away rulemaking authority from certain agencies completely. *Chevron* has been overruled. And on the adjudicative side, agency policymaking by adjudication has come under increased scrutiny. This Article has made the case that courts, and scholars, should pump the brakes when it comes to dismantling *Chenery II*'s core holding. Policymaking by adjudication is a natural feature of administration under law. Judicial attempts to police such policymaking would do more harm than good, and there are other ways to achieve limits on administrative arbitrariness, ways that would not implicate the sorts of problems posed by direct review of agencies' policymaking methods.

⁴⁶² See *supra* Section II.A.

⁴⁶³ Cf. Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 596 (2012) (“Agencies are regularly understaffed and overworked . . .”).

⁴⁶⁴ Cf. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 174 (“[T]he average time needed to complete a rulemaking across our 16 case-study rules was about 4 years, with a range from about 1 year to nearly 14 years . . .”).

⁴⁶⁵ See *supra* Section II.A.

What the New Major Questions Doctrine Is *Not*

Anita S. Krishnakumar*

ABSTRACT

The major questions doctrine has undergone a sea change in prominence within the span of two years. In the ten months between August 2021 and June 2022, the Court invoked the canon three times, using it aggressively to invalidate some of the signature policies implemented by the Biden Administration—including the Centers for Disease Control and Prevention’s eviction moratorium, the Occupational Safety and Health Administration’s attempt to impose a vaccine-or-test mandate on employees, and the Environmental Protection Agency’s efforts to regulate greenhouse gas emissions. This past term, it added a fourth case to this burgeoning list, striking down the Biden Administration’s student debt relief program. All eyes are now on the major questions doctrine. Several scholars have criticized the latest iteration of the doctrine, and some—including former law professor, now-Justice Amy Coney Barrett—have sought to defend it as consistent with textualism, as a linguistic canon, as part of the ordinary “common sense” context a reasonable reader would consider, or as a canon designed to protect the Constitution’s nondelegation principle.

This Article seeks to cut through the confusing labels and justifications that have been offered for this relatively new, somewhat reinvented, and incredibly powerful doctrine. It argues first that the major questions doctrine is not many of the things that commentators, including the Justices, have suggested it is: it is not a proxy for the nondelegation doctrine; it is not part of the “common sense” context that the “reasonable reader” brings to identifying a statute’s ordinary meaning; it is not a linguistic canon; and it is not even purposivism or intentionalism—or at least not good purposivism or intentionalism. The Article concludes by arguing that, in the end, the major questions doctrine may best be thought of as either a new multifactor test or standard of judicial review for “major” agency decisions, or as a form of naked pragmatism that uses clear statement rule rhetoric in an effort to sound more textualist than it is.

* Agnes Williams Sesquicentennial Professor of Legislation, Georgetown University Law Center. I owe deep thanks for valuable insights and conversations to Mila Sohoni, Daniel Walters, Bijal Shah, Kevin Tobia, Thomas W. Merrill, Eloise Pasachoff, William Buzbee, Ronald Cass, Ronald Levin, Gary Lawson, Lawrence Solum, Adam Zimmerman, and participants in an American Bar Association panel hosted by The George Washington University Law School, a workshop supported by The Gray Center for the Study of the Administrative State at Antonin Scalia Law School at George Mason University, and the Power in the Administrative State online workshop. I am especially indebted to my husband, Ron Tucker, for his patience and support with this project. Special thanks also to Dean William Treanor and Georgetown University Law Center as well as The Gray Center for generous research funding. James Nance provided excellent research assistance. All errors are my own.

TABLE OF CONTENTS

INTRODUCTION	1118
I. SOME THINGS THE NEW MAJOR QUESTIONS	
DOCTRINE IS <i>NOT</i>	1120
A. <i>A Nondelegation Proxy</i>	1122
B. <i>“Common Sense” Context for the</i> <i>Reasonable Reader</i>	1129
C. <i>A Linguistic Canon</i>	1135
D. <i>(Good) Purposivism</i>	1142
II. WHAT IS THE NEW MAJOR QUESTIONS DOCTRINE?	1150
A. <i>A Substantive Canon?</i>	1150
B. <i>An Implementation Test?</i>	1154
C. <i>Plain Old Pragmatism?</i>	1157
CONCLUSION	1162

INTRODUCTION

The major questions doctrine has undergone a sea change in prominence and importance within the span of just two years. Before the Supreme Court’s August 2021 decision to vacate a lower court stay on the Centers for Disease Control and Prevention’s (“CDC”) COVID-19-related eviction moratorium,¹ the doctrine was a little-known statutory interpretation canon discussed mostly by Legislation and Administrative Law scholars. Between 1994 and 2020, the Court had employed the major questions canon only five times,² and it was not even widely known by that name.³ By contrast, in the ten months between August 2021 and June 2022, the Court invoked the canon three times; moreover, it used the canon aggressively in these three instances to invalidate some of the

¹ See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021).

² The following were the five cases: *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (“The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act]’s registration provision is not sustainable.”); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” (quoting *Brown & Williamson*, 529 U.S. at 160)); *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (“Whether [tax] credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.” (quoting *Brown & Williamson*, 529 U.S. at 160)).

³ See *West Virginia v. EPA*, 597 U.S. 697, 766 (2022) (Kagan, J., dissenting) (accusing majority of “announc[ing] the arrival of the ‘major questions doctrine’”).

most high stakes policies implemented by the Biden Administration—including the CDC’s eviction moratorium, the Occupational Safety and health Administration’s (“OSHA”) attempt to impose a vaccine-or-test mandate on employees, and the Environmental Protection Agency’s (“EPA”) efforts to regulate greenhouse gas emissions.⁴ And during the 2022 term, it added a fourth case to this burgeoning list, striking down the Biden Administration’s student debt relief program.⁵

All eyes are now on the major questions doctrine. Most of the attention has been negative, with some scholars focusing on the impact the doctrine will have on the separation of powers and the administrative state⁶ and others criticizing the Court’s interpretive methodology. In this latter camp, some have argued that the doctrine is inconsistent with textualism⁷ or is a return to a form of purposive analysis that Justice Scalia and a majority of the modern Court have long sought to relegate to the statutory interpretation dustbin.⁸ Others have faulted the Court for “transforming” what was once merely a factor in the *Chevron*⁹ deference analysis into a super strong clear statement rule that trumps all other interpretive considerations.¹⁰ A few scholars—and some of

4 *Ala. Ass’n of Realtors*, 594 U.S. at 766 (eviction moratorium); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 120–21 (2022) (vaccine-or-test mandate); *West Virginia v. EPA*, 597 U.S. at 706 (EPA regulations).

5 *Biden v. Nebraska*, 143 S. Ct. 2355, 2374–75 (2023).

6 See Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 317–18 (2022); see also Nathan Richardson, Essay, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 176–77 (2022); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 15 (2023); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1056 (2023).

7 See Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y 463, 465 (2021) [hereinafter Squitieri, *Majorness?*]; Mike Rappaport, *Against the Major Questions Doctrine*, ORIGINALISM BLOG (Aug. 15, 2022), <https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html> [https://perma.cc/U92U-YQ7E]; Deacon & Litman, *supra* note 6, at 1059; Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*, 2022–2023 CATO SUP. CT. REV. 37, 54 (2023); Chad Squitieri, *Major Problems with Major Questions*, L. & LIBERTY (Sept. 6, 2022) [hereinafter Squitieri, *Major Problems*], <https://lawliberty.org/major-problems-with-major-questions/> [https://perma.cc/UYN8-BD2T].

8 See, e.g., Squitieri, *Major Problems*, *supra* note 7 (“The major questions doctrine is a product of legal pragmatism—a theory of statutory interpretation advanced by Justice Breyer which often elevates statutory purpose and consequences over text.”); Jed Handelsman Shugerman, *Biden v. Nebraska: The New State Standing and the (Old) Purposive Major Questions Doctrine*, 2022–2023 CATO SUP. CT. REV. 209, 231 (2023) (“In *Biden v. Nebraska*, Chief Justice Roberts implicitly endorsed the purposivism approach to major questions.”); Deacon & Litman, *supra* note 6, at 1047 (“Today, the major questions doctrine also seems to rest on a similar kind of [purposivism].”); Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 1011 (2021) (“[T]he major questions doctrine has an essential similarity with the mischief rule.”).

9 467 U.S. 837 (1984), *overruled by* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

10 See Sohoni, *supra* note 6, at 268–75; Richardson, *supra* note 6, at 175–77; Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 476–77 (2021); Daniel E.

the Justices—have sought to *defend* the doctrine as either a linguistic “importance canon,”¹¹ as “context” that the “reasonable person” would take into account in determining a statute’s ordinary meaning,¹² or as a canon designed to protect the Constitution’s nondelegation principle.¹³

This Article seeks to cut through the confusing labels and justifications that have been offered to describe this not quite new, somewhat reinvented, and suddenly very powerful doctrine. It argues that the major questions doctrine is *not* many of the things that commentators, including the Justices, have suggested it is: it is not a proxy for the nondelegation doctrine; it is not part of the ordinary context that the “reasonable reader” brings to identifying a statute’s ordinary meaning; it is not a linguistic canon; and it is not a return to the purposivism or intentionalism of old—or at least not a return to a *good* version of purposivism or intentionalism. Rather, the doctrine is best viewed as either (1) a new standard of review, or multifactor implementation test, for the judicial review of agency statutory interpretations, or (2) as a form of old-fashioned pragmatic reasoning akin to the absurd results doctrine.

The Article proceeds in two parts. Part I debunks several defenses and labels that the Justices and a few scholars have put forth to describe the new major questions doctrine. Part II argues that in the end, despite Justices Gorsuch’s and Barrett’s arguments to the contrary, the new major questions doctrine is best classified as a form of practical consequences analysis with an unusual trigger, or as a new implementation test that effectively displaces previous agency deference tests.

I. SOME THINGS THE NEW MAJOR QUESTIONS DOCTRINE IS *NOT*

The latest iteration of the major questions doctrine has spawned a cottage industry in legal reclassification. Either in an effort to quell criticisms that the doctrine is inconsistent with textualism, or to characterize the doctrine in familiar terms or, conversely, to point out how

Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 476–78 (2024); Deacon & Litman, *supra* note 6, at 1038–42.

¹¹ See Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 8) (on file with author).

¹² See *Biden v. Nebraska*, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring) (“[T]he doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way.”).

¹³ See, e.g., *Gundy v. United States*, 588 U.S. 128, 167–68 (2019) (Gorsuch, J., dissenting); *West Virginia v. EPA*, 597 U.S. 697, 735, 740–44 (2022) (Gorsuch, J., concurring); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 121 (2022) (Gorsuch, J., concurring); Sunstein, *supra* note 10, at 489 (“[T]he strong version of the major questions doctrine is unambiguously connected with the nondelegation doctrine.”); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2024–25, 2044 (2018) (characterizing the major questions doctrine as “a less extreme approach” that “reinforces the nondelegation doctrine”).

far the textualist Roberts Court has strayed from its methodological commitments, a number of scholars—and some of the Justices—have offered competing defenses, critiques, and characterizations of the newly constituted major questions doctrine. Justice Gorsuch, for example, has suggested that the doctrine is a close cousin to the nondelegation doctrine, serving as a check “against unintentional, oblique, or otherwise unlikely delegations of the legislative power.”¹⁴ Justice Barrett has rejected that characterization, arguing instead that the doctrine is part of the ordinary “context” that a reasonable reader would take note of in determining a statute’s ordinary meaning.¹⁵ Similarly, academic Ilan Wurman has suggested that the doctrine is best viewed as a linguistic canon that requires greater clarity and certainty for statutes that deal with especially “important” matters.¹⁶

In the opposite direction, a handful of textualist and nontextualist scholars have charged that the newest major questions doctrine is a form of purposivism—reaching beyond the statute’s text to determine whether a particular statutory reading is consistent with the statute’s core goals or design.¹⁷ Another, more sympathetic textualist scholar has analogized earlier versions of the major questions doctrine to a form of “mischief rule” analysis.¹⁸

This Part argues that, on closer examination, the new major questions doctrine is not any of the things the above defenders or critics have suggested it is. Section I.A explains that the doctrine is not a close cousin of the nondelegation doctrine because it does not focus on preventing excessively broad *congressional* delegations of power but rather on preventing *agency* overreach or abuse; moreover, it is both over- and underinclusive in addressing nondelegation concerns. Section I.B argues that the doctrine is not part of the ordinary “context” that “reasonable readers” take into account when determining ordinary meaning because the doctrine’s triggers—i.e., the economic impact the interpretation will have, the political significance of the subject matter the agency is regulating, the agency’s past practice, and so on—stray far beyond the statute’s text and are not the kinds of matters a reasonable reader would instinctively be aware of or informed about. Section I.C takes issue with Wurman’s claim that the doctrine should be viewed as a linguistic “importance” canon—noting that the doctrine does not share the usual features of a linguistic canon in that it is not triggered by sentence structure or grammar, and that it leaves courts too much wiggle

¹⁴ Nat’l Fed’n of Indep. Bus. v. OSHA, 595 U.S. at 121 (Gorsuch, J., concurring).

¹⁵ See Biden v. Nebraska, 143 S. Ct. at 2384 (Barrett, J., concurring).

¹⁶ See Wurman, *supra* note 11, at 6, 39–40.

¹⁷ See, e.g., Squitieri, *Major Problems*, *supra* note 7; Shugerman, *supra* note 8, at 231; Deacon & Litman, *supra* note 6, at 1047.

¹⁸ See Bray, *supra* note 8, at 1011.

room to determine what counts as “important.” And Section I.D argues that the doctrine is not even a form of “good” purposivism because it empowers the Justices to determine a statute’s core function based on their own intuitions and guesses rather than on concrete, independent evidence from the historical or legislative record.

A. *A Nondelegation Proxy*

Let us begin with the claim—articulated most prominently by Justice Gorsuch in a series of concurring and dissenting opinions—that the major questions doctrine is a “corollary” to the nondelegation doctrine.¹⁹ Justice Gorsuch argues that the major questions doctrine operates “in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”²⁰ He has described the doctrine as a “clear-statement rule” that is a “corollary” of Article I’s Vesting Clause, which is the source of the nondelegation doctrine,²¹ and has even suggested that the nondelegation and major questions doctrines are interchangeable—stating that “[w]hichever the doctrine, the point is the same.”²² Commentators writing both before and after the Court’s most recent major questions cases likewise have noted a connection between the major questions exception—now canon or doctrine—and the nondelegation doctrine.²³

But if we dig beyond these surface-level correlations and look closely at the relationship between the two doctrines, some important disconnects and tensions emerge—and suggest that the major questions doctrine cannot merely be viewed as a corollary to, or an enforcement mechanism for, the nondelegation doctrine. In his concurring opinion in *National Federation of Independent Business v. OSHA* (“*NFIB v.*

¹⁹ E.g., *West Virginia v. EPA*, 597 U.S. 697, 735, 740–41 (2022) (Gorsuch, J., concurring).

²⁰ *Gundy v. United States*, 588 U.S. 128, 167 (2019).

²¹ *West Virginia v. EPA*, 597 U.S. at 740.

²² *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring).

²³ See, e.g., John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 227 (2001) (conceptualizing *Brown & Williamson* as interpreting the applicable statute “to avoid significant nondelegation concerns”); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1200 (2018); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331, 334 (2000); Sunstein, *supra* note 10, at 489 (“[T]he strong version of the major questions doctrine is unambiguously connected with the nondelegation doctrine.”); Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 962 (2020) (“Kavanaugh’s major rules doctrine addresses concerns similar to those addressed by *Schechter*’s robust nondelegation. . . . A robust nondelegation doctrine would prohibit Congress from abdicating its constitutionally prescribed place in the answer to the question, ‘Who decides?’ And so would Justice Kavanaugh’s major rules doctrine.”); Sohoni, *supra* note 6, at 290–92 (noting that commentators have made this connection and questioning its validity).

OSHA”),²⁴ for example, Justice Gorsuch describes the nondelegation principle as a doctrine that “ensures democratic accountability by preventing Congress from *intentionally* delegating its legislative powers to unelected officials.”²⁵ Such “intentional[]” congressional delegation is problematic, Justice Gorsuch explains, because “[i]f Congress could hand off all its legislative powers to unelected agency officials, it ‘would dash the whole scheme’ of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives.”²⁶ Justice Gorsuch argues that the “major questions doctrine serves a similar function by guarding against *unintentional, oblique, or otherwise unlikely delegations* of the legislative power.”²⁷ Notice the shift here from *intentional* to *unintentional* delegations, a shift this Article will return to in a moment. The problem in such cases, Justice Gorsuch asserts, is that Congress sometimes “passes broadly worded statutes” that leave an agency “to work out the details of implementation.”²⁸ But the agency might later “*seek to exploit* some gap, ambiguity, or doubtful expression in Congress’s statutes to assume responsibilities far beyond its initial assignment.”²⁹ In Justice Gorsuch’s telling, the major questions doctrine “guards against” such agency exploitation.³⁰

Both Justice Gorsuch’s concurrence and the majority opinion in *West Virginia v. EPA*³¹ cast the connection between the major questions and nondelegation doctrines in a similar light. Justice Gorsuch’s opinion spends a lot of time explaining what “clear statement” rules are and characterizing the major questions doctrine as a “clear statement” rule that serves as a “corollary” to the Constitution’s Article I Vesting Clause, which vests “[a]ll federal ‘legislative Powers’” in Congress.³² And as in *NFIB v. OSHA*, Justice Gorsuch argues that the major questions doctrine ensures that “when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not ‘*exploit some gap, ambiguity, or doubtful expression* in Congress’s statutes to assume responsibilities far beyond’ those [that Congress] actually conferred on them.”³³ Both the majority and concurring opinions also declare that the major questions doctrine addresses

²⁴ 595 U.S. 109 (2022).

²⁵ *Id.* at 124 (emphasis added).

²⁶ *Id.* at 124–25 (quoting *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 61 (2015)).

²⁷ *Id.* (emphasis added).

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

³⁰ *Id.*

³¹ 597 U.S. 697 (2022).

³² *Id.* at 740, 737 (Gorsuch, J., concurring) (quoting U.S. CONST. art. I, § 1).

³³ *Id.* at 742 (emphasis added) (quoting *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. at 125 (Gorsuch, J., concurring)).

“a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”³⁴

There are several problems with Justice Gorsuch’s, and the *West Virginia v. EPA* majority’s, characterization of the major questions doctrine as essentially a stand-in for the nondelegation doctrine. First, as noted above, Justice Gorsuch’s characterization makes an important but veiled shift from preventing *intentional congressional* delegations of legislative power (nondelegation doctrine) to preventing *agency* exploitation of *unintentional, oblique, or otherwise unlikely* legislative delegations (major questions doctrine). While the nondelegation doctrine is about restricting Congress’s ability to give away too much power, the major questions doctrine is about preventing agencies from exploiting Congress’s delegation of power—i.e., from going too far and asserting powers that Congress *did not* intentionally grant them.

Second, the nondelegation doctrine does not make exceptions or allow broad delegations if Congress makes clear that it intends to give an agency broad policymaking power; rather, it acts as a brake, invalidating the broad delegation on the grounds that the *Constitution does not allow* such delegations. By contrast, the latest iteration of the major questions doctrine explicitly allows broad or significant delegations of power to administrative agencies—so long as Congress clearly and explicitly authorizes the delegation. Again, this is because the focus is on preventing administrative agencies from exploiting power not clearly given to them, not on preventing *intentional* legislative delegations of broad power. In other words, the nondelegation doctrine operates as an on-off switch; if the power delegated to an agency is significant or open-ended, the delegation is invalid, period. By contrast, the newest version of the major questions doctrine operates more like a dimmer switch, allowing more or less power to be exercised by the agency depending on the practical impact of the agency’s chosen statutory reading: if the application or exercise of power adopted by an agency is significant, neither the delegation nor the agency’s exercise of power is necessarily invalid—but Congress must be incredibly clear about its intention to allow the agency action at issue.

Justice Kavanaugh has recognized this tension between the major questions and nondelegation doctrines in his opinion commenting on the denial of certiorari in *Paul v. United States*.³⁵ Specifically, Justice Kavanaugh noted “*the Court has not adopted a nondelegation principle for major questions*”³⁶ and that the view of nondelegation

³⁴ *West Virginia v. EPA*, 597 U.S. at 724; *id.* at 742 (Gorsuch, J., concurring) (quoting majority opinion).

³⁵ 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

³⁶ *Id.* (emphasis added).

taken in Justice Gorsuch's *Gundy v. United States*³⁷ dissent "would not allow" what the major questions doctrine permits—i.e., "congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority."³⁸ In other words, the nondelegation doctrine is a black-and-white, on-off switch for excessive delegations, while the major questions doctrine is more nuanced. Perhaps relatedly, the two doctrines ask different questions: the nondelegation doctrine asks whether Congress *can* delegate the authority at issue to an agency, whereas the major questions doctrine asks whether Congress actually *did* delegate the authority at issue to the agency.³⁹

A third problem with the major-questions-as-nondelegation-proxy characterization is that the triggering factors that determine whether a particular doctrine applies in a particular case are significantly different for the nondelegation versus the major questions doctrine. The triggering factor for nondelegation is vagueness or broadness—i.e., a delegation that is loosely worded or open-ended and therefore provides too much discretion to an agency.⁴⁰ By contrast, the triggering factors for the major questions doctrine are the practical consequences that an interpretation will generate—i.e., the economic impact or political significance of the interpretation, or the extent to which it will intrude on state law, or the novelty of the interpretation as compared to the agency's past practice, and so on.⁴¹

Another recent not-quite-major-questions case, *Biden v. Missouri*,⁴² starkly illustrates how and why this difference matters. The case involved a vaccine mandate similar to the one at issue in *NFIB v. OSHA*, except that this mandate was issued by the Secretary of Health and Human Services ("HHS"), and applied to staff employed at facilities that are Medicare and Medicaid providers—e.g., hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities, and the like.⁴³ A majority of the Court *upheld* this vaccine mandate—on the same day that it invalidated the OSHA vaccine mandate—despite

³⁷ 588 U.S. 128 (2019).

³⁸ *Paul*, 140 S. Ct. at 342 (emphasis added).

³⁹ I am indebted to Kevin Tobia for this point.

⁴⁰ See, e.g., *Sessions v. Dimaya*, 584 U.S. 148, 216 (2018) (Thomas, J., dissenting) (describing vagueness doctrine as "a way to enforce" the nondelegation doctrine); *Granados v. Garland*, 17 F.4th 475, 480 (2021) (noting similarities between nondelegation and void for vagueness doctrines); *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 52 (2015) (noting litigants' claim that statute violates nondelegation doctrine because it grants agency "broad and unchecked power"); see also Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1806 (2012) ("Vague statutes have the effect of delegating lawmaking authority to the executive.").

⁴¹ See *Biden v. Missouri*, 595 U.S. 87, 104 (2022) (Thomas, J., dissenting).

⁴² 595 U.S. 87 (2022).

⁴³ See *id.* at 90–92.

similar arguments by the challengers and four dissenting Justices that HHS's mandate implicated matters of "vast economic and political significance" and that HHS lacked clear congressional authority to impose such a mandate.⁴⁴ Notably, the authorizing language at issue in the Medicare and Medicaid statute⁴⁵ is strikingly similar to the authorizing language at issue in the Occupational Safety and Health Act ("OSH Act")⁴⁶: the OSH Act empowers the Secretary of Labor to issue emergency standards if they determine such standards are "*necessary to protect employees*" from "grave danger from exposure" to "toxic" substances or "new hazards";⁴⁷ whereas the Medicare and Medicaid statute authorizes the Secretary of HHS to promulgate "such . . . requirements as the Secretary finds *necessary in the interest of the health and safety* of individuals."⁴⁸

Given the similar "necessary" language in both statutes, a nondelégation doctrine analysis would suggest that if one of these delegations is too broad, then so is the other. Indeed, under the robust nondelegation standard advocated in Justice Gorsuch's dissent in *Gundy v. United States*,⁴⁹ both of these delegations should have been invalidated—and the respective statutes essentially sent back to Congress to craft a narrower delegation with more detailed instructions to cabin and guide the agency's decision-making. In fact, if anything, the delegation articulated in *NFIB v. OSHA* should have held up *more favorably* than the one at issue in *Biden v. Missouri*, as the OSH Act provides greater limits on what kinds of dangers—i.e., "grave," involving exposure to "toxic" substances or "new hazards"—may be deemed "necessary" to protect the health and safety of the relevant population.⁵⁰

But under the major questions doctrine, the relevant triggering condition is not the broadness of the delegation—i.e., whether the "as necessary" language confers too much power on the agency—but rather, the economic and political significance—i.e., the impact in dollars and cents, or number of persons affected, or political salience—that the agency's chosen policy would have. Under the major questions analysis, what matters is not so much the language of the statute—i.e., the nature of the delegation penned by Congress—but rather, the policy that the

⁴⁴ See *id.* at 92; *id.* at 104 (Thomas, J., dissenting) (quoting *Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021)).

⁴⁵ Medicare and Medicaid Act, 42 U.S.C. §§ 1395–1395lll, 1396–1396v.

⁴⁶ 29 U.S.C. §§ 651–678.

⁴⁷ See *id.* § 655(c) (emphasis added).

⁴⁸ See 42 U.S.C. § 1395x(e)(9) (emphasis added).

⁴⁹ See *Gundy v. United States*, 588 U.S. 128, 158 (2019) (Gorsuch, J., dissenting) (stating that when Congress makes policy decisions regulating private conduct, it may authorize another branch to "fill up the details," or "make the application of the rule depend on executive fact-finding," or assign non-legislative responsibilities—placing limits on the power that Congress can delegate).

⁵⁰ See 29 U.S.C. § 655(c).

agency chooses to adopt pursuant to that delegation and the magnitude of the impact that policy will have on the economy, political landscape, etc. Thus, even similar policy choices made by two similar agencies operating under similar authorizing language in two different statutes can be treated differently by reviewing courts. Although the per curiam opinion in *Biden v. Missouri* did not engage in a major questions analysis—only the dissenting opinions mention the doctrine⁵¹—the strong subtext is that the majority concluded that the vaccine mandate for staff at Medicare and Medicaid facilities was not politically significant or controversial, or did not affect a large enough number of employees to have a significant impact on the American economy.⁵² It is perhaps troubling that the per curiam opinion did not bother to discuss this, but the point is that it is possible for the major questions doctrine to play no role in the Court’s analysis of a given agency interpretation because the doctrine’s relevance does not turn on the statute’s language, subject matter, or the nature of the delegation at issue. Rather, the doctrine turns on the Justices’ assessment of the practical consequences of the particular agency interpretation or application of the statute at issue.

Last, as the above analysis illustrates, the major questions doctrine should not be viewed as a proxy for the nondelegation doctrine because it allows broad, vague, and even sweeping delegations of congressional power so long as the agency action adopted pursuant to that broad delegation involves only a “minor” question. In other words, if an agency adopts a policy that has little economic or political impact, involves only small dollar amounts, impacts only a small number of people or businesses, and so on, then the major questions doctrine will not prevent that agency action—even if the statutory delegation of power under which the agency acts is overly broad, or lacks limiting instructions.

Thus, the major questions doctrine is both an under- and over-inclusive mechanism for enforcing the nondelegation doctrine. It is underinclusive because it allows legislative delegations of significant power to administrative agencies *so long as Congress is explicit about its intention to delegate such power to the agency*; and it is overinclusive because it rejects agency actions or interpretations that regulate matters of “vast economic and political significance”⁵³ *even if those interpretations are adopted pursuant to a delegation that is not broad enough to violate the nondelegation doctrine*, but also is not specific enough to explicitly authorize the particular agency action at issue.

⁵¹ *Biden v. Missouri*, 595 U.S. 87, 104 (2022) (Thomas, J., dissenting).

⁵² *See id.* at 95–96 (majority opinion) (“[A] vaccination requirement under these circumstances is a straightforward and predictable example of the ‘health and safety’ regulations that Congress has authorized the Secretary to impose.”).

⁵³ *Id.* at 104 (Thomas, J., dissenting) (quoting *Ala. Ass’n. of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021)).

Some proponents of the major-questions-as-corollary-to-nondelegation theory have suggested that the major questions doctrine should be viewed not as a precise substitute for the nondelegation doctrine, but rather as a canon that overprotects or enforces the principles underlying the nondelegation doctrine.⁵⁴ The idea is that the major questions doctrine increases the cost of delegating significant authority to agencies—and thereby discourages significant legislative delegations—through a “clarity tax”⁵⁵ that forces Congress to speak specifically and explicitly in order to confer significant power on agencies.⁵⁶ There are two problems with this formulation. First, as others have noted, it works as a bait and switch on Congress, which enacted all of the statutes and delegations to which the major questions doctrine has been applied *decades* before the Court articulated the doctrine—let alone the “clear statement” version of the doctrine.⁵⁷ Second, even under this “clarity tax” explanation, the major questions doctrine remains an underinclusive enforcement mechanism for the nondelegation principle—because it does not disincentivize all, or even most, congressional delegations of significant authority. That is, because the major questions doctrine invalidates only those agency regulations that involve “major” policy questions—as measured by economic, political, or societal impact—any agency regulation the courts decide is a “minor” or “non-major” question will sail past this test, even if the congressional delegation confers significant, or even massive, power to the agency. Again, the contrast between *NFIB v. OSHA*, in which the Court invalidated a vaccine mandate for virtually all employees in the workforce, and *Biden v. Missouri*, in which the Court upheld a vaccine mandate that applied only to healthcare employees—despite similar statutory language delegating similar authority to the relevant agencies in both cases—illustrates this point.⁵⁸

⁵⁴ See, e.g., Sunstein, *supra* note 10, at 483–84 (asserting that recent cases apply the major questions doctrine as “a nondelegation canon”); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1946–48 (2017) (describing the major questions doctrine as a “normative” canon that “is both a presumption against certain kinds of agency interpretations and an instruction to Congress”); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 172–76 (2010) (explaining that a court’s adoption of a clear statement rule often reflects a judicial determination that a particular constitutional principle “merits heightened protection”).

⁵⁵ See *Biden v. Nebraska*, 143 S. Ct. 2355, 2377–78 (2023) (Barrett, J., concurring).

⁵⁶ See *id.*

⁵⁷ See Sohoni, *supra* note 6, at 286.

⁵⁸ Compare *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 117–20 (2022), with *Biden v. Missouri*, 595 U.S. 87, 89 (2022).

B. “Common Sense” Context for the Reasonable Reader

In an unusually theoretical concurring opinion in *Biden v. Nebraska*,⁵⁹ Justice Barrett rejects the theory that the new major questions doctrine should be viewed as a “strong-form substantive canon” or a “clear-statement rule” designed to enforce the nondelegation doctrine.⁶⁰ Instead, she argues that the doctrine is better understood as an interpretive tool that “emphasize[s] the importance of *context* when a court interprets a [congressional] delegation [of authority] to an administrative agency.”⁶¹ Specifically, Justice Barrett contends that the doctrine reflects “common sense as to the manner in which Congress is likely to delegate” to an administrative agency a policy decision that will have significant “economic and political” consequences.⁶²

Justice Barrett ties together the concepts of *context* and *common sense* by arguing that “[t]he major questions doctrine situates text in *context*, which is how textualists, like all interpreters, approach the task at hand”⁶³ and adds that “[c]ontext also includes *common sense*,” or things that “go[] without saying.”⁶⁴ “Seen in this light,” Justice Barrett contends, “the major questions doctrine is a tool for discerning—not departing from—the text’s most natural interpretation.”⁶⁵

Central to Justice Barrett’s argument is a focus on the “reasonable” speaker or interpreter—a favorite textualist construct that figures prominently in discussions about “plain” or “ordinary” meaning. Justice Barrett notes, for example, that “[t]he usual textualist enterprise involves ‘hear[ing] the [statute’s] words as they would sound in the mind of a skilled, objectively reasonable user of words.’”⁶⁶ She then provides two law professor hypotheticals, involving a grocer’s instructions to a store clerk and a parent’s instructions to a babysitter, which are meant to approximate congressional delegations to agencies.⁶⁷ Justice Barrett argues that when the grocer or parent determines whether the actions taken by the clerk or babysitter constitute “reasonable” interpretations of the grocer’s or parents’ instructions, “common sense” context such as past interactions between the clerk and the grocer or the parents and the babysitter, the identity of the babysitter, and other such atextual

⁵⁹ 143 S. Ct. 2355 (2023).

⁶⁰ *Id.* at 2377 (Barrett, J., concurring).

⁶¹ *Id.* at 2376.

⁶² *Id.* at 2378 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

⁶³ *Id.* (emphasis added).

⁶⁴ *Id.* at 2379 (emphasis added).

⁶⁵ *Id.* at 2376.

⁶⁶ *Id.* at 2377 (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988) (second alteration in original)).

⁶⁷ *See id.* at 2379–80.

factors will play a significant role.⁶⁸ The major questions doctrine, Justice Barrett argues, operates based on similar “common sense principles of communication”—meaning that “[s]urrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency.”⁶⁹

The “reasonable” speaker or reader shows up again in Justice Barrett’s summary of the Court’s recent major questions cases when she explains that in each of those cases, the Court declined to “put on blinders” and “confine[] ourselves to the four corners of the statute,” and, instead, wisely “considered context that would be important to a *reasonable observer*.”⁷⁰ The “common sense” context Justice Barrett highlights includes an industry’s “unique political history” or “significant role” in the American economy,⁷¹ an agency’s attempt to regulate outside its traditional “wheelhouse” or area of relative “expertise,” the agency’s past practice, and the relative novelty of the challenged regulation.⁷² In the end, Justice Barrett argues that the “shared intuition behind these cases is that a *reasonable speaker* would not understand Congress to confer an unusual form of authority” on an agency without saying so explicitly.⁷³

Justice Barrett’s attempt to characterize the major questions doctrine as part of the “common sense” context surrounding congressional delegations of power to administrative agencies has already been met with significant criticism on the grounds that (1) her definition of “context” is “so broad” that it leaves no distance between textualism and the more capacious interpretive approaches she sees as problematic,⁷⁴ and (2) “judges can easily accomplish policymaking under the label of ‘context.’”⁷⁵

Both of these critiques are well-founded. The kind of “context” Justice Barrett sweeps under the umbrella of “common sense” is exceedingly pragmatic, consequentialist, and *atextual*. It also leaves enormous room for judicial discretion and policymaking. But rather than repeat arguments that others have already made, this Article seeks to add

⁶⁸ See *id.* at 2380.

⁶⁹ *Id.*

⁷⁰ *Id.* at 2383 (emphasis added).

⁷¹ See *id.* at 2382 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

⁷² See *id.* at 2382–83.

⁷³ *Id.* at 2383 (emphasis added).

⁷⁴ See Adrian Vermeule, *Text and “Context,”* YALE J. ON REGUL.: NOTICE & COMMENT (July 13, 2023), <https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/> [https://perma.cc/C2TG-22WW]; Kevin Tobia, Daniel Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. (forthcoming 2024) (manuscript at 54–56).

⁷⁵ Beau J. Baumann, *Let’s Talk About That Barrett Concurrence (on the “Contextual Major Questions Doctrine”)*, YALE J. ON REGUL.: NOTICE & COMMENT (June 30, 2023), <https://www.yalejreg.com/nc/lets-talk-about-that-barrett-concurrence-on-the-contextual-major-questions-doctrine-by-beau-j-baumann/> [https://perma.cc/Z4WF-YUTY].

another criticism to the list: Justice Barrett’s “common sense” context consists of a lot of background considerations that far exceed the capacity or awareness of most “reasonable readers” or users of English—the textualist guidepost for determining a statute’s ordinary meaning.

Recall that Justice Barrett herself advocates that courts should “consider[] context that would be important to a *reasonable observer*” and defends the major questions doctrine on the grounds that “a *reasonable speaker* would not understand Congress to confer an unusual form of authority” on an agency without saying so explicitly.⁷⁶ However, unless Justice Barrett’s measure of the “reasonable speaker” is a lawyer—and there is substantial reason to believe that it is not—it seems fanciful to suggest that the context that reader would be familiar with would include the agency’s past practices, the relative novelty of the regulation at issue, the regulation’s economic or political impact, the limits of the agency’s expertise, or what falls within—or outside—the agency’s “wheelhouse.” In short, the Court has framed what constitutes an “unusual” delegation in terms and tests that presume a sophisticated understanding of the regulatory landscape that only a reader with specialized knowledge—not the average “reasonable reader” or citizen on the street—can be expected to possess.

Careful readers may note that Justice Barrett refers to a “*skilled, objectively reasonable user of words*”⁷⁷—and may wonder if this does not imply that the reasonable reader that Justice Barrett, and other textualists, have in mind is a “reasonable lawyer.” But textualists and textualism have been far from clear on this point—and most textualist rhetoric actually suggests that the reasonable reader is the average citizen on the street, rather than a lawyer. Justice Scalia was notably inconsistent on this point: he once famously declared that “the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny”⁷⁸—a formulation that suggests that the reasonable reader is the average person on the street. But he declared elsewhere that textualists look for “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*”—suggesting perhaps that the ordinary reader is a lawyer familiar with the corpus juris.⁷⁹ Textualist scholar John Manning also has described the reasonable reader as a “skilled . . . user of words” who is aware of “the specialized connotations and practices” known

⁷⁶ *Biden v. Nebraska*, 143 S. Ct. at 2383 (Barrett, J., concurring) (emphasis added).

⁷⁷ *Id.* at 2377 (emphasis added).

⁷⁸ *Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

⁷⁹ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997).

to lawyers.⁸⁰ But both Justice Scalia's corpus juris comment and John Manning's "skilled user of words" description are a few decades old—and the rhetoric employed by many of the Court's current textualist Justices contradicts both.

Indeed, textualist Justices on the Roberts Court have—clearly and repeatedly—spoken about the reasonable reader in terms that indicate that they understand that reader to be an average citizen or member of the public. In *Bostock v. Clayton County*,⁸¹ for example, Justice Alito's dissenting opinion explicitly invoked the image of "*a group of average Americans* [who] decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval"—and insisted that these "ordinary citizens" formed the relevant "linguistic community" for determining the statute's ordinary meaning.⁸² Justice Kavanaugh's dissent similarly emphasized that "common parlance matters in assessing the ordinary meaning of a statute, *because courts heed how 'most people' 'would have understood' the text of a statute when enacted.*"⁸³ Several other opinions authored by textualist Justices make reference to how "friends" or ordinary people speak to each other in everyday conversation as proof of what a "reasonable reader" would understand a statute to mean.⁸⁴ Still, other textualist-authored opinions analogize complex statutory language to everyday contexts or settings—and offer these comparisons as definitive evidence of what a "reasonable" or "ordinary" reader would understand the statute to mean.⁸⁵ In short, modern textualism seems to have firmly embraced a vision of the reasonable reader as the ordinary citizen—even while the newest major questions doctrine has embraced

⁸⁰ John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434–35 (2005).

⁸¹ 590 U.S. 644 (2020).

⁸² *Id.* at 706 (Alito, J., dissenting) (emphasis added).

⁸³ *Id.* at 790 (Kavanaugh, J., dissenting) (emphasis added) (quoting *New Prime Inc. v. Oliveira*, 586 U.S. 105, 114 (2019)).

⁸⁴ See, e.g., *Wisconsin Central Ltd. v. United States*, 585 U.S. 274, 277–78 (2018) (holding ordinary meaning of "money" is "a medium of exchange"—as evinced by the fact that a "friend" would not say "his new car cost '2,450 shares of Microsoft'"); *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 83–84 (2017) (invoking everyday conversations between friends as evidence of the ordinary meaning of "debt[s] owed" in Fair Debt Collection Practices Act); *Kansas v. Garcia*, 589 U.S. 191, 204–05 (2020) ("In ordinary speech, no one would say that a person who uses an e-mail address has used information that is contained in all these places."); *Bond v. United States*, 572 U.S. 844, 860 (2014) ("[A]n educated user of English would not describe Bond's crime as involving a 'chemical weapon.'"); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 333 (2020) (framing inquiry in terms of what "an ordinary speaker of English would say"); *Sekhar v. United States*, 570 U.S. 729, 738 (2013) ("No fluent speaker of English would say . . .").

⁸⁵ See, e.g., *Niz-Chavez v. Garland*, 593 U.S. 155, 162 (2021) (analogizing to car purchase); *Voisine v. United States*, 579 U.S. 686, 705 (2016) (Thomas, J., dissenting) (person who strikes friend to demonstrate karate move); *Abramski v. United States*, 573 U.S. 169, 196 (2014) (Scalia, J., dissenting) (sending son to store to buy milk and eggs); *Loughrin v. United States*, 573 U.S. 351, 369 (2014) (Scalia, J., concurring in part) (child lying to parent to get a cookie).

several sophisticated tests for “majorness” that only those trained in the law can be expected to understand.⁸⁶

Consider two of the factors the Court has considered relevant “context” for determining “majorness” in its recent major questions cases, although Justice Barrett does not explicitly mention these in her *Biden v. Nebraska* concurrence:

- (1) That Congress neglected to enact legislative proposals to adopt the policy embodied in the agency’s regulation.⁸⁷
- (2) That the challenged agency policy intrudes on areas traditionally regulated by the states.⁸⁸

The former is technical, distinctly inside-baseball information about the legislative process that one cannot expect ordinary citizens on the street either to know or to intuitively consider as part of the “common sense” context for the statute. And the latter is a legal determination that only a lawyer could be expected to know or to consider as part of a regulation’s background context—not a matter that the average citizen reader would be aware of, let alone intuitively consider in determining the meaning of statutory text.

Last, there is recent empirical work based on surveys of ordinary citizens that calls into question Justice Barrett’s claim⁸⁹ that “a

⁸⁶ Justice Barrett has acknowledged this tension in her academic writing, and has attempted to address it by arguing (1) because lawyers act as “intermediaries” for ordinary citizens, it is not problematic to read statutes from the lawyers’ perspective, and (2) the legal fiction that all citizens are on constructive notice of the law assumes that ordinary citizens “are capable of deciphering language that is sometimes specialized and technical.” Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2209–10 (2017). Neither of these arguments is particularly persuasive.

⁸⁷ See *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (“‘More than 80 student loan forgiveness bills and other student loan legislation’ were considered by Congress during its 116th session alone.” (quoting Mark Kantrowitz, *Year in Review: Student Loan Forgiveness Legislation*, FORBES (Dec. 24, 2020, 9:16 PM), <https://www.forbes.com/sites/markkantrowitz/2020/12/24/year-in-review-student-loan-forgiveness-legislation/> [https://perma.cc/J829-HX7A])); *West Virginia v. EPA*, 597 U.S. 697, 731 (2022) (“Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program.”); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring) (“Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. Indeed, a majority of the Senate even voted to *disapprove* OSHA’s regulation.”); *Ala. Ass’n. of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021) (“Congress was on notice that a further extension would almost surely require new legislation, yet it failed to act in the several weeks leading up to the moratorium’s expiration.”).

⁸⁸ See *West Virginia v. EPA*, 597 U.S. at 744 (Gorsuch, J., concurring) (“[T]his Court has said that the major questions doctrine may apply when an agency seeks to ‘intrud[e] into an area that is the particular domain of state law.’” (quoting *Ala. Ass’n of Realtors*, 594 U.S. at 764) (alteration in original)); *Ala. Ass’n of Realtors*, 594 U.S. at 764 (“The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship.”); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. at 120 (noting costs to states of complying with OSHA’s mandate).

⁸⁹ See Tobia et al., *supra* note 74, at 62.

reasonable speaker would not understand Congress to confer an unusual form of authority without saying” so explicitly.⁹⁰ The experimental survey research asks survey respondents—i.e., ordinary citizens—several questions designed to test the assumptions underlying Justice Barrett’s babysitter hypothetical. Survey respondents’ answers suggest that, contrary to Justice Barrett’s hypothetical, ordinary citizens understand even *unusual* exercises of delegated power to fall within a principal’s instructions to an agent.⁹¹ That is, survey respondents viewed even extravagant expenditures by a babysitter as fitting within a parent’s instructions to the sitter to use the parent’s credit card to “make sure the kids have fun.”⁹² If this research accurately captures the reasonable reader’s views about how interpretations that push the outer bounds of delegated authority should be treated, then the major questions doctrine—which presumes that legislative delegations of power should be construed narrowly and that boundary-pushing interpretations should be presumed illegitimate—may not in fact represent the “common sense” context that Justice Barrett thinks it does.

One possible counter to this critique is that the major questions doctrine applies to regulatory statutes, and that regulatory statutes are written for a narrow audience that includes regulatory agencies, regulated industries, and the officials charged with implementing a statute—not the ordinary citizen on the street.⁹³ For the reasons stated above, I am not sure that this is who Justice Barrett has in mind when she invokes the “reasonable observer” or “reasonable speaker”; textualist Justices have made numerous statements suggesting that they believe the reasonable reader is the average citizen on the street.⁹⁴ But even if this is what Justice Barrett meant, there is little reason to think that the presumption underlying the major questions doctrine—i.e., that Congress does not typically delegate matters of great political or economic significance to agencies, and that Congress will be exceptionally clear if it does intend to do so—is a presumption or “common sense context” that regulatory agencies, regulated industries, or other officials charged with implementing a statute share. This is so for at least two reasons. First, Congress does not typically—or perhaps ever—regulate with the kind of specificity, or targeted language, that the Court seems to be demanding with the latest iteration of the major questions doctrine. Second, as other scholars have pointed out, Congress often deliberately speaks

⁹⁰ *Biden v. Nebraska*, 143 S. Ct. at 2383.

⁹¹ See Tobia et al., *supra* note 74, at 39–45.

⁹² See *id.* at 43, 49–50.

⁹³ See Lawrence Solum, *Krishnakumar on the Major Questions Doctrine*, LEGAL THEORY BLOG (Apr. 11, 2024, 11:55 AM), <https://lsolum.typepad.com/legaltheory/2024/04/krishnakumar-on-the-major-questions-doctrine.html> [<https://perma.cc/YM9C-572M>].

⁹⁴ See *supra* notes 82–86 and accompanying text.

ambiguously and broadly in its delegations to agencies—sometimes precisely in order to punt tough, politically controversial or high stakes issues to an agency.⁹⁵ Regulatory agencies, regulated industries, and other officials charged with implementing statutes long have operated with this knowledge and under this competing understanding; indeed, the *Chevron* doctrine that governed agency statutory interpretation for most of the past forty years is based on this idea.⁹⁶ The modern Court may disagree *normatively* with following a judicial presumption that Congress at least sometimes delegates important, politically controversial matters to agencies, or may question Congress’s constitutional authority to delegate significant matters to agencies. But denying that a presumption of this kind exists and has formed part of the background context for how regulated agencies and industries understand congressional delegations for years—as Justice Barrett’s defense of the major questions doctrine does—is either disingenuous or fanciful.

C. *A Linguistic Canon*

In a recent article, textualist scholar Ilan Wurman has offered a novel defense of the major questions doctrine that, like Justice Barrett’s “common sense” context argument, seeks to characterize the doctrine as something other than a traditional “substantive canon” of statutory construction.⁹⁷ Instead, Wurman suggests that the doctrine can be viewed as a linguistic “importance canon” that helps to clarify the meaning of an otherwise ambiguous statute.⁹⁸ Specifically, Wurman argues that in each of the Court’s most recent major questions cases,

⁹⁵ See, e.g., Tobia et al., *supra* note 74, at 52 (“[T]here is ample evidence that Congress often *does intend* to delegate major questions to agencies through vague language”); Shugerman, *supra* note 8, at 236–37 (“Legislatures often deliberately speak unclearly”); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–49 (1982) [hereinafter Fiorina, *Legislative Choice*] (coding as “SR,” for “shift the responsibility,” instances in which Congress dodged a major question); Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 46–47 (1986) [hereinafter Fiorina, *Legislator Uncertainty*] (noting that legislators avoid the trouble of making specific decisions by charging agencies with general regulatory mandates); Thomas W. Gilligan, William J. Marshall & Barry R. Weingast, *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J.L. & ECON. 35, 47–48 (1989) (linking Fiorina’s “SR” observation to literature on the development of the administrative state and independent agencies).

⁹⁶ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations ‘has been consistently followed by this Court’” (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961))), *overruled by* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

⁹⁷ Wurman, *supra* note 11, at 8.

⁹⁸ See *id.*

the relevant regulatory statute was plausibly ambiguous—and that “the Court can be understood to have resolved the ambiguity by adopting the narrower reading of the statute on the ground that . . . it was more plausible to think that Congress intended the narrower reading.”⁹⁹ Wurman bases his argument in part on Ryan Doerfler’s work involving insights from the philosophy of language: Doerfler has suggested that ordinary speakers—the textualist’s reference point for determining “ordinary meaning”—need to feel a higher degree of certainty to say that they “know” something in *high stakes* situations versus *low stakes* situations;¹⁰⁰ Wurman analogizes that when dealing with an “important” agency regulation that imposes a requirement on millions of individuals, inflicts high monetary costs on the government or private business, or is highly controversial—i.e., a *high stakes* situation—“it is intuitive to think” that ordinary speakers would “demand more epistemic confidence”—that is, greater clarity—before concluding that the statute in fact authorizes the regulation.¹⁰¹

Wurman’s effort to reframe the major questions doctrine as a linguistic rather than a substantive canon is clever but ultimately untenable for a number of reasons. The first problem lies in what triggers linguistic canons, or renders such canons applicable, in particular situations. Linguistic canons by definition focus on the text of the statute and encompass rules of syntax, grammar, and sentence structure.¹⁰² As then-Professor Barrett once put it, “Linguistic canons apply rules of syntax to statutes.”¹⁰³ For this reason, linguistic canons tend to turn on simple, easy-to-identify triggers such as the presence of a particular grammatical device (e.g., a last antecedent,¹⁰⁴ a particular verb tense,¹⁰⁵

⁹⁹ *Id.* at 6.

¹⁰⁰ See Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 528 (2018).

¹⁰¹ See Wurman, *supra* note 11, at 47. As Wurman acknowledges, this is not the only way to apply this insight from the philosophy of language; one could instead frame the question as whether judges should “demand more epistemic certainty” before overturning an expert agency’s interpretation. See *id.* at 48–49.

¹⁰² Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 180 (2018); Barrett, *supra* note 54, at 117.

¹⁰³ Barrett, *supra* note 54, at 117.

¹⁰⁴ See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 144 (2012) (“A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent.”); *Lockhart v. United States*, 577 U.S. 347, 351 (2016) (noting that when a statute includes “a list of terms or phrases followed by a limiting clause” courts apply the “rule of the last antecedent”); *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (“[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.”).

¹⁰⁵ See, e.g., *Carr v. United States*, 560 U.S. 438, 447–48 (2010) (holding statute’s use of present tense form of verb *travels* “reinforces the conclusion that pre-enactment travel falls outside the statute’s compass”); *Dean v. United States*, 556 U.S. 568, 572 (2009) (attaching significance to statute’s use of passive voice in saying “to be used,” stating that it “reflects ‘agnosticism . . . about who does the using.’” (quoting *Watson v. United States*, 552 U.S. 74, 81 (2007))).

the use of the word “shall”¹⁰⁶); or sentence structure (e.g., the inclusion of a list—which triggers the *noscitur a sociis* and *ejusdem generis* canons¹⁰⁷); or the presence of two parallel or similarly worded statutory provisions—which triggers the meaningful variation subpart of the whole act rule.¹⁰⁸ By contrast, Wurman’s “importance canon” has a much more complicated trigger—a determination that an agency regulation addresses an “important” or “major” question. This is problematic because what counts as “important” is a subjective, open-ended, often difficult to define inquiry—different in kind from the more straightforward determination that a statute contains a particular grammatical device or sentence structure.

Indeed, the Court’s latest major questions cases have articulated a hodgepodge of factors—almost a “totality of the circumstances” type test—for determining whether an agency regulation is “major.” These factors, which include economic significance,¹⁰⁹ whether the agency regulation falls within the agency’s wheelhouse,¹¹⁰ whether it intrudes on an area typically regulated by the states,¹¹¹ whether the matter regulated

¹⁰⁶ See, e.g., *Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 302 (1989) (“shall” connotes mandatory or compulsory behavior); SCALIA & GARNER, *supra* note 104, at 112 (“Mandatory words impose a duty.”).

¹⁰⁷ See, e.g., SCALIA & GARNER, *supra* note 104, at 195 (*noscitur a sociis*); *id.* at 199 (*ejusdem generis*); *Third Nat’l Bank v. Impac Ltd.*, 432 U.S. 312, 322 (1977) (“[W]ords grouped in a list should be given related meaning.”); *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (*ejusdem generis*); *James v. United States*, 550 U.S. 192, 199 (2007) (*ejusdem generis*); *Hughey v. United States*, 495 U.S. 411, 419 (1990) (*ejusdem generis*).

¹⁰⁸ See, e.g., *Dean*, 556 U.S. at 572–74 (comparing parallel clauses of sentencing enhancement statute and attributing significance to fact that one clause expressly contains an “intent” requirement, while the other does not); *United States v. Hayes*, 555 U.S. 415, 421–22 (2009) (parallel criminal statutes use “elements” in the plural when they want their offense-defining provisions to require more than one element for the offense).

¹⁰⁹ See *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (explaining “economic and political significance” of the authority an agency has asserted may “provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000))); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 117–20 (2022) (vaccine mandate is a “significant encroachment” that will force states and employers “to incur billions of dollars in unrecoverable compliance costs”); *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (“The ‘economic and political significance’ of the Secretary’s action is staggering.” (quoting *West Virginia v. EPA*, 597 U.S. at 721)).

¹¹⁰ See *West Virginia v. EPA*, 597 U.S. at 729 (presuming that Congress does not task agencies with making policy judgments in areas in which it has “no comparative expertise”); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. at 118 (noting that “[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most” and that “a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed”).

¹¹¹ See *Ala. Ass’n. of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (“The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship.”).

is politically controversial,¹¹² whether Congress has rejected “something akin” to the agency’s regulation,¹¹³ and whether the regulation is inconsistent with the agency’s past practices¹¹⁴—add up to a much more open-ended, normative triggering mechanism than the kinds of linguistic devices that typically trigger the linguistic canons. It is not as simple as finding that a particular agency regulation will cost X dollars or impact Y number of people—the charitable equivalent, perhaps, of finding that a statute contains a particular verb tense or other grammatical device; the interpreter also has to make a subjective judgment call that X dollars or Y number of people is a large enough number that it renders the regulation “economically or politically significant.” If one of the other triggering tests applies, the inquiry will be even more subjective and open-ended, requiring the court to determine whether an agency action falls within the agency’s expertise (or “wheelhouse”), intrudes too much on areas traditionally regulated by states, is inconsistent with the agency’s past practice, and so on.

A second related difficulty with Wurman’s formulation is that it assumes that ordinary speakers of English will agree on what is “high

¹¹² See, e.g., *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. at 117–18 (COVID-19 vaccine mandate); *Ala. Ass’n of Realtors*, 594 U.S. at 764 (eviction moratorium); *West Virginia v. EPA*, 597 U.S. at 732 (noting that scheme EPA adopted “has been the subject of an earnest and profound debate across the country” and that this “makes the oblique form of the claimed delegation all the more suspect” (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006))); *id.* at 743 (Gorsuch, J., concurring) (explaining that an issue may be major where “certain States were considering” the issue or “when Congress and state legislatures were engaged in robust debates”); *Biden v. Nebraska*, 143 S. Ct. at 2373–74 (“Student loan cancellation ‘raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy.’” (quoting Jeff Stein, *Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022, 6:00 AM), <https://www.washingtonpost.com/us-policy/2022/08/31/student-debt-biden-forgiveness/> [<https://perma.cc/9P9R-Z9NU>])); *id.* at 2384 (Barrett, J., concurring) (“[A]n initiative of this scope, cost, and political salience is not the type that Congress lightly delegates to an agency.”).

¹¹³ See *West Virginia v. EPA*, 597 U.S. at 724 (agency “adopt[ed] a regulatory program that Congress had conspicuously and repeatedly declined to enact itself”); *id.* at 743 (Gorsuch, J., concurring) (“[T]his Court has found it telling when Congress has ‘considered and rejected’ bills authorizing something akin to the agency’s proposed course of action.” (quoting *Brown & Williamson*, 529 U.S. at 144)); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. at 121–24 (Gorsuch, J., concurring) (noting that although Congress has enacted several statutes aimed at combating COVID-19 it has “chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate” and that “a majority of the Senate even voted to *disapprove* OSHA’s regulation”); *Biden v. Nebraska*, 143 S. Ct. at 2373 (Congress considered and declined to enact “[m]ore than 80 student loan forgiveness bills” (quoting Kantrowitz, *supra* note 87)).

¹¹⁴ See *West Virginia v. EPA*, 597 U.S. at 724–25 (invoking novelty of the regulation as an indicia of majorness); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. at 119 (“This ‘lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.” (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))); *Biden v. Nebraska*, 143 S. Ct. at 2369 (agency’s past exercises of statutory authority “implemented only minor changes, most of which were procedural”).

stakes” much as they would agree that a statute contains a last antecedent, or uses the past tense, or contains the word “shall.” In other words, Wurman’s classification sweeps under the rug one of the central criticisms leveled against the major questions doctrine—that it depends on an open-ended, subjective judgment call about what counts as “major” versus “minor” or “ordinary” agency action.

The major questions doctrine has been criticized on two different, although related, grounds: first, that it is *inappropriate*—and inconsistent with textualism—to require a clear statement from Congress before allowing agencies to adopt policies that regulate major questions;¹¹⁵ and second, that what constitutes a major question is an open-ended inquiry that empowers judges to decide cases according to their own policy preferences.¹¹⁶ Wurman’s “linguistic” canon formulation addresses the first criticism but not the second. That is, it ignores the widespread concern that the latest iteration of the major questions doctrine is so open-ended that it leaves judges free to deem “major” and reject any agency regulation they do not like, and to deem “minor” and uphold any regulation they approve. Wurman’s “linguistic importance canon” argument brushes past these concerns and seems to take for granted that the “majorness” or “importance” of a particular agency action will be self-evident to ordinary people, who will intuitively expect the relevant statute to make especially clear if and when Congress intends to authorize the agency to take such action. However, there is extant evidence that this kind of intuitive, self-evident consensus often does not exist in the real world—indeed, in the latest major questions cases, the nine Justices on the Roberts Court often could not agree on whether a particular agency action should be considered “major.”¹¹⁷ Lower court

¹¹⁵ See, e.g., Sohoni, *supra* note 6, at 283; Squitieri, *Majorness?*, *supra* note 7, at 466; Rappaport, *supra* note 7; Deacon & Litman, *supra* note 6, at 1041; Adler, *supra* note 7, at 54; Squitieri, *Major Problems*, *supra* note 7; Benjamin Eidelson & Mathew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 518 (2023); Walters, *supra* note 10, at 523–24.

¹¹⁶ See, e.g., Squitieri, *Majorness?*, *supra* note 7, at 464 (stating that the major questions doctrine calls on courts to determine policy questions); Sohoni, *supra* note 6, at 287–88 (calling the doctrine “opa[que]” and “malleable”); Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, STANFORD UNIV., HOOVER INST. CTR. FOR REVITALIZING AM. INSTS. (Nov. 13, 2023), https://www.hoover.org/sites/default/files/research/docs/Merrill_WebReadyPDF.pdf [<https://perma.cc/FLS5-2Q97>] (noting “indeterminacy” of doctrine); Walters, *supra* note 10, at 39–40 (calling the major questions doctrine “chimerical”).

¹¹⁷ Compare, e.g., Nat’l Fed’n of Indep. Bus. v. OSHA, 595 U.S. at 117 (“There can be little doubt that OSHA’s mandate qualifies” as an exercise of powers of “vast economic and political significance.” (quoting Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 594 U.S. 758, 764 (2021))), with *id.* at 135 (Breyer, Sotomayor, Kagan, JJ., dissenting) (arguing “[n]othing about that measure is so out-of-the-ordinary as to demand” a clear statement before OSHA may adopt it); Biden v. Missouri, 595 U.S. 87, 89 (2022) (upholding vaccine mandate for healthcare staff at Medicare and Medicaid facilities, declining to mention major questions doctrine), with *id.* at 104

judges likewise have clashed over whether particular agency regulatory actions qualify as “major” or not.¹¹⁸

Such open-endedness, or lack of clarity, about when a canon’s triggering factors have been met is more a hallmark of *substantive* canons than of linguistic ones. Think, for example, of the rule of lenity, which holds that ambiguities in criminal statutes must be resolved in favor of the defendant.¹¹⁹ Whether a statute is sufficiently “ambiguous” to trigger the rule—like the question whether an agency regulation involves a “major” question of the kind that requires especially clear authorization—is often open to interpretation or debate. And judges regularly have disagreed about when the triggering conditions for lenity have been met.¹²⁰ Consider also the avoidance canon, which holds that if

(Thomas, J., dissenting) (vaccine mandate for healthcare staff “is undoubtedly significant” and requires clear statement from Congress); *Ala. Ass’n of Realtors*, 594 U.S. at 764 (“[T]he sheer scope of the CDC’s claimed authority” is “exactly the kind of power” that has “vast ‘economic and political significance.’” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))), *with id.* at 769 (Breyer, Sotomayor, Kagan, JJ., dissenting) (arguing that eviction moratoriums are less “significant” than quarantines, which statute clearly allows CDC to impose).

¹¹⁸ Compare, e.g., *Louisiana v. Biden*, 55 F.4th 1017, 1028 (5th Cir. 2022) (federal contractor vaccine mandate that applies to “roughly ‘one-fifth of the entire U.S. Labor Force’” involves major question (quoting *History of Executive Order 11246*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> [perma.cc/JZH3-PCA7])), *with id.* at 1038 (Anderson, J., concurring in part, dissenting in part) (concluding not a major question because “this is not an ‘enormous and transformative expansion in’ regulatory authority” but merely “a standard exercise of the federal government’s *proprietary* authority” (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324)); *In re MCP No. 165*, 21 F.4th 357, 372 (6th Cir. 2021) (“The major questions doctrine is inapplicable here, however, because OSHA’s issuance of the ETS is not an enormous expansion of its regulatory authority.”), *with id.* at 397–98 (Larsen, J., dissenting) (OSHA’s policy implicates major questions doctrine); *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 959–60 (D.C. Cir. 2021) (per curiam) (major questions doctrine does not apply to clean power plan), *with id.* at 1001–02 (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part) (clean power plan constitutes a policy of major economic and political significance).

¹¹⁹ See, e.g., NORMAN J. SINGER & J.D. SHAMBLE SINGER, 3 STATUTES AND STATUTORY CONSTRUCTION § 59:3, at 167–75 (7th ed. 2008); *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (noting that under the rule of lenity, “an ambiguous criminal statute is to be construed in favor of the accused”); *United States v. Bass*, 404 U.S. 336, 347 (1971) (noting that ambiguity should be “resolved in favor of lenity” (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))); see also *United States v. Granderson*, 511 U.S. 39, 54 (1994) (“[W]here text, structure, and history fail to establish that the Government’s position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”).

¹²⁰ Compare, e.g., *Wooden v. United States*, 595 U.S. 360 (2022) (declining to mention or apply rule of lenity), *with id.* at 388 (Gorsuch, J., concurring) (applying rule of lenity); *United States v. Davis*, 588 U.S. 445, 464 (2019) (invoking lenity), *with id.* at 496 (Kavanaugh, J., dissenting) (statute not ambiguous enough for lenity to apply); *United States v. Granderson*, 511 U.S. 39, 54 (1994) (invoking lenity), *with id.* at 60 (Scalia, J., concurring in the judgment) (discussing the “wretchedly drafted statute” apparently without finding need to invoke lenity), *and id.* at 69 (Kennedy, J., concurring in the judgment) (offering a different interpretation of the statute from the majority but rejecting the necessity to invoke lenity), *and id.* at 70 (Rehnquist, C.J., dissenting) (offering yet another interpretation of the disputed statute but rejecting the necessity to invoke lenity);

there are two or more plausible readings of a statute, and one of these raises serious constitutional concerns, the Court should adopt the reading that avoids the constitutional problem.¹²¹ Judges have also regularly disagreed about if and when the avoidance canon is applicable.¹²² Other substantive canons similarly turn on ambiguity determinations that are open to debate.¹²³ By contrast, judges typically do not disagree about the *presence* of an antecedent or the fact that a statute uses the passive voice or the present tense—although they do sometimes disagree about what inference to draw from the presence of such grammatical devices.¹²⁴

Dowling v. United States, 473 U.S. 207, 229 (1985) (invoking lenity), *with id.* at 232 (Powell, J., dissenting) (concluding that the statute is “very broad,” but not “ambiguous”); Dixon v. United States, 465 U.S. 482, 500 n.19 (1984) (declining to invoke lenity after examining the statute’s legislative history), *with id.* at 506 (O’Connor, J., dissenting) (concluding that lenity should be applied); United States v. Mitchell, 39 F.3d 465, 470, 476 (4th Cir. 1994) (declining to find sufficient ambiguity to trigger the doctrine of lenity), *with id.* at 476–77 (Murnaghan, J., dissenting) (finding the disputed phrase sufficiently ambiguous to require application of the doctrine).

¹²¹ See, e.g., Rapanos v. United States, 547 U.S. 715, 738–39 & n.9 (2006) (plurality opinion); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); United States v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909); see also Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 399–401 (2005); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 82–83; Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court’s Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 88–90 (1996).

¹²² Compare, e.g., Clark v. Martinez, 543 U.S. 371, 381–82 (2005) (invoking avoidance canon), *with id.* at 395 (Thomas, J., dissenting) (criticizing majority’s application of avoidance canon), and Jennings v. Rodriguez, 583 U.S. 281, 296 (2018) (explaining that the Ninth Circuit “misapplied” the avoidance canon); United States v. Davis, 588 U.S. 445, 463 (2019) (rejecting application of avoidance), *with id.* at 493–95 (Kavanaugh, J., dissenting) (defending and applying avoidance canon); Valenzuela Gallardo v. Lynch, 818 F.3d 808, 823 (9th Cir. 2016) (applying avoidance canon to reject the Board of Immigration Appeals’ interpretation), *with id.* at 826 (Seabright, J., dissenting) (stating that the Board of Immigration Appeals’ interpretation “does not raise ‘grave’ constitutional vagueness concerns”); United States v. Simms, 914 F.3d 229, 251 (4th Cir. 2019) (avoidance canon not applicable because statute lacks more than one plausible construction), *with id.* at 272 (Niemeyer, J., dissenting) (court should have relied on avoidance canon “to give the statute the benefit of the doubt”).

¹²³ These include, for example, the maxim that ambiguities in deportation statutes should be interpreted in favor of noncitizens. See *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); cf. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (*Chevron* deference rule that courts should defer to “reasonable” agency interpretations of ambiguous or unclear statutes), *overruled by* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

¹²⁴ Compare, e.g., *Lockhart v. United States*, 577 U.S. 347, 350–52 (2016) (noting presence of a modifying phrase and a last antecedent and concluding that the modifying phrase qualifies only the clause immediately preceding it), *with id.* at 363–67 (Kagan, J., dissenting) (noting presence of modifying phrase and last antecedent but concluding that modifier qualifies all clauses in the statutory sentence, not just the one immediately preceding the modifier); *Carr v. United States*, 560 U.S. 438, 447–51 (2010) (inferring meaning from a statute’s use of present tense verbs), *with id.* at

Wurman seems to acknowledge that the major questions doctrine is different from traditional linguistic canons—referring to it, at times, as a “*quasi* linguistic” canon.¹²⁵ Indeed, he suggests that the doctrine may occupy a space between substantive and linguistic canons but one closer to the linguistic end of the spectrum.¹²⁶ That is, even if the doctrine is not a classic, or typical, linguistic canon, Wurman argues that it should not be considered a substantive canon because substantive canons “depend on [an underlying] constitutional or traditional value”—whereas the major questions doctrine depends on the philosophy of language insight that “ordinary speakers” of English intuitively demand greater certainty in high stakes versus low stakes situations.¹²⁷ As discussed above, one difficulty with this argument is that it begs the question what counts as a “high” versus a “low” stakes situation—and treats that complicated assessment as an intuitive determination that ordinary citizens automatically make in a manner akin to how they process language or sentence structure.¹²⁸ As noted earlier, another difficulty with this argument is that Congress often deliberately speaks unclearly—sometimes precisely in order to punt tough, politically controversial or high stakes issues to an agency.¹²⁹ Based on this political reality, one could argue, as one scholar has, that there may be “an equally plausible descriptive linguistic canon” suggesting that ordinary citizens expect Congress to speak *ambiguously* when it delegates politically contentious matters to administrative agencies.¹³⁰

In short, the effort to characterize the major questions doctrine as a linguistic importance canon fails for two reasons. First, the major questions doctrine quite plainly has nothing to do with the syntax, grammar, or structure of a statute; and second, the doctrine requires a far more intricate and inevitably subjective analysis of the consequences and history of the agency action at issue than ordinary speakers of English can be expected to understand intuitively or to agree upon universally.

D. (Good) Purposivism

Finally, some scholars have suggested that both the early and the latest iterations of the major questions doctrine are, at bottom, a form

463–64 (Alito, J., dissenting) (arguing that use of present tense verbs carries no meaning, in part because legislative drafting manuals encourage the use of the present tense for all statutes).

¹²⁵ See Wurman, *supra* note 11, at 39 (emphasis added).

¹²⁶ See *id.*

¹²⁷ See *id.* at 39–40, 46.

¹²⁸ See *supra* note 117 and accompanying text.

¹²⁹ See, e.g., sources cited *supra* note 95.

¹³⁰ See Shugerman, *supra* note 8, at 237–38.

of old-fashioned, traditional purposivism.¹³¹ Professor Jed Shugerman, for example, has argued that early major questions cases such as *FDA v. Brown & Williamson Tobacco Corp.*¹³² and *King v. Burwell*¹³³ were highly purposive—relying on legislative history and congressional intent (*Brown & Williamson*) or the design and policy goals that motivated the statute at issue (*King*).¹³⁴ Shugerman contends that the most recent Biden-era major questions cases have continued in this vein of elevating purpose over text—noting, for example, that in *Biden v. Nebraska*, Justice Roberts discussed the scope of Congress’s delegation in “distinctly purposive terms” that debated how the “enacting Congress” would have viewed the Secretary’s decision to cancel \$430 billion in student loans.¹³⁵ Likewise, Professor Sam Bray, writing shortly before the explosion of recent Biden-era major questions cases, suggested that “the major questions doctrine has an essential similarity with the mischief rule”—in that both require the interpreter to focus on the original social problem that the statute (or agency) was designed to address and to determine whether the statutory application (or agency action) at issue falls within or beyond the scope of that social problem.¹³⁶

There is, at first blush, considerable support for this characterization. Many of the moves the Court has made in its recent major questions cases look a lot like traditional purposivism. For example, the Court’s most recent major questions cases have consistently argued that particular policies or regulations exceed an agency’s statutory authority because those policies or regulations fall outside the agency’s “sphere of expertise.”¹³⁷ In each case, the Court essentially determined that the relevant agency had authority to regulate certain core subjects (e.g., workplace-related hazards, emissions, public health), and then concluded that the challenged regulations were *different in kind* from—or outside the scope of—those core subjects (e.g., communicable diseases that spread outside as well as within the workplace, energy policy rather than emissions, evictions rather than public health).

¹³¹ See *id.* at 231–32; Squitieri, *Major Problems*, *supra* note 7 (“The major questions doctrine is a product of legal pragmatism—a theory of statutory interpretation advanced by Justice Breyer which often elevates statutory purpose and consequences over text.”).

¹³² 529 U.S. 120, 125–26 (2000).

¹³³ 576 U.S. 473, 481–82 (2015).

¹³⁴ See Shugerman, *supra* note 8, at 230–31.

¹³⁵ See *id.* at 21–23 (“Congress did not unanimously pass the HEROES Act with such power in mind.” (quoting *Biden v. Nebraska*, 143 S. Ct. 2355, 2372–73 (2023))).

¹³⁶ See Bray, *supra* note 8, at 1011.

¹³⁷ See *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 118 (2022) (OSHA imposing vaccine or test mandate to combat the alleged workplace hazard of COVID-19); *West Virginia v. EPA*, 597 U.S. 697, 730 (2022) (EPA citing its general authority in environmental regulation to “dictat[e] the optimal mix of energy sources nationwide”); *id.* at 747–50 (Gorsuch, J., concurring).

Moreover, the Court in each case made some form of legislative intent argument in connection with its use of the major questions doctrine. Perhaps most notably, all of the majority opinions in all of the Biden-era cases have taken special note of the fact that Congress considered and declined to enact legislative proposals similar to the challenged agency policy, or in one case, expressly disapproved the challenged agency policy.¹³⁸ In *Alabama Ass'n of Realtors v. Department of Health & Human Services*,¹³⁹ for example, the Court observed that although Congress knew that the eviction moratorium was about to expire, it had “failed to act in the several weeks leading up to the moratorium’s expiration” to extend the moratorium.¹⁴⁰ Similarly, in *NFIB v. OSHA*, the per curiam opinion noted that a majority of the Senate had voted to enact a resolution disapproving OSHA’s vaccine-or-test mandate.¹⁴¹ Likewise, in *West Virginia v. EPA*, the Court noted that the EPA’s new power plan “conveniently enabled it to enact a program” that Congress had considered and rejected multiple times.¹⁴² Additionally, in *Biden v. Nebraska*, the Court observed that Congress previously considered, but declined to enact, “[m]ore than 80 student loan forgiveness bills,” noting that the policy at issue was one that “Congress has chosen not to enact itself.”¹⁴³

Although all of this gesturing toward the statute’s core mischief and legislative intent looks and sounds a lot like traditional purposivism, it is not. For when we look beneath the surface, the purpose and intent arguments employed in the latest major questions cases differ in important ways from traditional purposivism—or at least from *good* traditional purposivism. This is because unlike *good* purposivism, the purpose and intent-based arguments invoked in the latest major questions cases lack any external tether or concrete evidence of the statute’s purpose beyond the Justices’ own intuitions. That is, the agency “expertise” and even the rejected proposal arguments the Court employs in its latest major questions cases are wholly unconnected to the circumstances surrounding a statute’s enactment, the policy goals set by the *enacting* Congress, or the *actual* intent of the statute’s drafters. This is because instead of citing historical or legislative record evidence about the original problem the statute was designed to solve, the enacting Congress’s intentions, or even legislative proposals considered and rejected by the *enacting* Congress, the latest major questions cases rely on circumstantial evidence of the *present-day* Congress’s *policy views*

¹³⁸ See cases cited *supra* note 113.

¹³⁹ 594 U.S. 758 (2021).

¹⁴⁰ *Id.* at 766.

¹⁴¹ Nat’l Fed’n of Indep. Bus. v. OSHA, 595 U.S. at 119.

¹⁴² *West Virginia v. EPA*, 597 U.S. at 731.

¹⁴³ *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (quoting Kantrowitz, *supra* note 87).

and mere judicial declarations that the regulation at issue falls outside the agency's wheelhouse.

Let us start by setting the record straight about *good* purposivism. *Good* purposivism does not make blanket assertions based on judicial intuition. Rather, *good* purposivism rests on some objective historical or legislative record evidence that establishes the core problem a statute was designed to remedy or explains Congress's goals in enacting the statute. Such evidence typically takes the form of statutory text such as a preamble or legislative findings, legislative history, contemporary newspaper articles, or historical documents.¹⁴⁴ Although there have undoubtedly been several cases in which courts have engaged in *bad* purposivism of the kind that is mostly based on judicial intuition and only loosely connected to objective historical sources, this has not been the dominant mode of purposivism practiced on the modern Supreme Court.¹⁴⁵ Indeed, since Justice Scalia joined the Court and began calling attention to the looseness of the Hart & Sacks-style purposivism¹⁴⁶ of the 1970s, the purposivism practiced by the modern Court has hewed much more closely to cues contained in the statute's text, legislative record, or circumstances surrounding the statute's enactment.¹⁴⁷

Thus, for example, in *Brown & Williamson*, a pre-Biden-era major questions case, the Court relied on (1) congressional hearing testimony

¹⁴⁴ See, e.g., *King v. Burwell*, 576 U.S. 473, 479–81 (2015) (academic book, hearing testimony, and history of state health reform efforts that preceded the Affordable Care Act); *Yates v. United States*, 574 U.S. 528, 535–36 (2015) (committee report); *Bond v. United States*, 572 U.S. 844, 848–49 (2014) (preamble to an international treaty and academic books); *Lawson v. FMR LLC*, 571 U.S. 429, 448–49 (2014) (newspaper articles and committee report); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 649 (2013) (statute's text and committee report); *Jefferson v. Upton*, 560 U.S. 284, 290 (2010) (precedent); *Dean v. United States*, 556 U.S. 568, 579 (2009) (Stevens, J., dissenting) (floor statements); *Bilski v. Kappos*, 561 U.S. 593, 639–40 (2010) (Stevens, J., concurring) (House and Senate committee reports).

¹⁴⁵ See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 118–19 (2012) (describing present-day purposivism as more “textually-constrained” than old-fashioned, *Holy-Trinity*-style purposivism); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1277 (2020) (“Modern purposivism . . . looks distinctly different from the purposivism that prevailed in the 1970s, during the heyday of purposive analysis.”).

¹⁴⁶ Henry Hart and Albert Sacks famously developed a New-Deal-inspired theory known as “The Legal Process,” which posited that law is a “purposive activity” and urged judges to assume “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably[]”—and, accordingly, to “[i]nterpret the words of the statute . . . so as to carry out the purpose as best [the Court] can.” See WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY, & ELIZABETH GARRET, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 427–30 (6th ed. 2020).

¹⁴⁷ See Manning, *supra* note 145, at 119 (commenting that the Court's current purposivist Justices now “rely on the text to structure and constrain their use of purpose”); *id.* at 141 (“[N]ew purposivists accept the constraints of the statutory text . . .”); Krishnakumar, *supra* note 145, at 1344 (“[P]urposivist Justices’ estimations [of statutory purpose] are at least tethered to a written legislative record created by legislators and external to themselves.”).

in which Food and Drug Administration (“FDA”) officials expressly disavowed the authority to regulate tobacco products and (2) rejected legislative proposals to amend the Federal Food, Drug, and Cosmetic Act (“FDCA”)¹⁴⁸ to explicitly give the FDA authority to regulate tobacco products—to conclude that the FDA’s reading of the FDCA conflicted with Congress’s purpose and intent.¹⁴⁹ Likewise, in *King v. Burwell*, decided in 2015, the Court relied on an actuarial report and a Senate hearing describing predecessor state statutes that Congress sought to emulate when enacting the Affordable Care Act (“ACA”)¹⁵⁰—in order to establish the goals and policy design of the ACA.¹⁵¹

By contrast, the “sphere of expertise” and “agency wheelhouse” arguments the Court has invoked in its latest major questions cases have stemmed mostly from the Justices’ own intuitions. The Court’s legislative intent arguments similarly have rested on judicial intuitions and assumptions that Congress *could not possibly have intended* to give an agency certain kinds of regulatory power—rather than on concrete evidence of Congress’s *actual* intent. Moreover, even when the Court has pointed to objective legislative record evidence showing that the present-day Congress considered and rejected a legislative proposal to adopt a policy similar to the agency policy at issue, that gesture toward legislative intent has focused on the *wrong* Congress—not to mention has inferred too much meaning, perhaps inaccurately, from Congress’s failure to act.

Consider the following examples:

In *NFIB v. OSHA*, the Court’s per curiam opinion emphasized that the OSH Act empowers the Secretary of HHS to set “*workplace* safety standards, not broad public health measures.”¹⁵² The Court seemed to base this limitation on its own intuitions about the meaning of the term “*occupational*”—a word it invoked often and italicized repeatedly.¹⁵³ In the Court’s estimation, the term “occupational” refers only to “work-related” dangers—and therefore does not authorize OSHA to regulate dangers, such as COVID-19, that occur both inside and outside

¹⁴⁸ 21 U.S.C. §§ 301–392.

¹⁴⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 145–46 (2000) (hearing testimony); *id.* at 147–48 (rejected proposals).

¹⁵⁰ The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

¹⁵¹ *King v. Burwell*, 576 U.S. 473, 479–81 (2015) (citing LEIGH WACHENHEIM & HANS LEIDA, *THE IMPACT OF GUARANTEED ISSUE AND COMMUNITY RATING REFORMS ON STATES’ INDIVIDUAL INSURANCE MARKETS* 38 (2012); *Hearing on Examining Individual State Experiences with Health Care Reform Coverage Initiatives in the Context of National Reform Before the Senate Committee on Health, Education, Labor, and Pensions*, 111th Cong. 9 (2009)).

¹⁵² *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022) (citing 29 U.S.C. § 655(b)).

¹⁵³ *See id.* at 114, 117–19 (invoking the term “occupational” seven times and italicizing it four of those times).

the workplace.¹⁵⁴ In so reasoning (or intuiting), the Court ignored OSHA's own past regulatory practices, which include the adoption of rules addressing many dangers that occur both inside and outside the workplace—such as tractor safety, ladders, and asbestos.¹⁵⁵ In other words, the Court privileged its own intuitions about the scope of the term “occupational” over historical evidence of that term's meaning.

In *West Virginia v. EPA*, the Court again relied heavily on agency expertise and core regulatory function arguments that look like traditional purposivism, but lack any tether to external evidence of Congress' actual intent.¹⁵⁶ Specifically, the Court noted that the scientific judgments EPA had made in setting pollution emissions levels that would require a shift from coal and gas to clean power sources required technical and policy expertise that EPA does not have, and that differ from the kind of expertise “traditionally needed in EPA regulatory development.”¹⁵⁷ This time, the Court cited comments EPA had made in a request for special funding¹⁵⁸—a better source than the Justices' own intuition, but still a far cry from concrete evidence of Congress's actual intent.

In *Alabama Ass'n of Realtors*, the Court at least offered *some* concrete, text-based hook for its statutory scope argument—but even that argument rested on judicial intuitions about the underlying purpose behind the statute's text.¹⁵⁹ Specifically, the Court in *Alabama Ass'n of Realtors* made an *ejusdem generis* argument that several terms listed in the second sentence of the Public Health Services Act¹⁶⁰ (e.g., “fumigation,” “disinfection,” “sanitation”) indicate that the CDC has authority only over actions that relate directly to “identifying, isolating, [or] destroying [a] disease”¹⁶¹—and not to housing-related matters like evictions.¹⁶² Notably, however, that argument depended on judicial inferences about what the terms “fumigation,” “disinfection,” and “sanitation” have in common—i.e., the connecting theme, or organizing purpose underlying the statute's grant of authority to the CDC—not on objective, external evidence of the problem that the Public Health Services Act was designed to remedy or that the CDC was authorized to combat. As I have elsewhere argued, such judicial inferences about

¹⁵⁴ *Id.* at 117–18.

¹⁵⁵ See Roll-over protective structures (ROPS) for tractors used in agricultural operations, 29 C.F.R. § 1928.51; Ladders, 29 C.F.R. § 1926.1053; Asbestos, 29 C.F.R. § 1910.1001.

¹⁵⁶ See generally *West Virginia v. EPA*, 597 U.S. 697 (2022).

¹⁵⁷ *Id.* at 729 (quoting EPA's admissions to this effect in ENV'T PROT. AGENCY, FISCAL YEAR 2016 JUSTIFICATION OF APPROPRIATION ESTIMATES FOR THE COMMITTEE ON APPROPRIATIONS 213 (2015)).

¹⁵⁸ See *id.*

¹⁵⁹ See generally *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758 (2021).

¹⁶⁰ 42 U.S.C. §§ 201–300mm-64.

¹⁶¹ *Ala. Ass'n of Realtors*, 594 U.S. at 763.

¹⁶² *Id.* at 763–64.

the organizing theme connecting the items in a statutory list amount at bottom to judicial speculation about a statute's underlying purpose.¹⁶³ Here, the majority concluded that the statute's goal was to empower the CDC to “identify[], isolat[e], [or] destroy[] [a] disease” as opposed to empowering the CDC to stop the spread of communicable diseases generally—or some broader purpose that might have swept in an eviction moratorium designed to prevent infected people from spreading a disease from one location to another.¹⁶⁴ In so extrapolating the statute's purpose from surrounding words in a statutory list, without the benefit of any contextual clues, or evidence from the legislative record or contemporary historical accounts, the Court engaged in a practice I have referred to as “backdoor purposivism”¹⁶⁵—a practice that is, in many ways, the opposite of *good* purposivism.

Because of its dependence on judicial intuition, the Court's use of mischief and intent-sounding arguments in the latest major questions cases is at best a *false* form of purposive analysis—one that does not look to actual facts or circumstances surrounding an agency's creation or to record evidence created at the time of the statute's enactment but, rather, simply declares what an agency's core function is and extrapolates from there to establish the outer edges of an agency's authority.

In a similar vein, although the recent major questions cases gesture toward congressional intent, such gesturing falls short of *good* purposivism because it does not make a meaningful attempt to discern Congress's *actual* legislative design or intent. For example, all of the recent Biden-era major questions cases include a lot of figures that illustrate the sheer number of people or businesses that will be affected, or the amount of money that will have to be spent as a result of the agency regulation at issue—and then reason that it is highly “unlikely” that Congress could have intended to give the agency authority to implement a policy that would have such a large impact or cost on so many people or entities.¹⁶⁶ In other words, the cases use the sheer size of a regulation's impact to presume a legislative intent *not to delegate* so

¹⁶³ See generally Krishnakumar, *supra* note 145.

¹⁶⁴ *Ala. Ass'n of Realtors*, 594 U.S. at 763.

¹⁶⁵ See generally Krishnakumar, *supra* note 145.

¹⁶⁶ See e.g., *Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. 109, 112 (2022) (noting that vaccine-or-test mandate “applies to roughly 84 million workers”); *Ala. Ass'n of Realtors*, 594 U.S. at 764 (“At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium.”); *West Virginia v. EPA*, 597 U.S. 697, 714–15 (2022) (commenting that the regulation at issue “would entail billions of dollars in compliance costs . . . require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. . . . [as well as reduce] GDP by at least a trillion 2009 dollars by 2040”); *Biden v. Nebraska*, 143 S. Ct. 2355, 2372–73 (2023) (observing challenged regulation would “release 43 million borrowers from their obligations to repay \$430 billion in student loans” and noting that this “amounts to nearly one-third of the Government's \$1.7 trillion in annual discretionary spending”).

much authority to the agency. But such a presumption does not rest on any evidence of Congress's actual intent; rather, it imputes to Congress an intent that depends on the Justices'—rather than Congress's—judgment about how much regulatory impact is too much.¹⁶⁷

In fact, the Justices may well be getting Congress's actual intent *wrong* in at least some of these cases. As noted in Section I.C above, Congress often deliberately chooses to delegate tough, politically controversial issues to an agency in order to avoid having to decide such issues itself.¹⁶⁸ Moreover, as textualists long have complained, it is dubious to make inferences about Congress's intent—enacting or present-day—based on actions that it fails to take¹⁶⁹ because there are numerous possible reasons why Congress might fail to adopt a particular legislative proposal.¹⁷⁰

Finally, the Court's references to legislative action, or inaction, in the Biden-era major questions cases fall short of *good* purposivism because they focus on how subsequent, often present-day, Congresses—rather than the *enacting*-era Congress that drafted the statute—have acted when considering whether to legislate a policy similar to the

¹⁶⁷ This kind of use of practical reasoning to presume legislative intent is a form of what I have elsewhere called “backdoor purposivism.” See Krishnakumar, *supra* note 145.

¹⁶⁸ See, e.g., Tobia et al., *supra* note 74, at 52; Shugerman, *supra* note 8, at 26; Fiorina, *Legislative Choice*, *supra* note 95, at 46–49 (coding as “SR,” for “shift the responsibility,” instances in which Congress punted a major question); Fiorina, *Legislator Uncertainty*, *supra* note 95, at 46–47; Gilligan et al., *supra* note 95, at 47–48 (linking Fiorina’s “SR” observation to literature on the development of the administrative state and independent agencies).

¹⁶⁹ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (Justice Scalia opinion noting that “[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute” (quoting *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 169 (2001))); *Halliburton v. Erica P. John Fund*, 573 U.S. 258, 300 (2014) (Thomas, J., concurring) (“‘Congressional inaction lacks persuasive significance’ because it is indeterminate; ‘several equally tenable inferences may be drawn from such inaction.’” (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994))); *Tex. Dep’t. of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 571 (2015) (Alito, J., dissenting) (“Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute.” (citations omitted) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989))).

¹⁷⁰ See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69, 85, 90 (1988) (listing several reasons); *Rapanos*, 547 U.S. at 750 (2006) (Scalia, J.) (“We have no idea whether the Members’ failure to act in 1977 was attributable to their belief that the Corps’ regulations were correct, or rather to their belief that the courts would eliminate any excesses, or indeed simply to their unwillingness to confront the environmental lobby.”); *Solid Waste Agency*, 531 U.S. at 169–70 (Rehnquist, C.J.) (“[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.’ A bill can be proposed for any number of reasons, and it can be rejected for just as many others.” (citations omitted) (quoting *Cent. Bank of Denver*, 511 U.S. at 187)); *United States v. Est. of Romani*, 523 U.S. 517, 535–36 (1998) (Scalia, J., concurring) (“Congress cannot express its will by a *failure* to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.”).

agency regulation at issue. If the Court is concerned about the scope of power that Congress delegated to the agency, it should be focusing on the behavior of the *enacting* Congress that designed the statute and wrote the delegation into law, rather than on actions taken by later Congresses that had nothing to do with crafting the enabling statute. The materials the Court has cited in its most recent major questions cases—such as the disapproval resolution in *NFIB v. OSHA*—demonstrate, at best, evidence that the *present-day* Congress disapproves of the *particular agency policy at issue*, not that the *enacting* Congress failed to give the agency *authority* to adopt that policy.¹⁷¹ That is, the Court’s reliance on post-enactment, and often present-day, Congresses’ legislative action or inaction sheds no light on the question of how much authority an enabling statute enacted by a different Congress at a different point in time delegated to the agency.

II. WHAT IS THE NEW MAJOR QUESTIONS DOCTRINE?

If the new major questions doctrine is not (1) a nondelegation doctrine proxy or a substantive canon that enforces the constitutional principles underlying the nondelegation doctrine, (2) part of the “common sense” context that reasonable readers take into account when determining ordinary meaning, (3) a linguistic canon that approximates how ordinary speakers understand or talk about important matters, or (4) a form of good, old-fashioned purposivism—then what exactly *is* it?

This Part explores several possible answers to that question. It concludes that while the doctrine’s status and proper classification are very much still evolving—because the Court is still figuring out how it is going to use the doctrine as well as how to describe its place within the statutory interpretation toolkit—for now, the best label and closest analogy for the doctrine may be that it is a form of practical-consequences-based reasoning similar to the absurdity doctrine. That conclusion, in turn, is problematic for textualist jurists because it means the major questions doctrine is precisely the kind of open-ended, atextual interpretive tool that textualists have long decried.

A. A Substantive Canon?

The emerging conventional wisdom seems to be that the major questions doctrine is a substantive canon and, specifically, a clear statement rule form of substantive canon. Numerous scholars have described the

¹⁷¹ See *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. at 119 (noting that the most noteworthy action taken by Congress regarding the vaccine mandate was a majority Senate vote disapproving the regulation).

doctrine as a substantive canon or clear statement rule,¹⁷² and Justices Gorsuch and Kavanaugh explicitly have labeled it the latter.¹⁷³ More specifically, scholars have argued that the latest iteration of the doctrine is essentially an “anti-deference” canon that turns *Chevron*’s presumption of agency reasonableness into a presumption of agency overreach that requires a clear statement from Congress to be overcome.¹⁷⁴

This classification works on many levels. The major questions doctrine does effectively shift the baseline for judicial review of agency interpretations from one of deference—and a presumption that Congress has authorized all reasonable agency interpretations—to a baseline of antideference—and a presumption that agencies are prone to overreach such that agency exercises of significant power should be viewed skeptically. In that sense, the doctrine operates similarly to numerous substantive canons that impose a policy-based presumption on interpretations involving certain *kinds* of statutes.¹⁷⁵ Further, the major questions doctrine does look, talk, and walk like a clear statement rule—in that the antideference presumption it imposes can be rebutted by a clear statement indicating that Congress intended to authorize the agency to take the challenged action.¹⁷⁶

But there is one aspect of the new major questions doctrine, or presumption, that does not quite fit the substantive canon or clear

¹⁷² See, e.g., Sohoni, *supra* note 6, at 282 (stating that in Biden-era cases the Court “enunciated a clear statement rule—the new major questions doctrine”); Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL’Y 773, 774 (2022) (describing the doctrine as “a new substantive canon”); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 649 (2023) (arguing the Court has “transmogrified” the doctrine into a clear statement rule”); Richardson, *supra* note 6, at 176 (describing “expansion of the ‘major questions doctrine’ into a substantive canon of statutory construction”); Deacon & Litman, *supra* note 6, at 1012, 1041 (calling the doctrine both a “clear statement rule” and a “substantive canon”); Walters, *supra* note 10, at 489 (similar).

¹⁷³ See *West Virginia v. EPA*, 597 U.S. 697, 740 (2022) (Gorsuch, J., concurring); Brett M. Kavanaugh, *Remarks at Notre Dame Law School*, 98 NOTRE DAME L. REV. 1849, 1852 (2023).

¹⁷⁴ See Richardson, *supra* note 6, at 177 (calling the major questions doctrine a “reversal” of *Chevron*); Keith W. Rizzardi, *From Four Horsemen to the Rule of Six: The Deconstruction of Judicial Deference*, 12 MICH. J. ENV’T. & ADMIN. L. 63, 80 (2022).

¹⁷⁵ See ESKRIDGE ET AL., *supra* note 146, at 648 (“Traditionally, the main substantive canons were directives to interpret different types of statutes ‘liberally’ or ‘strictly.’”). Examples include the presumption that the Sherman Act should be applied liberally, in light of its overall purpose of benefitting consumers, *see id.* at 1168 (citing *Wyerhauser v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312 (2007)); the rule of lenity dictating that ambiguities in criminal statutes should be construed narrowly, in favor of the accused, *see id.* at 1170; the presumption that ambiguities in deportation statutes should be construed in favor of noncitizens, *see id.* (citing *INS v. St. Cyr*, 533 U.S. 289, 320 (2001)); the presumption that veterans’ benefits statutes should be construed liberally in favor of veterans, *see id.* at 1171 (citing *King v. St. Vincent’s Hosp.*, 502 U.S. 215 (1991)); and the presumption that Internal Revenue Service tax assessments are correct, *see id.* (citing *United States v. Fior D’Italia*, 536 U.S. 238, 242–43 (2002)).

¹⁷⁶ See ESKRIDGE ET AL., *supra* note 146, at 651 (explaining that “‘clear statement rules’ . . . may be overcome” by clear statutory language).

statement rule mold: that the doctrine is triggered by a multifactor practical consequences test. As discussed above, the Court has established several practical, effects-based tests for determining whether a particular agency interpretation involves a “major question”—ranging from the sheer size of the impact the interpretation is expected to have, to the political salience or controversiality of the policy effected by the interpretation, to whether Congress has rejected “something akin” to the policy adopted in the challenged interpretation.¹⁷⁷ No other substantive canon has a trigger quite like this. Rather, substantive canons typically are triggered by a statute’s subject matter,¹⁷⁸ ambiguousness,¹⁷⁹ intrusion into matters typically regulated by states,¹⁸⁰ or a connection to constitutional concerns.¹⁸¹ They neither require courts to analyze the impact that an interpretation will have on society nor empower courts to reject particular interpretations they believe will have significant impacts—that is, they do not turn on the practical effects a particular interpretation will have, and they do not direct courts to engage in a case-by-case practical effects analysis. Instead, substantive canons require courts merely to determine whether a statute concerns a given subject matter, whether a statute is ambiguous, whether a statute raises federalism or

¹⁷⁷ See *supra* notes 109–14 and accompanying text.

¹⁷⁸ These include canons that tip the scales in cases involving immigration, Native American tribes, veterans’ benefits, or antitrust statutes. See, e.g., *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312, 318–19 (2007) (Sherman Act should be applied in light of its overall purpose of benefitting consumers); *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (ambiguities in deportation statutes should be construed in favor of noncitizens); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (same); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (rule against state taxation of Indian tribes and reservation activities); *Hagen v. Utah*, 510 U.S. 399, 411–12 (1994) (presumption against national “diminishment” of Indian lands); *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220 n.9 (1991) (presumption that veterans’ benefits statutes should be construed liberally for their beneficiaries). Nor can the major questions doctrine be considered one of these subject-matter-based canons—the subject matter being agency interpretations—because it does not apply to *all* agency interpretations but only to those agency interpretations that are “major.” This would be the equivalent of a subject-matter-based canon that applies only to those immigration, or Indian law, or antitrust statutes that meet “x, y, z” criteria—but there are no substantive canons that work quite that way.

¹⁷⁹ These include canons such as the rule of lenity and the avoidance canon, discussed above. See sources cited *supra* notes 119, 121 and accompanying text.

¹⁸⁰ These include preemption canons and federalism clear statement rules. See, e.g., *Rapanos v. United States*, 548 U.S. 715, 737–38 (2006) (superstrong clear statement rule against federal intrusion upon “traditional state authority”); *Gregory v. Ashcroft*, 501 U.S. 452, 461–64, 470 (1991) (same); *CTS Corp. v. Waldburger*, 573 U.S. 1, 17–19 (2014) (presumption against federal preemption of traditional state regulation); *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (same); *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 810 (1989) (presumption against federal regulation of inter-governmental taxation by the states).

¹⁸¹ These include canons such as the clear statement rule for waivers of sovereign immunity. See, e.g., *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 729–30 (2003); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 544 (2002); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

other constitutional concerns, and so on.¹⁸² If the answer is yes, then the substantive canon will apply—and will direct the Court to tip the scales in favor of a particular party or interpretive outcome *based on policy values already embedded in the canon*. In other words, substantive canons do not require the Court to engage in a fresh policy analysis in each case; they merely establish default rules based on already completed or baked-in policy judgments that apply when certain threshold conditions are met. Thus, although the triggers for substantive canons—e.g., ambiguity, subject matter, constitutional concerns—are more nuanced and open to debate than the triggers for linguistic canons, they tend to be simpler and far less focused on practical effects than the triggers for the major questions doctrine.

A second problem with the theory that the major questions doctrine is a clear statement rule is that clear statement rules, by definition, tend to trump other interpretive factors when they are invoked. That is, they direct courts to rule a certain way *unless* a statute clearly requires otherwise. For this reason, clear statement rules typically drive the Court's analysis—and are applied as a threshold inquiry in cases in which they are used. That is, the Court typically starts with the premise that a certain principle, such as federalism or state sovereignty, is so important and ingrained in our legal system that it must presume that Congress does not abrogate it—and that only a clear statement from Congress indicating an intent to override such a principle can suffice to show that a particular statute contravenes a particular principle.¹⁸³

But that is not how the Court actually employed the new major questions doctrine in at least some of its most recent Biden-era cases. For although the Court did treat the major questions doctrine as a threshold determination in two cases—*NFIB v. OSHA* and *West Virginia v. EPA*—it did not do so in two others—*Alabama Ass'n of Realtors* and *Biden v. Nebraska*. Rather, in the latter two cases the Court began its opinions with an analysis of the statute's text, concluded that the text did not support the agency's exercise of authority, and only then mentioned the major questions doctrine as a secondary argument favoring its statutory reading.¹⁸⁴ This is out of step with how the Court usually employs clear statement rules.¹⁸⁵

¹⁸² See sources cited *supra* notes 172–74.

¹⁸³ See, e.g., cases cited *supra* notes 180–81.

¹⁸⁴ See *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (noting at end of opinion, after engaging in traditional textual analysis that “[t]he ‘economic and political significance’ of the Secretary’s action is staggering by any measure” (quoting *West Virginia v. EPA*, 597 U. S. 697, 721 (2022))); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (commenting, on second-to-last page of opinion that “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”).

¹⁸⁵ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460–64 (1991) (beginning with federalism clear statement analysis); *Riegel v. Medtronic*, 552 U.S. 312, 334 (2008) (Ginsburg, J., dissenting).

In short, then, although the new major questions doctrine does share several features in common with substantive canons, and with clear statement rules in particular, it fits awkwardly within the substantive canon mold because of its multifactor practical-consequences-based triggering test and because the Court has treated it as a secondary, rather than threshold, inquiry in at least some of its recent cases.

B. *An Implementation Test?*

If the major questions doctrine is not a substantive canon, it might instead be a new *implementation* test or standard of review for evaluating agency interpretations of statutes—similar to the “hard look” review test articulated in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,¹⁸⁶ or the deference test articulated in *Skidmore v. Swift & Co.*¹⁸⁷ that preceded *Chevron*, or the test for vote dilution claims under the Voting Rights Act¹⁸⁸ articulated in *Thornburg v. Gingles*.¹⁸⁹ Briefly, the *State Farm* test for “hard look” judicial review of agency policy decisions directs courts to consider whether an agency (1) has relied on factors that Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁹⁰ If the Court concludes that one or more of these factors has been met, then the agency action will be deemed “arbitrary and capricious” and the Court will invalidate it.¹⁹¹ *Skidmore* similarly directs that courts should consider the following factors in determining how much weight to accord an agency’s interpretation of a statute it administers: (1) the thoroughness evident in the agency’s interpretation, (2) the validity of its reasoning, (3) the consistency of the interpretation with earlier and later pronouncements, and (4) all those factors which give the

(“Preemption analysis starts with the assumption that ‘the historic police powers of the States [a]re not to be superseded . . . unless that was the clear and manifest purpose of Congress.’” (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006) (noting that “[o]ur resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause” before applying spending clause clear statement rule); *Nev. Dep’t of Hum. Res.*, 538 U.S. at 726 (beginning with clear statement rule).

¹⁸⁶ 463 U.S. 29, 33 (1983).

¹⁸⁷ 323 U.S. 134, 140 (1944).

¹⁸⁸ The Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 4371 439 (codified as amended in scattered sections of 52 U.S.C.).

¹⁸⁹ 478 U.S. 30, 79 (1986).

¹⁹⁰ See *State Farm*, 463 U.S. at 43.

¹⁹¹ See *id.*

interpretation power to persuade.¹⁹² *Gingles*, which concerns the Voting Rights Act rather than agency decision-making, establishes three factors for courts to consider in evaluating vote dilution claims: (1) whether the minority voting group is “sufficiently large and geographically compact to constitute a majority in a single-member district,” (2) whether the minority group is “politically cohesive,” and (3) whether the majority votes “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”¹⁹³

Like these multifactor implementation tests, the new major questions doctrine provides a series of factors for courts to consider—(1) economic and political significance,¹⁹⁴ (2) novelty or consistency with past agency practices,¹⁹⁵ (3) whether Congress has rejected “something akin” to the agency policy,¹⁹⁶ (4) whether the agency regulation falls within the agency’s wheelhouse,¹⁹⁷ and (5) whether it intrudes on an area typically regulated by the states.¹⁹⁸ If the Court concludes that at least some of these factors have been met—it is unclear how many suffice—then it will presume the agency action “major” and decline to defer to or uphold it.

Notably, the factors articulated in *State Farm* and *Skidmore*, like the factors articulated in the Court’s Biden-era major questions cases, are open-ended and leave significant room for judicial discretion and judgment calls in application.¹⁹⁹ They are also similarly imprecise about how many factors must be met in a given case in order for the agency action to be deemed suspect or ineligible for deference—amounting, in essence, to a “totality of the circumstances” type evaluation of the agency’s decision-making process (*State Farm*), the soundness of the agency’s interpretation (*Skidmore*), or the scale of the agency’s policy choice (major questions).²⁰⁰ The test articulated in *Gingles* is slightly different, in that all three factors must be met in order for plaintiffs to make a valid vote dilution claim.²⁰¹

As the above discussion shows, the major questions doctrine fits, in many ways, the patterns of an implementation test. However, the doctrine also differs in some important respects from traditional

¹⁹² See *Skidmore*, 323 U.S. at 140.

¹⁹³ *Gingles*, 478 U.S. at 50–51.

¹⁹⁴ See *supra* note 2.

¹⁹⁵ See *supra* note 114.

¹⁹⁶ See *supra* note 113.

¹⁹⁷ See *supra* note 110.

¹⁹⁸ See *supra* note 111.

¹⁹⁹ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

²⁰⁰ See *State Farm*, 463 U.S. at 43; see also *Skidmore*, 323 U.S. at 140.

²⁰¹ See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (noting that the factors under the test “are ‘necessary preconditions’”).

implementation tests like the *State Farm*, *Skidmore*, and *Gingles* tests outlined above. First, the major questions doctrine, and accompanying factors, come with a clear statement carve-out. That is, even when a court concludes that an agency action satisfies one or more of the factors the Court has outlined—e.g., economic or political significance, outside an agency’s wheelhouse—it could nevertheless uphold the agency action if it concludes that Congress clearly authorized the agency to take the action. This clear statement carve-out is more theoretical possibility than realistic opt-out, as Congress is nearly never going to have clearly authorized the agency to take the specific action at issue. Nonetheless, at least in design, the major questions test differs from other implementation tests in this potentially significant way. By contrast, if a court finds that one or more of the *State Farm* factors is satisfied, the agency will fail hard look review and there is no alternate avenue through which the agency’s action would be upheld anyway;²⁰² similarly, if the *Skidmore* factors point in the wrong direction, the court will not defer to the agency’s interpretation.²⁰³

Second, the major questions doctrine differs from other implementation tests in that it is not necessarily employed as a threshold inquiry, or determinative test, in the Court’s analysis—as other implementation tests typically are. Rather, as noted earlier, the Court in both *Alabama Ass’n of Realtors* and *Biden v. Nebraska* invoked the major questions doctrine only as a secondary factor, after concluding based on de novo statutory analysis that the statute did not permit the agency interpretation at issue.²⁰⁴ This is not how the *State Farm* or *Gingles* implementation tests are employed, although the *Skidmore* multifactor test sometimes is employed in this manner.²⁰⁵

Despite the above differences, the major questions doctrine is more similar to the *State Farm*, *Skidmore*, and *Gingles* multifactor implementation tests than it is to clear statement rule substantive canons. For

²⁰² See *State Farm*, 463 U.S. at 43 (declaring that “an agency rule would be arbitrary and capricious” if the agency’s explanation for adopting the rule meets any of the articulated factors).

²⁰³ See, e.g., *Johnson City Med. Ctr. v. United States*, 999 F.2d 973, 983 (6th Cir. 1993) (Batchelder, J., dissenting) (reasoning Internal Revenue Service revenue ruling does not satisfy *Skidmore* factors and therefore should not receive deference).

²⁰⁴ *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021); *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

²⁰⁵ See, e.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (mentioning *Skidmore* only as a secondary factor, after engaging in close textual analysis of contested statutory provision); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (mentioning *Skidmore* only after conducting de novo analysis of statute’s text); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449 (2003) (citing *Skidmore* only in passing after conducting de novo analysis of meaning of statutory term “employee”); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 15–16 (2011) (mentioning *Skidmore* only as secondary factor, after conducting de novo analysis of statutory term “filed”); *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 150 (2008) (mentioning *Skidmore* only as passing factor at tail end of opinion, after analyzing interpretive question de novo).

although most other implementation tests the Court has adopted tend to serve as threshold inquiries, the *Skidmore* factors are not always used this way—suggesting that this may not be a necessary design feature for all implementation tests. Moreover, because the major questions doctrine’s “clear statement” carve-out is unlikely to save an interpretation that satisfies the multifactor test for majorness, this difference too seems less weighty than the differences that separate the major questions doctrine from traditional substantive canons.

If the major questions doctrine is indeed best classified as a new implementation test, or judicial standard of review, that is somewhat problematic for textualists. Textualists have not historically been fond of multifactor tests or standards of review—preferring instead to determine outright the “plain” meaning of relevant statutory words and phrases.²⁰⁶ Perhaps because judicially articulated multifactor tests look and feel too much like common law decision-making rather than neutral, objective textual analysis, textualists have at times excoriated such tests as vehicles for judicial policymaking.²⁰⁷ Thus, if the new major questions doctrine is indeed a new form of implementation test, or standard of judicial review, textualists will need to grapple with that incongruence.

C. *Plain Old Pragmatism?*

A third possibility is that the major questions doctrine is a form of practical consequences reasoning or a practical-effects-based canon, like the absurdity doctrine. As I have elsewhere explained, practical consequences arguments are prevalent in the Roberts Court’s statutory opinions and can take a variety of forms—including providing “facts about the world” that support one statutory reading over another, “absurd results” arguments, and “undesirable consequences” arguments that describe the negative policy outcomes that an interpretation will generate.²⁰⁸

²⁰⁶ See, e.g., *Wooden v. United States*, 595 U.S. 360, 385 (2022) (Gorsuch, J., concurring in the judgment) (criticizing majority’s multifactor test as “a judicial gloss on the statute’s terms” and noting that multifactor balancing tests tend to “suppl[y] notoriously little guidance” to judges); *Medellín v. Texas*, 552 U.S. 491, 514 (2008) (arguing that the dissent’s approach would lead to “the open-ended rough-and-tumble of factors”); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 350 (2005) (preferring clear and predictable rules over judgmental standards).

²⁰⁷ See, e.g., *Gamble v. United States*, 587 U.S. 678, 724 (Thomas, J., concurring) (majority’s multifactor balancing test “has resulted in policy-driven, ‘arbitrary discretion’ and “by frequently sweeping in subjective factors, provides a ready means of justifying whatever result five Members of the Court seek to achieve.”); *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (deriding such a framework as “that test most beloved by a court unwilling to be held to rules . . . th’ol’ ‘totality of the circumstances’ test”).

²⁰⁸ See Anita S. Krishnakumar, *Practical Consequences in Statutory Interpretation* (Oct. 11, 2023) (unpublished manuscript) (on file with author).

The new major questions doctrine invokes elements of all three of these forms of arguments but seems most similar to the “facts about the world” form. Recall that every time the Court invoked the doctrine in its 2020–2022 term cases, it cited facts and figures quantifying the economic or political effect the challenged agency policy would have.²⁰⁹ Moreover, the multifactor test the Court has established for determining whether an agency interpretation involves a “major question” focuses almost entirely on qualitative facts about the world—i.e., whether the agency policy resolves an issue that is the subject of “robust” political debate, whether the agency policy is novel or inconsistent with the agency’s past practice, or whether the agency policy intrudes on matters typically regulated by states.²¹⁰

The major questions doctrine also shares features in common with the absurd results form of practical consequences argument. Notably, the upshot of the major questions analysis—i.e., the inference that *if the practical consequences generated by the agency policy are such that the policy should be considered “major,” then Congress is unlikely to have authorized the agency to adopt the policy because Congress tends to resolve “major questions” itself*—is rather similar to the logical inference behind the absurdity doctrine: that if an interpretation would produce an absurd result, then Congress is unlikely to have intended that interpretation because Congress does not intend to enact statutes that produce absurd results.²¹¹ Also worth noting is that the major questions doctrine, like the absurdity doctrine and other forms of practical consequences analysis, is open-ended, leaving it entirely up to courts to determine what counts as economic or political “significance,” or as a matter of “robust” political debate, or a “novel” as opposed to typical agency practice.

Finally, the fact that the Court has been inconsistent in how and when it applies the major questions doctrine supports the theory that the doctrine most closely resembles a practical-effects-based test or

²⁰⁹ See *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 112 (2022) (noting that vaccine-or-test mandate “applies to roughly 84 million workers”); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (“At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium.”); *West Virginia v. EPA*, 597 U.S. 697, 714–15 (2022) (commenting that regulation at issue “would entail billions of dollars in compliance costs . . . require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. . . [as well as reduce] GDP by at least a trillion 2009 dollars by 2040”); *Biden v. Nebraska*, 143 S. Ct. 2355, 2372–73 (2023) (noting challenged regulation would “release 43 million borrowers from their obligations to repay \$430 billion in student loans” and that this “amounts to nearly one-third of the Government’s \$1.7 trillion in annual discretionary spending”).

²¹⁰ See sources cited *supra* notes 109–14.

²¹¹ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2394 (2003) (“The absurdity doctrine rests on the intuition that some such outcomes are so unthinkable that the federal courts may safely presume that legislators did not foresee those particular results and that, if they had, they could and would have revised the legislation to avoid such absurd results.”).

consideration. As noted earlier, the Court has been inconsistent concerning how and at what point in the interpretive inquiry it invokes the doctrine: in some cases, it has applied the doctrine as a threshold inquiry, as in *NFIB v. OSHA* and *West Virginia v. EPA*; in others it has mentioned the doctrine only as secondary consideration after conducting its own de novo analysis, as in *Biden v. Nebraska* and *Alabama Ass'n of Realtors*; and in others, it has not mentioned the doctrine at all, as in *Biden v. Missouri*. This is precisely how the Court employs other forms of practical consequences arguments, including the absurdity doctrine. That is, the Court (or an ancillary opinion) sometimes invokes the absurdity doctrine—or other form of practical consequences—upfront, treating it as a trump card that supersedes other interpretive tools,²¹² but at other times, it invokes the absurdity doctrine—or another form of practical consequences analysis—only as a secondary, or even minimal, factor in its interpretive analysis.²¹³

As the above discussion illustrates, the major questions doctrine looks, walks, and talks a lot like a practical-effects-based canon, similar to the absurdity doctrine. The chief difference between the major questions doctrine and other forms of practical consequences considerations is, as discussed *infra*, that it contains a clear statement rule carve-out. That is, even if a challenged agency interpretation will have an “economically or politically significant” impact, or meets some of the other effects-based tests the Court has adopted, the doctrine dictates that the interpretation may be upheld if the statute clearly empowers the agency to adopt it.²¹⁴ This is not how other practical consequences tests work; courts do not ordinarily conclude that an interpretation will

²¹² See, e.g., *Borden v. United States*, 593 U.S. 420, 482 (2021) (Kavanaugh, J., dissenting) (“The idea that [certain specified] offenses would fall outside of [the Armed Career Criminal Act’s] scope is . . . ‘glaringly absurd.’” (quoting *United States v. Begay*, 934 F.3d 1033, 1047 (9th Cir. 2019))); *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 432 (2016) (“It would make little sense . . . [to impose] an on-the-merits requirement for a defendant to obtain prevailing party status [because it] would undermine . . . congressional policy”); *Carr v. United States*, 560 U.S. 438, 459–61 (2010) (Alito, J., dissenting) ([T]he conclusion that the Court reaches makes no sense.”); *Thompson v. N. Amer. Stainless, LP*, 562 U.S. 170, 176–77 (2011) (“If any person injured in the Article III sense by a Title VII violation could sue, absurd consequences would follow.”).

²¹³ See, e.g., *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 245 (2009) (stating that the school district’s reading of the statute would produce a rule “bordering on the irrational” after discussing other arguments); *Corley v. United States*, 556 U.S. 303, 317 (2009) (stating in one paragraph that the government’s reading of the statute would lead to absurdities); *Knight v. Comm’r*, 552 U.S. 181, 190 (2008) (briefly implying that petitioner trustee’s reading of a statute was impractical); *McQuiggin v. Perkins*, 569 U.S. 383, 394 (2013) (relying primarily on precedent, but also noting that “[i]t would be passing strange” to adopt the state’s alternate reading of the statute).

²¹⁴ See *West Virginia v. EPA*, 597 U.S. 697, 716 (2022) (“[C]ourts ‘expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.’” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022) (“‘We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance’ The question, then, is

result in undesirable, absurd, unjust, or otherwise problematic consequences and then allow for the possibility—even in theory—that the interpretation may stand if Congress clearly authorized it.

There is, however, an explanation that might reconcile this “clear statement” rule carve-out with the otherwise practical-effects-based nature of the major questions doctrine: it is widely agreed that practical consequences based tests or doctrines are antitextual.²¹⁵ Indeed, the absurdity doctrine often is described as an exception to the plain meaning rule and has been criticized as inconsistent with a textualist approach to interpreting statutes.²¹⁶ Several textualist members of the current Supreme Court have also openly disparaged the use of practical consequences as a factor in determining statutory meaning.²¹⁷ Clear statement rules, by contrast, have come to be viewed as an acceptable

whether the Act plainly authorizes the Secretary’s mandate.” (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021))).

²¹⁵ See, e.g., SCALIA & GARNER, *supra* note 104, at 353 (“[W]hen once the meaning is plain, it is not the province of a court to scan its wisdom or its policy.” (quoting G. GRANVILLE SHARP & BRIAN GALPIN, *MAXWELL ON THE INTERPRETATION OF STATUTES* 5 (10th ed. 1953))); Scalia, *supra* note 79, at 22 (decrying notion that laws should be interpreted to “mean whatever they ought to mean, and that unelected judges decide what that is” (emphasis added)); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 25 (1998) (arguing that the use of “judicially-selected policy norms is in clear tension with . . . textualism”); Krishnakumar & Nourse, *supra* note 102, at 176–77 (administrability-based pragmatic reasoning involves consideration of practical consequences, thus characterizing it as a rule of construction is a “bit upside down”); Manning, *supra* note 211, at 2420 (arguing consequentialist arguments such as the absurd results doctrine are, at bottom, a form of strong intentionalism and therefore incompatible with textualism).

²¹⁶ See, e.g., Manning, *supra* note 211, at 2395, 2420–21 (describing absurd results doctrine as an “exception” to the “‘plain meaning’ presumption”; absurd results doctrine is inconsistent with textualism); *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (noting that a statute’s “plain language” controls unless it produces results that are “absurd or glaringly unjust” (quoting *Sorrells v. United States*, 287 U.S. 435, 450 (1932))); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 326 (2001) (“[T]he existence of the absurd results exception undermines the foundation of the textualist theory of statutory interpretation.”); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 45–46 (1994) (reasoning if one embraces the absurd results exception “there is no logical reason not to sacrifice plain meaning” for other reasons, including inconsistency with Congress’s intent); John Copeland Nagle, *Textualism’s Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, at 2–4 (arguing that correcting apparent statutory errors under the absurdity doctrine is inconsistent with modern textualism).

²¹⁷ See, e.g., *Pereida v. Wilkinson*, 592 U.S. 224, 241 (2021) (Gorsuch, J., opinion) (“It is hardly this Court’s place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair. Our license to interpret statutes does not include the power to engage in such freewheeling judicial policymaking.”); *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 220 (2012) (Thomas, J., opinion) (“[P]olicy concerns cannot justify an interpretation of [a statute] that is inconsistent with the text”); *Star Athletica v. Varsity Brands, Inc.*, 580 U.S. 405, 413 (2017) (Thomas, J., opinion) (arguing that the Court should focus on the statute’s text, not engage in a “free-ranging search for the best copyright policy”); *Patel v. Garland*, 596 U.S. 328, 346 (2022) (Barrett, J., opinion) (“[W]e inevitably swerve

corollary to textual analysis, and a legitimate tool in a textualist jurist's interpretive toolkit.²¹⁸ The major questions doctrine may be a product of the intersection of these two interpretive principles. That is, the modern textualist Court may have grafted the clear statement rule feature onto the latest iteration of the major questions doctrine in an effort to make what is otherwise a practical-effects-based doctrine appear more textualist. In other words, by falling back on the common textualist argument that “if Congress had intended a particular result, it could, should, or would have said so clearly in the text,” the textualist Justices who have articulated the latest version of the major questions doctrine may indirectly be seeking to preserve the appearance—or perhaps to convince themselves—that what they are doing in these cases is ordinary textualism, while in reality adopting a test that is fundamentally practical and consequentialist in nature.

In short, the “clear statement” aspect of the new major questions doctrine may be confusing the classification discussion—leading observers to view the doctrine as a substantive canon when it is really just a form of consequentialism. Indeed, Justice Barrett's “common sense” context defense perhaps unwittingly highlights the consequentialist nature of the major questions inquiry: although she tries—unsuccessfully—to spin this consequentialist dimension as background context that merely informs the Court's ordinary meaning analysis, appeals to “common sense” are inherently practical in nature and this arguments thus underscores the major questions doctrine's similarity to other practical-consequences-based canons like the absurd results doctrine.

In the end, the major questions doctrine's similarity to other practical consequences-based canons leaves the doctrine in fundamental tension with modern textualism in ways that the Court's current caselaw fails to grapple with. Other commentators have noted how open-ended, standardless, and ultimately judge-empowering the Court's newly articulated tests for determining “majorness” are;²¹⁹ indeed, it is such

out of our lane when we put policy considerations in the driver's seat . . . policy concerns cannot trump the best interpretation of the statutory text.”).

²¹⁸ See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 123 (2001) (noting that “textualists have not hesitated to apply” clear statement rules); Larry J. Obhof, Note, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statement Rules*, 2004 MICH. ST. L. REV. 123, 127 (2004) (federalism-based clear statement rules “fit within an overall textualist philosophy”); Barrett, *supra* note 54, at 168–71, 182 (2010) (substantive canons, such as clear statement rules, that are “constitutionally grounded” are consistent with textualism).

²¹⁹ See, e.g., Sohoni, *supra* note 6, at 266 (noting that the new major questions cases “annex[] enormous interpretive power to the federal judiciary by enunciating a standard for substantive legitimacy that is so malleable that, at present, it can be said only to mean ‘just what [the Court] choose[s] it to mean—neither more nor less’” (quoting Lewis Carroll, *Through the Looking-Glass and What Alice Found There*, in ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 196 (Richard Kelly ed., 2015))); Mark A. Lemley, *The Imperial Supreme Court*,

criticisms that likely prompted textualist justices and scholars like Justice Gorsuch, Ilan Wurman, and Justice Barrett to proffer textualist-friendly characterizations of the doctrine. But if these characterizations are inapt, as this Article argues that they are, and the major questions doctrine is ultimately little more than a judge-empowering inquiry into the practical consequences an interpretation will effect—either outright or in the form of a judicial standard of review—then the doctrine is one that should be difficult for the honest textualist to embrace or defend.

CONCLUSION

This Article has argued that the major questions doctrine is not any of the things its textualist defenders have sought to characterize it as—neither a nondelegation proxy, a linguistic canon, nor common sense context for the reasonable reader. Instead, the doctrine most closely resembles plain old-fashioned consequentialist reasoning of a kind similar to the absurd results canon that has been maligned by many textualists. The doctrine also potentially could be categorized as a new threshold, or implementation, test for the judicial review of agency statutory interpretations—a new *Skidmore* type test that determines whether an agency interpretation will receive any deference at all, or instead be presumed invalid. Either way, it is not merely “ordinary interpretation” or an example of traditional, standard, everyday textual or *purposive* interpretation—and it deserves to be treated as the *sui generis* interpretive tool that it is.

136 HARV. L. REV. F. 97, 100 (2022) (the new major questions doctrine “seems to be designed to allow the Court to reject significant agency actions that are within their grant of power but that the agency implements in ways the Court doesn’t like”); Deacon & Litman, *supra* note 6, at 1089 (commenting on the “manipulability” of the new major questions doctrine); Elena Chachko, *Toward Regulatory Isolationism? The International Elements of Agency Power*, 57 U.C. DAVIS L. REV. 57, 106 (2023) (the new major questions doctrine “is subject to practically unfettered judicial discretion”); William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1675 (2023) (new major questions doctrine “has added layers of interpretive discretion for textualists”). See generally Richard Yates, *Unconstrained Judicial Aggrandizement: Major Questions Doctrine In ALA v. EPA*, 49 ECOLOGY L.Q. 331 *passim* (2022) (new major questions doctrine aggrandizes judicial power); Lisa Heinzerling, *An Unequal Liberty*, ATLANTIC (Nov. 28, 2022, 7:00 AM), <https://www.theatlantic.com/ideas/archive/2022/11/supreme-court-west-virginia-v-epa-liberty/672250/> [<https://perma.cc/6YEW-L8A6>] (new major questions doctrine empowers the Justices “to pick and choose between the regulations they like and those they think run afoul of this arbitrary standard”).

ESSAY

Judicial Review of Agency Noncompliance with Presidential Administration Orders and OMB Circular A-4

*Eitan Sirkovich**

ABSTRACT

President Biden's Executive Order 14,094, Modernizing Regulatory Review, continues the line of presidential directives dating back to the Reagan Administration that centralize the President's control over administrative agencies' regulatory processes. Its express purpose is to ensure well-reasoned, high-quality regulations, but it affords no private right of action to enforce its terms.

The Administrative Procedure Act ("APA") shares a similar goal of achieving reasoned agency decision-making, however, unlike the executive orders, the APA authorizes judicial review and expects courts to set aside agency regulations that are arbitrary and capricious. These two authorities make overlapping demands from agencies, but one eschews judicial review while the other requires it. This creates an issue for courts when plaintiffs bring challenges alleging that an agency's failure to comply with the executive order requires vacating its final rule. Does the court have jurisdiction to consider the compliance failure?

Courts try to bifurcate the issues and dismiss arguments grounded in the executive order. The issues are so intertwined, however, that this approach fails to account for the reality that the President's views on what well-reasoned decision-making requires informs our conception of what good governance looks like and cannot be ignored, regardless of whether the executive order creates a private right of action.

* J.D., May 2024, The George Washington University Law School.

This Essay argues that Congress has given the courts an imperative under the APA to consider all the relevant facts when reviewing unelected experts' policy decisions. This obligation does not depend on whether the President has created a private right of action through executive order—the APA already does so. It is further argued that courts fail to fulfill Congress's expectations when they put on blinders to the executive orders' requirements; instead, courts should treat noncompliance with presidential directives as persuasive evidence of arbitrary and capricious agency action.

TABLE OF CONTENTS

INTRODUCTION	1164
I. THE DEVELOPMENT OF THE “REASONED DECISION-MAKING” REQUIREMENT OF AGENCIES	1168
A. <i>The D.C. Circuit Debates</i>	1169
B. <i>The Rise of Presidential Administration</i>	1172
C. <i>The Supreme Court Weighs In</i>	1174
II. DISENTANGLING THE EXECUTIVE ORDERS FROM THE APA	1176
A. <i>The Traditional Approach: Judicial Review Unavailable</i>	1176
B. <i>A Proposed Alternative: Persuasive Evidence of Arbitrariness</i>	1179
CONCLUSION	1181

INTRODUCTION

On April 6, 2023, President Biden signed Executive Order No. 14,094, “Modernizing Regulatory Review,”¹ which seeks to promote inclusivity in regulatory policy and more rigorous regulatory analyses.² Executive Order No. 14,094 (“Biden EO”) represents the beginning of a new chapter in the story of “presidential administration,” first told by then-Professor Elena Kagan.³ The development of presidential administration traces its lineage through what this Essay refers to as “the presidential administration orders,” back to President Ronald Reagan’s Executive Order No. 12,291 (“Reagan EO”),⁴ which gave way

¹ Exec. Order No. 14,094, 3 C.F.R. 369 (2024).

² See *id.*

³ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (detailing a history of the shift toward presidents more closely overseeing and controlling the administrative state).

⁴ Exec. Order No. 12,291, 3 C.F.R. 127 (1982); see also Kagan, *supra* note 3, at 2272–78 (explaining the history of presidents’ struggle to influence agencies and how Reagan’s EO was the first of its kind to change the dynamic between presidents and executive agencies).

to President Clinton's Executive Order No. 12,866 ("Clinton EO")⁵ and, later, President Obama's Executive Order No. 13,563 ("Obama EO").⁶ Each of these represent different iterations of the same tool used to manage the process of regulatory rulemaking across the executive agencies; the Biden EO incorporates the Clinton and Obama orders by reference.⁷ The core tenets of the orders on presidential administration have remained constant and transcended the political party of the President issuing them.⁸ Each order has thus represented not a change in political ideology, but a concentration of power in the hands of the President, his staff, and the Office of Management and Budget ("OMB").⁹

Under the Biden EO, "[s]ignificant regulatory action[s]," those which require a complete regulatory impact analysis ("RIA"), are redefined as actions resulting in \$200 million of annual economic impact, double the previous threshold.¹⁰ Additionally, it requires earlier public engagement that is more robust and inclusive of historically marginalized communities.¹¹ To further these engagement efforts, it directs the Administrator of the Office of Information and Regulatory Affairs ("OIRA")—a powerful component within OMB—to consider guidance or tools to modernize the notice-and-comment process, including through technological changes like artificial intelligence.¹²

Finally, and perhaps most contentiously, the Biden EO will revolutionize the way that agencies conduct their cost-benefit analyses ("CBA").¹³ It requires CBA to include "distributive impacts and equity;" and further instructs OMB to publish a new version of Circular A-4, the lengthy 2003 document meticulously detailing how executive agencies are to conduct their RIA.¹⁴ After conducting a process of internal and external engagement, OMB released the updated Circular A-4 on

⁵ Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

⁶ Exec. Order No. 13,563, 3 C.F.R. 215 (2012) (collectively these orders will be referred to as "the presidential administration orders").

⁷ See Exec. Order No. 14,094, 3 C.F.R. 369 (2024). Though not binding upon the independent agencies, they provide meaningful guidance to them. See Kagan, *supra* note 3, at 2288.

⁸ See Kagan, *supra* note 3, at 2247–49.

⁹ See *id.*

¹⁰ Compare Exec. Order No. 14,094, 3 C.F.R. 369 (2024) (amending the threshold amount for "[s]ignificant regulatory action" at \$200 million), with Exec. Order No. 12,866, 3 C.F.R. 641–42 (1994) (setting the threshold amount for "[s]ignificant regulatory action" at \$100 million).

¹¹ See Exec. Order No. 14,094, 3 C.F.R. 369–70 (2024).

¹² See *id.*

¹³ See *id.* at 21,880–81; see also OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-4 (Nov. 9, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf> [<https://perma.cc/RC3Z-GMVE>].

¹⁴ Exec. Order No. 14,094, 3 C.F.R. 371 (2024) (quoting Exec. Order No. 12,866, 3 C.F.R. 639 (1994)).

November 9, 2023.¹⁵ The new Circular A-4 requires CBA to include the social cost of carbon, updated discount rates, and the tallying of global costs and benefits rather than just domestic.¹⁶

The Biden EO, like each of its predecessors, expressly disclaims the creation of “any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States.”¹⁷ Courts have interpreted this language to mean that the presidential administration orders offer no cause of action and are, therefore, not subject to judicial review.¹⁸ This language might suggest that the presidential administration orders are of little consequence to the practice of administrative law before Article III courts. However, this Essay demonstrates why that is not the case.

The Administrative Procedure Act (“APA”)¹⁹ has often been called a “superstatute” because of how it structures and influences the whole of government in ways akin to the Constitution.²⁰ As with the Constitution, there has been a movement to return our jurisprudence back to the original understanding of those who ratified it, known as “APA originalism.”²¹ Even a staunch APA originalist must acknowledge, however, that the Act’s requirements of agencies may change over time because “[w]hat is ‘arbitrary’ depends on what is understood and known.”²² And what is understood and known is frequently uncovered by actions that agencies undertake pursuant to the presidential administration orders, like quantitative CBA.²³

When courts review agency regulations under the APA, they seek to ensure that the agency engaged in “reasoned decision-making” to reach its conclusion.²⁴ The court is not invited to substitute its policy

¹⁵ See OFF. OF MGMT. & BUDGET, *supra* note 13.

¹⁶ See *id.* at 8–9, 75–81. Discount rates adjust quantitative analysis to appropriately weigh the timing of when costs and benefits will be realized. *Id.* at 75.

¹⁷ Exec. Order No. 14,094, 3 C.F.R. 371 (2024); Exec. Order No. 12,291, 3 C.F.R. 133–34 (1982); Exec. Order No. 12,866, 3 C.F.R. 649 (1994); Exec. Order No. 13,563, 3 C.F.R. 217 (2012).

¹⁸ See, e.g., *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986); *Meyer v. Bush*, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993); *Helicopter Ass’n Int’l, Inc. v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013).

¹⁹ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

²⁰ See Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 808 (2018).

²¹ See *id.* at 809.

²² Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV’T L. REV. 1, 8 (2017).

²³ The purpose of conducting CBA is to gather information, which increases knowledge and transparency about proposed regulations and their impacts. See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1489 (2002).

²⁴ *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). The D.C. Circuit did not actually mention the APA in this case, but it has become recognized as a critical part of

views for those of the agency when determining whether a decision was arbitrary and capricious.²⁵ The presidential administration orders share the APA's objective of improving the quality of decision-making.²⁶ Circular A-4's attention to every detail of regulatory analysis is just one demonstration of this.²⁷ But as Professor Cass Sunstein, a former Director of OIRA, has concluded in an allusion to a famous Justice Oliver Wendell Holmes Jr.'s dissent: "If the Constitution does not enact Mr. Herbert Spencer's Social Statics," then "the APA [does not] enact Office of Management and Budget . . . Circular A-4[.]"²⁸ In other words, though both the APA and the presidential administration orders promote "reasoned decision-making," the term's use in each case is not necessarily coextensive.

Envision a government in which presidential administration and OMB were absent—what would reasoned decision-making entail? Which activities of the administrative state are required by the APA, and which obligations would disappear in the absence of the presidential administration orders? Answering these questions helps reveal the contours of where power over the administrative state rests. Although the presidential administration orders eschew the creation of judicially enforceable rights, it may nevertheless be the case that in requiring agencies to engage in certain practices, such practices become customary elements of good governance—the state of the art—thereby raising the floor on what reasoned decision-making requires under the APA.²⁹ Knowing what is required by executive order but not by the original APA—and where there is room for argument—is important for any litigant challenging regulatory actions.

This Essay proceeds in two parts. Part I provides background on the development of the requirement in administrative law that agencies engage in "reasoned decision-making" to ensure their actions

the historical development of arbitrary and capricious review. *See infra* note 57 and accompanying text.

²⁵ See 5 U.S.C. § 706(2)(A); *see also* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

²⁶ See Exec. Order No. 14,094, 3 C.F.R. 371 (2024) (directing OMB to update Circular A-4 with the goal of "[i]mproving [r]egulatory [a]nalysis"); *see also* Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (issued "in order to . . . [e]nsure well-reasoned regulations"); Exec. Order No. 12,866, 3 C.F.R. 639 (1994) ("Each agency shall . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."); Exec. Order No. 13,563, 3 C.F.R. 215 (2012) ("[E]ach agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify) . . .").

²⁷ See OFF. OF MGMT. & BUDGET, *supra* note 13, at 3–4.

²⁸ Sunstein, *supra* note 22, at 9.

²⁹ See *id.* at 8 ("It may not have been arbitrary to refuse to assign a value to statistical life in 1960, or to use a value that would seem hopelessly ill-informed by 2017; but in 2017, the refusal to assign such a value, or the use of a hopelessly ill-informed value, could indeed be arbitrary.").

are nonarbitrary. It explores how the D.C. Circuit, which was chiefly responsible for the development of the “hard look review” doctrine, debated the proper role of judges as it relates to the federal bureaucracy. It also discusses the impact of the presidential administration orders on control over agencies and the idea of what well-reasoned regulatory analysis entails. The discussion presents a problem: both the APA and the presidential administration orders conceptualize what reasoned decision-making looks like, but the two do not perfectly overlap. This poses a challenge to any attempt to argue an agency’s action is invalid because it failed to comply with a presidential order. It may very well be the case that the agency’s noncompliance is arbitrary, but if that is to have any legal effect, it must be because the APA recognizes it as such.³⁰

Part II attempts to unravel what is required by reasoned decision-making under the APA versus under the presidential administration orders and Circular A-4. Courts have typically sidestepped the issue in cases challenging agency noncompliance with the executive orders by finding no right to judicial review.³¹ This Essay argues that this approach abandons the judiciary’s responsibility under the APA, as determined by the D.C. Circuit debates, to ensure decisions are well-reasoned. Moreover, it shies away from confronting the reality that our conceptions of reasonableness and arbitrariness are inevitably informed by the presidential administration orders, even though they disclaim the creation of procedural or substantive rights. In place of this approach, this Essay proposes an alternative in which courts take notice of the requirements of the presidential administration orders and Circular A-4 and consider agency noncompliance as persuasive evidence of arbitrary and capricious decision-making under APA section 706(2)(A).

I. THE DEVELOPMENT OF THE “REASONED DECISION-MAKING” REQUIREMENT OF AGENCIES

Since the dawn of the administrative state, there has been a tension between Americans’ commitment to democratic pluralism and the efficiencies and benefits created by trusting unelected, expert officials to make public policy.³² To temper this problem, both the President and the courts have developed requirements that agencies engage in reasoned decision-making and bring their expertise to bear on an issue. The courts have done this through the development of multiple review doctrines,

³⁰ See *id.* at 8–9.

³¹ See *infra* Section II.A.

³² See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676–79 (1975).

chief of which is the so-called “hard look” review. The President has done this by issuing the presidential administration orders and expanding OMB’s role in regulatory policy, particularly through Circular A-4. This Part details the development of the reasoned decision-making requirements as one coherent chronology.

A. *The D.C. Circuit Debates*

In 1946, Congress, seeking to require uniform standards from the burgeoning bureaucracy borne by the New Deal, passed the APA.³³ The APA conceptualized agency action as falling into two primary categories: rulemaking and adjudication.³⁴ This Essay deals with the former. Additionally, in APA section 702,³⁵ Congress authorized judicial review of agency action under standards set forth in section 706.³⁶ These standards laid the foundation for the development of the requirement of reasoned decision-making, which is used to determine whether an agency’s action was impermissible.³⁷ Although the APA empowered courts to “hold unlawful and set aside”³⁸ agency actions for a host of reasons, it is the justification provided in section 706(2)(A) that has become the most ubiquitous: agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁹

But arbitrary and capricious review did not become fashionable until decades after the APA’s enactment. In 1946, the public shared positive sentiments toward agency experts overall, seeing them as harbingers of popular New Deal programs.⁴⁰ Views of the courts, on the other hand, were negatively tainted by the judiciary’s conservative bend and disastrous *Lochner v. New York*⁴¹ decision that struck down worker safety protections under a now discredited theory that they violated business’ economic substantive due process.⁴² Citations to the APA were made sparingly until the era of the Cold War, when the failures of “the best and the brightest” minds made the public disenchanted with

³³ See 5 U.S.C. §§ 551–559, 701–706.

³⁴ See *id.* §§ 553–554.

³⁵ See *id.* § 702.

³⁶ See *id.* § 706.

³⁷ See *Citizens to Pres. Overton Park, Inc., v. Volpe*, 401 U.S. 402, 417 (1971) (requiring the Secretary of Transportation to state the reason for his decision to build a highway through a park).

³⁸ 5 U.S.C. § 706(2).

³⁹ *Id.* § 706(2)(A); see, e.g., Alexander Mechanick, *The Interpretative Foundations of Arbitrary or Capricious Review*, 111 Ky. L.J. 477, 480 (2022) (“The importance of ‘arbitrary [or] capricious’ review under the Administrative Procedure Act (APA) § 706(2)(A) can hardly be overstated.” (alteration in original) (quoting 5 U.S.C. § 706)).

⁴⁰ See Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2601–03 (2002).

⁴¹ 198 U.S. 45 (1905), overruled by *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

⁴² See Warren, *supra* note 40, at 2601–03.

agency expertise.⁴³ Furthermore, people feared that agencies had been “captured” by special interest groups.⁴⁴

As distrust of agency expertise grew, courts began to wrestle more deliberately with how judicial review of the administrative state should function. Even so, they often neglected to ground their administrative law decisions in the APA.⁴⁵ The earliest scrutiny of agency decision-making focused primarily on whether an agency had adequately completed the record, grounded its decision in the facts found, and considered relevant parts of the problem, especially those parts required by its organic statute.⁴⁶

During this transformative era in administrative law, three judges of the D.C. Circuit—David Bazelon, Harold Leventhal, and J. Skelly Wright—advanced competing visions of the judicial role in the administrative context.⁴⁷ Judge Bazelon recognized that judges are generalists, thus he argued their role should be limited to rigorously ensuring agency experts adhere to procedures required by law.⁴⁸ Judge Leventhal took a different view. He believed that courts have a duty to study the agency record, explicitly called into focus by the APA, and cannot defer when the job is difficult.⁴⁹ If an agency matter is truly too technical, it is incumbent upon Congress to create specialized courts.⁵⁰ Otherwise, judges are required to investigate the substantive matters underlying agency decision-making.⁵¹ Judge Wright struck a middle approach emphasizing the importance of congressional intent, wary of requiring additional procedures more demanding than what Congress prescribed.⁵² Despite this hesitation to dictate additional procedures, he insisted that judges “review agency action aggressively if the court believe[s] that an agency [is] not carrying out congressional will.”⁵³

⁴³ *Id.* at 2602 (quoting DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1972)).

⁴⁴ *See* Kagan, *supra* note 3, at 2264–69 (quoting ROBERT C. FELLMEYER, *THE INTERSTATE COMMERCE COMMISSION* 15–22 (1970)).

⁴⁵ *See, e.g.,* *Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 608–09, 611 (2d Cir. 1965); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 841 (D.C. Cir. 1970).

⁴⁶ *See, e.g.,* *Scenic Hudson*, 354 F.2d at 612.

⁴⁷ *See* Warren, *supra* note 40, at 2600. The D.C. Circuit was uniquely positioned to immerse itself in administrative law issues after the removal of its criminal docket, especially given its geographic area of jurisdiction. *See id.* at 2604–05.

⁴⁸ *See id.* at 2617–26.

⁴⁹ *See* *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976); *id.* at 69 (Leventhal, J., concurring).

⁵⁰ *See id.* at 68 (Leventhal, J., concurring) (“Our present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions. It may be that some judges are not initially equipped for this role If technical difficulties loom large, Congress may push to establish specialized courts.”).

⁵¹ *See id.* at 69.

⁵² *See* Warren, *supra* note 40, at 2626.

⁵³ *Id.*

All three judges have their fingerprints on the doctrine of “hard look review,” the approach courts take to review agency action for reasoned decision-making.⁵⁴ This has led to a lack of clarity about whether hard look review is an investigation into the substantive or procedural aspects of agency rulemaking. The distinction is an important one because the Supreme Court has held that the APA “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies.”⁵⁵ This means that if hard look review is a procedural review, as Judge Bazelon argued, it has a narrower role for judges than if it is an investigation into an agency’s substantive reasoning.

Judge Leventhal was the first to coin the phrase “hard look” in the context of reviewing agency decision-making.⁵⁶ He zeroed in on the procedural versus substantive dichotomy, writing that courts must “intervene not merely in case of procedural inadequacies,” but also when there are signs that “the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.”⁵⁷ Leventhal undoubtedly understood his version of hard look review as substantive, not procedural.⁵⁸

Judge Bazelon contrastingly argued that judges should not “dig deeper into the technical intricacies of an agency’s decision,” but that they must “go further in requiring the agency to establish a decision-making *process* adequate to protect the [public interest].”⁵⁹ Judge Bazelon’s approach is somewhat at odds with the text of the APA, however, which lists the review standard for arbitrary and capricious action in section 706(2)(A) separately from section 706(2)(D) which already covers agency actions taken “without observance of procedure required

⁵⁴ Though Leventhal is largely credited with the doctrine’s creation and claimed to be the “sponsor” of it. *Id.* at 2616–17 (quoting *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 859 (D.C. Cir. 1979) (Leventhal, J., concurring), *rev’d by* *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981)).

⁵⁵ *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 524 (1978).

⁵⁶ See *Pikes Peak Broad. Co. v. FCC*, 422 F.2d 671, 682 (D.C. Cir. 1969) (“We are satisfied that the Commission gave petitioners’ predictions a hard look.”); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (finding when a permit applicant’s allegations are “stated with clarity and accompanied by supporting data,” they should not receive “perfunctory treatment, but must be given a ‘hard look’” (quoting *Pikes Peak Broad. Co.*, 422 F.2d at 682)).

⁵⁷ *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (footnote omitted).

⁵⁸ See *Ethyl Corp. v. EPA*, 541 F.2d 1, 69 (D.C. Cir. 1976) (Leventhal, J., concurring) (“The substantive review of administrative action is modest Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably.”).

⁵⁹ *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, J., concurring) (emphasis added).

by law.”⁶⁰ If arbitrary and capricious review is only a procedural hard look, then the two subsections are redundant.⁶¹

B. *The Rise of Presidential Administration*

While the debate over what reasoned agency decision-making should look like raged on in the D.C. Circuit, a new actor weighed in on the issue: President Ronald Reagan. The Reagan Administration entered government with a distinctly antiregulatory point of view.⁶² In Reagan’s eyes, the administrative state was to blame for all of America’s ills.⁶³ From labor protections to airline safety to environmental regulations, Reagan took every measure he could to remove the administrative state’s influence.⁶⁴ He famously quipped that the scariest words someone could say were, “I’m from the government, and I’m here to help.”⁶⁵

The Reagan EO was the first of what have been called in this Essay “the presidential administration orders.”⁶⁶ Today, the term “presidential administration” may almost seem like a redundancy, meaning nothing different than just “administration.” That was not so in the 1980s.⁶⁷ In fact, the President’s role in managing the bureaucracy was quite limited and faced stiff competition from Congress, experts, and interest groups for control.⁶⁸ Each of these other competitors’ authority predominated at some time or another in the 20th century.⁶⁹ As noted previously, prior to this point, the public had viewed the administrative state favorably, understanding the career employees who worked in it to be neutral

⁶⁰ 5 U.S.C. § 706(2).

⁶¹ Such a redundancy ought to be avoided as “[i]t is [courts’] duty ‘to give effect, if possible, to every clause and word of a statute.’” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

⁶² See Jefferson Decker, *Deregulation, Reagan-Style*, REGUL. REV. (Mar. 13, 2019), <https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style> [<https://perma.cc/P5V6-VJ3X>] (explaining that the two kinds of regulation “have been attacked with different levels of intensity by administrations that have made a political commitment to deregulation, from the Administration of President Ronald Reagan”).

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ *News Conference—I’m Here To Help*, RONALD REAGAN PRESIDENTIAL FOUND. & INST., <https://www.reaganfoundation.org/ronald-reagan/reagan-quotes-speeches/news-conference-1/> [<https://perma.cc/YVY5-8UTK>].

⁶⁶ See Kagan, *supra* note 3, at 2277 (describing how Reagan created “a centralized mechanism for review of agency rulemakings unprecedented in its scale and ambition—and soon shown to be unprecedented in its efficacy as well, though perhaps still not to the degree its advocates desired”).

⁶⁷ See *id.* at 2253–55.

⁶⁸ See *id.*

⁶⁹ See *id.*

experts.⁷⁰ The President's relationship with the executive agencies looked more like today's relationship with the independent agencies in the sense that it allowed bureaucrats to act relatively autonomously.⁷¹

The Reagan EO, however, completely overhauled the dynamic between the President and the executive agencies. It leveraged what, to that point, had been the relatively dormant powers of OMB and OIRA to oversee all the regulatory actions of the executive agencies.⁷² The Reagan EO provided additional review procedures for any "[m]ajor rule[s]," which included any regulations "likely to result in . . . [a]n annual effect on the economy of \$100 million or more;" cause "[a] major increase in costs or prices"; or have "[s]ignificant adverse effects on competition."⁷³ Key among these procedures was the requirement of an RIA which required, inter alia, a CBA, a description of alternative approaches and why they were not adopted, and, if relevant, the legal reasons why the rule should not be based on costs alone.⁷⁴

Then-Professor Elena Kagan wrote the following in her seminal work coining the term "presidential administration":

Although the order and the legal opinion supporting it explicitly disclaimed any right on the part of OMB, or the President himself, to dictate or displace agency decisions, the order effectively gave OMB a form of substantive control over rulemaking: under the order, OMB had authority to determine the adequacy of an impact analysis and to prevent publication of a proposed or final rule, even indefinitely, until the completion of the review process.⁷⁵

Ironically, the Reagan EO intentionally gummed up the works of an administrative state that the President had criticized for being inefficient.⁷⁶ Although the President's power to manage the executive agencies through executive order arises from the Constitution,⁷⁷ not the APA, it is nevertheless the case that each embodies a commitment to promoting an ideal of reasoned decision-making; the Reagan EO's stated purpose is to "[e]nsure well-reasoned regulations."⁷⁸

⁷⁰ See *supra* note 40 and accompanying text.

⁷¹ See Kagan, *supra* note 3, at 2272–74.

⁷² See *id.* at 2278.

⁷³ Exec. Order No. 12,291, 3 C.F.R. 127–28 (1982).

⁷⁴ See *id.* at 128–30.

⁷⁵ Kagan, *supra* note 3, at 2278 (footnote omitted).

⁷⁶ See *id.* at 2249.

⁷⁷ See *id.* at 2319–31 (discussing the constitutionality of the President's control over the administrative state, particularly as it concerns the President's directive authority).

⁷⁸ Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

C. The Supreme Court Weighs In

President Reagan's aggressive antiregulatory philosophy overreached in at least one instance, when he directed the National Highway Traffic Safety Administration ("NHTSA") to reverse course on issuing a rulemaking initiated by the previous administration requiring automatic seatbelts in cars.⁷⁹ In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,⁸⁰ the Supreme Court found the agency had crossed the line into arbitrary and capricious action.⁸¹ In doing so, the Court provided today's leading authority on what the hard look review should include: an examination of whether the agency (1) "relied on factors which Congress ha[d] not intended it to consider," (2) "entirely failed to consider an important aspect of the problem," or (3) "offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be ascribed to . . . agency expertise."⁸² Additionally the Court required agencies to articulate the basis of their decision, explain any deviations from prior regulatory policy, and consider reasonable alternatives.⁸³

Decided only two years after President Reagan's announcement of the Reagan EO, it should not escape attention that *State Farm* was the first reported Supreme Court case to reference an agency's RIA.⁸⁴ Although the Reagan EO disclaimed the creation of a right to judicial review, the decision indicates that if requirements of the Executive Order are going to form the basis for an agency's decision, then they will become de facto reviewable under arbitrariness review.⁸⁵ The APA does not require agencies to conduct a formal RIA, but it does impose an expectation that if an agency is to do so, it must be well-reasoned and nonarbitrary.⁸⁶ Since the beginning of the era of presidential

⁷⁹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 46, 59 (1983).

⁸⁰ 463 U.S. 29 (1983).

⁸¹ See *id.* at 56.

⁸² *Id.* at 43.

⁸³ See *id.* at 42–43, 46, 51.

⁸⁴ See *id.* at 48; Catherine M. Sharkey, *State Farm "With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1619 (2014) ("[R]egulatory impact analyses should—and as a practical matter do—play a role in substantive judicial review of the underlying regulation under *State Farm* arbitrary and capricious review."). In the period between the issuance of the Reagan EO and the *State Farm* opinion, none of the cases reviewing agency actions for reasoned decision-making referred to an agency's RIA, suggesting that *State Farm* was the first to do so. See, e.g., *Env't Def. Fund, Inc. v. Higginson*, 655 F.2d 1244 (D.C. Cir. 1981); *LeFebvre v. Westinghouse Elec. Corp.*, 549 F. Supp. 1021 (D. Md. 1982), *rev'd by* 747 F.2d 197 (4th Cir. 1984); *Marinette Marine Corp. v. Dep't of Navy*, 527 F. Supp. 587 (D.D.C. 1981), *overruled by* *Ametex Enters., Ltd.*, SBA No. 2442 (June 30, 1986); *Curtis, Inc. v. Interstate Com. Comm'n*, 662 F.2d 680 (10th Cir. 1981).

⁸⁵ See Sharkey, *supra* note 84, at 1618 n.125 and accompanying text.

⁸⁶ See 5 U.S.C. § 706(2)(A).

administration, the APA's rejection of arbitrary and capricious agency actions has left the door open to challenges to agency actions required by presidential orders.

The Supreme Court stopped short, however, of explicitly adopting any of the D.C. Circuit jurists' views of whether the hard look review constituted a procedural or substantive review.⁸⁷ The closest the opinion comes to broaching the topic is in its reaffirmation of its prior ruling that the APA imposes the maximum procedural requirements of agencies.⁸⁸ The Court's reassurance that it did "not require . . . any specific procedures which NHTSA must follow," gave a strong implication that the hard look review is substantive.⁸⁹ However, ambiguity over this point remained, as "*State Farm's* hard look [did] not rest on the same philosophic basis as Judge Bazelon's, Judge Leventhal's, or Judge Wright's reviews."⁹⁰ Professor Sunstein writes that the opinion "endorses the primary elements, both substantive and procedural, of the hard-look doctrine."⁹¹

The consequences of this failure to choose between the D.C. Circuit jurists' approaches revealed themselves in the Supreme Court's 2016 decision in *Encino Motor Cars, LLC v. Navarro*.⁹² There, Justice Anthony Kennedy, writing for the majority, described *State Farm's* requirement that "an agency must give adequate reasons for its decisions" as providing "[o]ne of the basic *procedural* requirements of administrative rulemaking."⁹³ Had the *State Farm* court explicitly adopted Judge Leventhal's approach, this confusing line of judicial precedent likely would have been avoided.

Nevertheless, *State Farm* remains the most detailed guidance the Supreme Court has provided on arbitrary and capricious review. The 20th century began with a popular New Deal administrative state on the rise and the judiciary in a historically weak position following *Lochner*. By the century's conclusion, roles were reversed with the public trust in agency expertise dwindling and the Supreme Court flexing its muscle to methodically conduct a hard look into agencies' decision-making. This hard look review represented only one check on the administrative state, however. At the same time, successive presidents of both parties tightened their grip on the regulatory state and introduced their own expectations of what high-quality bureaucratic

⁸⁷ See *State Farm*, 463 U.S. at 50–51.

⁸⁸ See *id.*

⁸⁹ *Id.*

⁹⁰ Warren, *supra* note 40, at 2632.

⁹¹ Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 210 (1983).

⁹² 579 U.S. 211 (2016).

⁹³ *Id.* at 221 (emphasis added).

decision-making entails. The interplay between these two checks on the administrative state is the focus of the remainder of this Essay.

II. DISENTANGLING THE EXECUTIVE ORDERS FROM THE APA

This Part proceeds in two Sections. Section II.A reviews the body of caselaw that has concluded that judicial review of agency actions that fail to comply with the presidential administration orders and Circular A-4 is unavailable. This Section argues that discarding these matters as unreviewable is an abdication of the duty Congress entrusted to the courts under the APA to strike down arbitrary and capricious actions. Section II.B argues a better alternative is available which would allow courts to treat noncompliance with the presidential administration orders or Circular A-4 as persuasive evidence of arbitrariness under the APA. This approach does not require abrogating past decisions; it helps the legal system conform to people's expectations about how agencies should behave, and it still respects the separation of powers.

A. *The Traditional Approach: Judicial Review Unavailable*

The presidential administration orders, which direct agencies to conduct RIAs, disclaim the creation of “any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States.”⁹⁴ Likewise, OMB Circular A-4, which provides the methodology for conducting RIAs, portrays itself as merely a “guidance,” not a legally binding document.⁹⁵ The new Circular A-4 states that “[a] high-quality regulatory analysis is designed to inform policymakers, other government stakeholders, and the public about the effects of alternative actions.”⁹⁶ It follows naturally that a good RIA is something one would expect from an agency engaged in reasoned decision-making. Similarly, one might also plausibly wonder whether the APA's reasoned decision-making requirement demands an RIA as well.

This was not the conclusion reached in *Michigan v. Thomas*⁹⁷ when the State of Michigan challenged the Environmental Protection Agency's (“EPA”) disapproval of rules Michigan had proposed to mitigate fugitive dust emissions—a reversal from the position EPA had previously adopted.⁹⁸ Michigan raised two arguments relevant here: first, that the agency had not adequately considered the problem nor explained the reasons for its change in position, and second, that the

⁹⁴ See, e.g., Exec. Order No. 14,094, 3 C.F.R. 369, 371 (2024).

⁹⁵ OFF. OF MGMT. & BUDGET, *supra* note 13, at 2.

⁹⁶ *Id.*

⁹⁷ 805 F.2d 176 (6th Cir. 1986).

⁹⁸ See *id.* at 180.

agency violated the Reagan EO by failing to conduct an RIA.⁹⁹ The Sixth Circuit ruled against Michigan, finding that EPA had articulated a reasonable basis for its action in its final rule and that EPA's failure to conduct an RIA was judicially unreviewable under the express terms of the Reagan EO.¹⁰⁰ The court recognized the Reagan EO served only as an internal management tool, and the President "clear[ly] and unequivocal[ly] inten[ded] that agency compliance with Executive Order 12,291 not be subject to judicial review."¹⁰¹ Similar challenges since have met the same fate.¹⁰²

This outcome is surprising considering that the Supreme Court has found that a complete failure to consider costs at all is arbitrary and capricious.¹⁰³ To reconcile these decisions, it is necessary to conclude that there are various reasonable ways to consider costs, of which Circular A-4 is but one. But is it possible that an inadequate consideration of costs, as demonstrated by noncompliance with an executive order or Circular A-4, is functionally the same as the failure to weigh costs at all? This does not seem to be the case either.

In 2021, the Eleventh Circuit considered a petitioner's argument that an agency's RIA failed to abide by the requirements of the presidential administration orders, and thus its regulation was invalid.¹⁰⁴ The court easily disposed of the issue by engaging in a three-part test to conclude that judicial review was unavailable under the express terms of the presidential administration orders.¹⁰⁵ In May 2023, the Eastern District of Virginia, following the Eleventh Circuit's framework, rejected a challenge to a Bureau of Alcohol, Tobacco, and Firearms ("ATF")

⁹⁹ See *id.* at 184–87.

¹⁰⁰ See *id.*

¹⁰¹ *Id.* at 187.

¹⁰² See, e.g., *Meyer v. Bush*, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) ("Executive Order [12,866] carefully stated that its purpose was only for internal management and that it created no private rights. As such, it is doubtful that it had any legal significance. An Executive Order devoted solely to the internal management of the executive branch—and one which does not create any private rights—is not, for instance, subject to judicial review."); *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013) ("To the extent HAI contends that the FAA violated Executive Order 12,866, . . . which require[s] that the agency perform cost benefit analyses for each proposed regulation, . . . an agency's failure to comply with th[is] order[] [is not] subject to judicial review.").

¹⁰³ See *Michigan v. EPA*, 576 U.S. 743, 751–54 (2015). While this decision postdates *Michigan v. Thomas*, the finding of unreviewability has persisted. See *supra* note 102.

¹⁰⁴ See *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1326 (11th Cir. 2021).

¹⁰⁵ See *id.* at 1327. This three-part test asked: (1) does the EO have specific statutory foundation, (2) does either the statute or EO preclude judicial review, and (3) is there an objective standard by which the agency's actions can be judged? *Id.* As later discussed, this analysis is misplaced because the APA's requirement to engage in reasoned decision-making does not depend upon whether judicial review of compliance with an executive order is available.

interpretive regulation defining handguns equipped with certain braces as rifles.¹⁰⁶

The plaintiff framed the issue somewhat differently, arguing that the RIA's failure to monetize costs and consider negative externalities was a violation of the executive orders and Circular A-4 *in addition* to the APA.¹⁰⁷ Nevertheless, the district court analyzed the question of whether ATF's alleged failure to conduct an adequate RIA under both the Clinton EO and OMB Circular A-4 should require the rule be set aside separately from its analysis of whether the agency action had been arbitrary and capricious.¹⁰⁸ The court wrote:

[W]hile Defendants' regulatory analysis may have room for improvement, the law does not require perfection [S]ince '[c]ompliance with [OMB] Circular A-4 is not required by any statute or regulation,' including the APA, compliance with the circular is not subject to judicial review. Similarly, EO 12,866 provides no private right of action, meaning that non-compliance with the order is also not subject to judicial review.¹⁰⁹

The court's analysis attempts to handle the noncompliance issues separately from the APA issues as if the two exist in separate universes. This leads to an incongruity in the opinion in which one part, focused on the executive order and Circular A-4, concludes that the agency's analysis may have room for improvement while another, focused on the APA, concludes the agency engaged in reasoned decision-making.¹¹⁰ The court's excuse that "the law does not require perfection" does not explain why imperfections in an RIA (or other requirements of the presidential administration orders) should not at least be taken into account when deciding on arbitrariness.¹¹¹

An agency's failure to comply with the presidential administration orders and Circular A-4 is deeply concerning since these documents encapsulate what the President and OMB understand to be the best standards for reasoned decision-making.¹¹² These tools provide benchmarks of good governance to "improve the internal management of the

¹⁰⁶ *Miller v. Garland*, 674 F. Supp. 3d 296, 306–07 (E.D. Va. 2023).

¹⁰⁷ See Application for a Nationwide Temporary Restraining Order and a Preliminary and Permanent Injunction at 10–15, *Miller*, 674 F. Supp. 3d 296 (No. 1:23-cv-195).

¹⁰⁸ See *Miller*, 674 F. Supp. 3d at 306–08.

¹⁰⁹ *Id.* at 306–07 (citations omitted).

¹¹⁰ See *id.* at 306–11.

¹¹¹ See *id.* at 306.

¹¹² The new Circular A-4 underwent lengthy interagency review, public comment, and peer review to develop a product "designed to assist analysts in regulatory agencies by providing guidance on conducting high-quality and evidence-based regulatory analysis." See OFF. OF MGMT. & BUDGET, *supra* note 13, at 1–2.

Federal Government”—a state of the art, if you will.¹¹³ The judiciary’s rigid approach to the issue starts and ends with whether judicial review is available; this fails to consider how the reasoned decision-making requirements under the presidential administration orders and Circular A-4 inform and overlap with those of section 706(2)(A). The APA espouses Congress’s intent that the judiciary assist in guaranteeing well-reasoned decision-making by the federal bureaucracy.¹¹⁴ Courts abdicate this duty by hiding behind jurisdictional barriers constructed higher than legally required.

B. A Proposed Alternative: Persuasive Evidence of Arbitrariness

Contrast the above cases with *California v. Bernhardt*,¹¹⁵ a case in which the Bureau of Land Management (“BLM”) was sued for its rescission of a previous rule that had addressed waste prevention in oil and natural gas production.¹¹⁶ While reaching its rescission decision, the BLM claimed to be limited to considering domestic costs and prohibited from considering global costs.¹¹⁷ The district court rejected this regulatory approach as arbitrary and capricious.¹¹⁸ In support of its conclusion, the court highlighted how the presidential administration orders require agency RIAs to consider “‘all costs and benefits’ of regulatory actions.”¹¹⁹ The court did not go through the process of determining whether the executive order itself was judicially reviewable. Instead, it simply used noncompliance with one of its requirements as a barometer of whether reasoned decision-making under the APA had taken place.¹²⁰ The opinion silently recognizes that the executive order need not be judicially enforceable for it to be judicially noticeable.¹²¹

The approach in *Bernhardt*, which essentially treats noncompliance with the presidential administration orders and Circular A-4 as persuasive evidence of arbitrariness, contains several advantages over dismissing these matters as unreviewable. The approach resolves the tension between the competing authorities on reasonableness while maintaining respect for the separation of powers. It cannot be avoided that requiring certain procedures, like RIA, alters the universe of what is known. This inherently changes what the APA substantively requires

¹¹³ *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) (quoting Exec. Order 12,291, 3 C.F.R. 133 (1982)).

¹¹⁴ See 5 U.S.C. §§ 702, 706.

¹¹⁵ 472 F.Supp. 3d 573 (N.D. Cal. 2020).

¹¹⁶ See *id.* at 582–83.

¹¹⁷ See *id.* at 612.

¹¹⁸ See *id.* at 614.

¹¹⁹ *Id.* at 612 (quoting Exec. Order 12,866, 3 C.F.R. 638 (1994)).

¹²⁰ See *id.*

¹²¹ See *id.* at 611–12.

because “[w]hat is ‘arbitrary’ depends on what is understood and known.”¹²² Once this knowledge exists, the APA does not require courts to put on blinders to it. The duty to set aside agency action that is arbitrary and capricious encapsulates a duty to take judicial notice of what is known or readily knowable.

This duty does not depend on the President’s creation of any procedural or substantive rights. Accordingly, adopting this approach would not require abrogating the body of cases finding that judicial review is unavailable under the presidential administration orders. These decisions are grounded in the express language that disclaims the creation of “any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States.”¹²³ Treating noncompliance as persuasive evidence of arbitrariness, however, does not require the creation of any right or benefit. A right to nonarbitrary agency action *already exists*, thanks to section 706(2)(A).¹²⁴

In *State Farm*, the NHTSA conducted an RIA not because the APA required it but because the Reagan EO did.¹²⁵ Once the RIA was conducted, however, the Supreme Court found a judicial obligation under the APA to give a “hard look” at the agency action to ensure that the analysis was the product of reasoned decision-making; this was despite the fact that the Reagan EO eschewed the creation of any right of judicial review.¹²⁶ *State Farm* shows that when the President requires agencies to follow certain procedures, those agencies have an obligation under the APA to carry out the substantive elements of those procedures in a nonarbitrary manner.¹²⁷

This duty is a substantive one, which means that failure to comply with the precise procedure directed by the presidential administration orders and Circular A-4 is not a death knell for agency action. However, procedural requirements are imposed to advance substantive goals.¹²⁸ The D.C. Circuit debates, as well as the ambiguity over the dichotomy created by *State Farm* and *Encino Motor Cars*, demonstrate that the two cannot always be readily distinguished.¹²⁹ In these instances, it is appropriate for judges to treat the failure to follow procedural requirements under the presidential administration orders and Circular A-4 as persuasive evidence of arbitrariness. As merely persuasive evidence, it

¹²² Sunstein, *supra* note 22, at 8.

¹²³ Exec. Order No. 14,094, 3 C.F.R. 371 (2024).

¹²⁴ 5 U.S.C. § 706(2)(A).

¹²⁵ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

¹²⁶ See *id.* at 48–52; Exec. Order No. 12,291, 3 C.F.R. 133–34 (1982).

¹²⁷ See *supra* note 84 and accompanying text.

¹²⁸ President Clinton recognized that in a divided government, controlling the administrative process was the best method he had available for achieving his domestic policy goals. See Kagan, *supra* note 3, at 2281–82.

¹²⁹ See *supra* notes 88–93 and accompanying text.

is within the fact finder's discretion to decide how much weight, if any, to afford the agency's noncompliance. All section 706(2)(A) requires is that agencies engage in reasoned decision-making.¹³⁰ If this is achieved despite noncompliance with presidential directives, then the APA does not empower courts to undo the agency action or redress the procedural failure on the President's behalf. If the substantive ends are achieved, they may justify the procedural flaws.

CONCLUSION

Judicial review of agency action will be more faithful to Congress's intent under the APA if an approach that recognizes agency noncompliance with the President's mandates as persuasive evidence of arbitrariness is adopted, and the legal system will better conform to our expectations of what a well-reasoned decision requires.

¹³⁰ See *supra* Section I.C.

ESSAY

The Mathematical Question: Defining “Relatively Easy” Political Questions

Nathaniel Schwamm*

ABSTRACT

Justiciability doctrines are intertwined with constitutional commands and prudential concerns. They weave together text and history; they aim to protect democracy and individual rights. In 2019, the Supreme Court, in Rucho v. Common Cause, determined that partisan gerrymandering claims suffer from justiciability problems by implicating a doctrinal subpart—the political question doctrine. Within its decision, the Court intended to calm fears that the decision would reach too far, so it wrote that other types of politically implicated claims were not impacted. For example, one-person, one-vote claims are still justiciable, the Court wrote, because they are “relatively easy to administer as a matter of math.” But, beyond one-person, one-vote claims, where else is math “relatively easy”? Multiple courts are now struggling to answer this question across diverse legal problems.

* J.D., May 2024, The George Washington University Law School; B.S. 2018, The George Washington University. I am thankful to the members, associates, and editors of *The George Washington Law Review* for their thoughtful editing and, more importantly, their friendship. A specific thanks is owed to Julianna Pendleton, Shloke Nair, Stephanie Sauer, and Luke Schlobohm for their meticulous work on this Essay and to Kendall Archer, Hyung Jo Choi, Lauren Lehner, Rachel Blau, Jessica Shelnutt, Paul Harryhill, Olivia Venus, and Min Ji Doh, for their tireless work throughout all of Volume 92. Lastly, thank you to Olivia Altman, my parents, family, friends, and professors for encouraging my intellectual growth, supporting me in countless ways, discussing this Essay since it was just a theoretical idea, and reminding me to talk about more than just math and the law.

This Essay proposes an analytic framework to ease that struggle and answer that question: the mathematical question doctrine. In turn, this Essay defines the contours, shows its advantages, and reconceptualizes Rucho. First, it explores the background of the political question doctrine and articulates a set of its justifications. Second, it explains how those justifications flare when courts need to consider math, but it rejects a categorical treatment. Instead, the Essay enumerates factors at the core of a mathematical question: the complexity of math, numerosity of variables, and ease of quantifiability. It roots these factors within the jurisprudential justifications of the political question doctrine and shows their problematic traits. Third, the Essay revisits Rucho to show that although the proposed approach is consistent with caselaw, it is more fully fleshed out, better explains the approach and outcome of Rucho, and gives useful guidance to future courts.

TABLE OF CONTENTS

INTRODUCTION	1184
I. THE POLITICAL QUESTION	1186
A. <i>Doctrinal Development</i>	1186
B. <i>Doctrinal Justifications</i>	1189
1. Protecting Democracy	1189
2. Protecting Competency	1190
3. Protecting Efficiency	1191
II. THE MATHEMATICAL QUESTION	1192
A. <i>From Justifications to Hesitancy</i>	1192
B. <i>From Hesitancy to a Categorical Answer</i>	1193
C. <i>From Hesitancy to Factors</i>	1195
1. Complexity	1195
2. Numerosity	1196
3. Quantifiability.	1197
III. <i>RUCHO</i> REVISITED	1199
A. <i>Traditional Political Question Conception</i>	1199
B. <i>Mathematical Question Conception</i>	1201
CONCLUSION	1204

There is an old saying that lawyers can't do math. While this is a tired stereotype, there is no question that some lawyers and math just don't mix. For that reason, much like the "some assembly required" warning on certain products, we start off by cautioning that there is "some math required" in this [Essay]. Fear not, however, for it is simple math and instructions are included.

—Justice Carlos A. Samour¹

INTRODUCTION

For some, doctrines of justiciability² are "esoteric concepts" left to the ramblings of judges and lawyers.³ Yet justiciability falls at the center of core societal disputes. It implicates military soldiers⁴ and domestic farmers.⁵ It decides issues involving Congress⁶ and the Executive.⁷ It has prevented a mother from challenging the execution of her son.⁸ And it is intertwined with adversarialism, which permeates the American judicial system.⁹

In 2019, the Supreme Court, in *Rucho v. Common Cause*,¹⁰ added partisan gerrymandering to the list of nonjusticiable political questions because it held that partisan gerrymandering presented questions that could not be answered with judicially manageable standards.¹¹ But the Court was clear; although it struck down partisan gerrymandering claims, it did not disturb other areas of law like one-person, one-vote claims.¹²

Unlike partisan gerrymandering claims, one-person, one-vote claims, the Court reasoned, are "relatively easy to administer as a matter of math."¹³ Yet math is rarely easy, especially for lawyers,¹⁴ and

¹ Owens v. Carlson, 511 P.3d 637, 639 (Colo. 2022) (en banc) (citation omitted).

² "The umbrella term 'justiciability' generally includes the related doctrines of standing, ripeness, mootness, and political question." Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 228 n.11 (1990).

³ See Stephenson v. Woodward, 182 S.W.3d 162, 175 (Ky. 2005) (Lambert, C.J., concurring), modified (Ky. 2006).

⁴ Gilligan v. Morgan, 413 U.S. 1, 5 (1973).

⁵ Schroder v. Bush, 263 F.3d 1169, 1176 (10th Cir. 2001).

⁶ Powell v. McCormack, 395 U.S. 486, 549–50 (1969).

⁷ Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

⁸ Gilmore v. Utah, 429 U.S. 1012, 1016–17 (1976) (Burger, C.J., concurring) (concurring in termination of stay of execution).

⁹ See Bandes, *supra* note 2, at 248.

¹⁰ 588 U.S. 684 (2019).

¹¹ *Id.* at 716–18.

¹² *Id.* at 707–08.

¹³ *Id.*

¹⁴ See, e.g., Jackson v. Pollion, 733 F.3d 786, 788 (7th Cir. 2013) ("The discomfort of the legal profession, including the judiciary, with science and technology is not a new phenomenon. Innumerable are the lawyers who explain that they picked law over a technical field because they have

the Court left a group “peculiarly averse to math”¹⁵ to determine that ease.¹⁶ Accordingly, courts are struggling with this application.¹⁷

This Essay recasts the political question doctrine into an easier inquiry by introducing an analytical framework: the “mathematical question.” *Rucho* differentiated gerrymandering claims and one-person, one-vote claims on the basis of math, and the mathematical question posits that the distinction is neither categorical nor inherently obvious. Instead, courts ought to consider a series of factors—complexity, numerosity, and quantifiability—to determine whether math brings a dispute out of judicial reach. This approach is rooted in the underlying justifications behind the political question doctrine. Although this approach is consistent with *Rucho*, it rejects the summary dismissal of claims and elaborates on the meaning of “relatively easy” math.¹⁸ This analytical framework can resolve ongoing justiciability questions arising in areas of law ranging from election ballot design to environmental policy.¹⁹

While proposing this analytical framework, Part I explains the history behind the traditional political question doctrine and its justifications. Part II elaborates on the mathematical question, situates math within the political question doctrine, rejects a categorical approach to courts’ hesitancy about math, and breaks down the justiciability inquiry into a more digestible set of factors courts ought to consider. In doing so, it ties the factors to the justifications for the political question doctrine and establishes this approach’s comparable ease. Part III revisits *Rucho* and the one-person, one-vote doctrine to demonstrate how the proposed mathematical question leads to better analysis than

a ‘math block’—‘law students as a group, seem peculiarly averse to math and science.’” (quoting DAVID L. FAIGMAN, MICHAEL J. SAKS, JOSEPH SANDERS & EDWARD K. CHENG, MODERN SCIENTIFIC EVIDENCE: STANDARDS, STATISTICS, AND RESEARCH METHODS, at v (student ed. 2008))); *Malech v. Malech*, No. 154192FL, 2022 WL 2230874, at *1 (Md. Ct. Spec. App. June 21, 2022) (“Lawyers often joke that we went to law school because we aren’t good at or don’t like math. But sometimes math and law intersect, and when they do the results can be messy.”).

¹⁵ See FAIGMAN ET AL., *supra* note 14, at v.

¹⁶ *Rucho*, 588 U.S. at 707–08.

¹⁷ Compare *Nelson v. Warner*, 472 F. Supp. 3d 297, 311 (S.D. W. Va. 2020) (holding question of ballot ordering justiciable because they “involve[d] far fewer variables” and thus were relatively easy math), and *Jacobson v. Lee*, 411 F. Supp. 3d 1249, 1257–58 (N.D. Fla. 2019) (holding question of ballot ordering justiciable), *vacated and remanded*, 974 F.3d 1236 (11th Cir. 2020), with *Jacobson v. Fla. Sec’y*, 957 F.3d 1193, 1215 (11th Cir. 2020) (holding question of ballot ordering nonjusticiable because no clear and manageable standards could be identified), *vacated and superseded*, 974 F.3d 1236 (11th Cir. 2020). Compare *Juliana v. United States*, 947 F.3d 1159, 1173 (9th Cir. 2020) (holding plaintiffs’ challenge to fossil fuel use nonjusticiable because lack of manageable standards resulting from mathematical comparisons), with *id.* at 1187–88 (Staton, J., dissenting) (finding challenge justiciable in part because standards were manageable).

¹⁸ *Rucho*, 588 U.S. at 708.

¹⁹ See *supra* note 17.

the traditional conception of political questions. Lastly, this Essay concludes by summarizing the contribution of the mathematical question and proposing its future application.

I. THE POLITICAL QUESTION

A. Doctrinal Development

Today's political question doctrine asks whether a particular controversy is the "sort of question that is within the competence of the federal courts to decide or whether it is instead a nonjusticiable political question outside the scope of the judicial power."²⁰ Courts are particularly worried about deciding cases without judicial standards or that require making policy decisions.²¹

However, the political question doctrine did not begin in recent history; instead, it traces its origin to the inception of judicial review.²² As Chief Justice John Marshall explained, certain "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."²³ In other words, the establishment of judicial review in *Marbury v. Madison*²⁴ came with a limitation that the Court would not interfere with political questions.²⁵ Early cases seized on Chief Justice Marshall's language and declined to review questions "submitted to" other branches.²⁶ For example, the Court has articulated that questions of foreign relations and the military belong to the Executive,²⁷ and questions of congressional procedure belong to Congress.²⁸

In contrast, determining who has the right to decide a policy, rather than determining the policy itself, does not pose a political question.²⁹ Nor does the fact that the law is about politics provide immunity from judicial review.³⁰ "In passing, the Court also rejected the political question doctrine in claims challenging Congress's plenary authority over

²⁰ Chad M. Oldfather & Sydney Star, *Roberts, Rules, and Rucho*, 53 CONN. L. REV. 705, 718 (2022).

²¹ See *id.* at 718–19.

²² See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

²³ *Id.*

²⁴ 5 U.S. (1 Cranch) 137 (1803).

²⁵ Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 449–51 (1996).

²⁶ *Marbury*, 5 U.S. (1 Cranch) at 170; see also Pushaw, *supra* note 25, at 450–51.

²⁷ See *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302, 304 (1918); *Gilligan v. Morgan*, 413 U.S. 1, 10–11 (1973).

²⁸ See *Nixon v. United States*, 506 U.S. 224, 226 (1993).

²⁹ See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

³⁰ See *Powell v. McCormack*, 395 U.S. 486, 547–48 (1969) (holding that whether the House properly expelled a member was not a political question).

American Indian tribes, the assertion of executive privilege in response to a congressional subpoena, and the President's authority to disregard a treaty."³¹

Yet Marshall did not label questions "by the constitution and laws, submitted to" other branches as the only type of nonjusticiable questions.³² Instead, that was only one of the prongs; the justiciability doctrine, more broadly, also reaches questions that, "in their nature[,] [are] political."³³ Thus, courts have sought to determine what naturally belongs within each branch's power.³⁴ Yet merely stating that certain questions naturally do not belong to the judiciary simply restates the ultimate question without identifying factors contributing to that nature.

In 1962, the Court in *Baker v. Carr*³⁵ aimed to synthesize the political question doctrine.³⁶ First, there are questions with "a textually demonstrable constitutional commitment of the issue to a coordinate political department."³⁷ This bucket neatly mirrors what Marshall envisioned as questions "submitted to" other branches.³⁸ Second, there are questions with "a lack of judicially discoverable and manageable standards for resolving" them.³⁹ This seems to define a judicial question—and by contrast, a political question—by its answer; a judicial question can be answered only with a judicial answer. Third, political questions can require "an initial policy determination of a kind clearly for nonjudicial discretion."⁴⁰ Fourth, they can express a "lack of the respect due coordinate branches of government."⁴¹ Fifth, a political question can require "an unusual need for unquestioning adherence to a political decision already made."⁴² Lastly, it may risk "the potentiality of embarrassment from multifarious pronouncements by various departments on one

³¹ Scott Dodson, *Article III and the Political Question Doctrine*, 116 NW. U. L. REV. 681, 696 n.96 (2021) (citing *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248–50 (1985); *United States v. Nixon*, 418 U.S. 683, 692–97 (1974); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986)).

³² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

³³ *Id.*

³⁴ See Pushaw, *supra* note 25, at 478; see also *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("The functions of government under our system are apportioned.").

³⁵ 369 U.S. 186 (1962).

³⁶ *Id.* at 217.

³⁷ *Id.*

³⁸ *Marbury*, 5 U.S. (1 Cranch) at 170. Admittedly, Marshall only spoke of questions "submitted to the executive." *Id.* However, as *Baker* indicates, the Court has been clear that courts should neither encroach on the Executive nor Congress in certain areas. *Baker*, 369 U.S. at 211.

³⁹ *Baker*, 369 U.S. at 217.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

question.”⁴³ Any of these situations presents a question with a political nature.⁴⁴

Against this backdrop, the Supreme Court in *Rucho v. Common Cause* held that the political question doctrine barred partisan gerrymandering claims from being considered by federal courts.⁴⁵ The Court rooted its holding to the words of Marshall.⁴⁶ The Court did not “condone excessive partisan gerrymandering,” but it found that “the avenue for reform” fell outside the federal judiciary.⁴⁷ The Court based its holding on the absence of any specific constitutional text, the lack of developed caselaw, the inability to distinguish between illegality and legality, the complexity of underlying calculations, and the existence of intertwined policy judgments.⁴⁸

Before *Rucho* was decided, there was fear among some that an adverse court ruling might disturb more than just partisan gerrymandering claims.⁴⁹ For example, some amici noted that the underlying standards that lower courts employed in the districting context were similar to tests deployed in one-person, one-vote claims.⁵⁰ As background, one-person, one-vote claims were established through a series of Supreme Court cases that held that the Constitution requires states to give their citizenry equal representation in voting.⁵¹ In practice, this means that districts must be drawn with relatively equal sizes so that all individuals have equal voting power.⁵²

Yet, in *Rucho*, the Court declined to overturn its prior holdings and explicitly noted that one-person, one-vote claims did not raise political questions.⁵³ Although the language was explicit, the reasoning was not

⁴³ *Id.*

⁴⁴ *Id.* But see *Al-Tamimi v. Adelson*, 916 F.3d 1, 12 (D.C. Cir. 2019) (noting that the Supreme Court seems to focus most heavily—if not exclusively—on the first two factors identified in *Baker*); *Oldfather & Star*, *supra* note 20, at 718 (noting how *Rucho* focused solely on the second and third factors).

⁴⁵ *Rucho v. Common Cause*, 588 U.S. 684, 718 (2019).

⁴⁶ *Id.* at 695–96 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁴⁷ *Id.* at 719–21.

⁴⁸ *Oldfather & Star*, *supra* note 20, at 721–31 (2022) (summarizing and synthesizing the rationales in *Rucho*).

⁴⁹ See, e.g., Richard L. Hasen, *Roberts’ Rules*, SLATE (Mar. 25, 2019, 11:08 AM), <https://slate.com/news-and-politics/2019/03/john-roberts-supreme-court-gerrymandering-cases.html> [<https://perma.cc/U99R-ZD7X>] (discussing how the then-looming decision in *Rucho*, and other cases, would reflect broader jurisprudence in future years).

⁵⁰ Brief for Eric S. Lander as Amicus Curiae Supporting Respondents at 24, *Rucho*, 588 U.S. 684 (No. 18-422).

⁵¹ See Kent D. Krabill & Jeremy A. Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 TEX. REV. L. & POL. 275, 278–81 (2012).

⁵² See *id.* at 280. This simplifies the analysis somewhat, but for an example of some of the intricacy, see *infra* note 182.

⁵³ *Rucho*, 588 U.S. at 709.

fully developed.⁵⁴ In turn, it opened the door to lower courts' current confusion.⁵⁵

B. Doctrinal Justifications

Courts are not always clear why the political question doctrine exists despite it stretching back to the inception of judicial review.⁵⁶ As *Baker* illuminated, different categories of cases implicate the doctrine, and each of those categories may implicate different justifications.⁵⁷ Given that this Essay focuses mostly on the second *Baker* factor—the nonexistence of judicially manageable standards—this discussion concentrates on justifications in cases implicating that factor.⁵⁸

1. Protecting Democracy

The constitutional arguments take two main strands. First, “The nonjusticiability of a political question is primarily a function of the separation of powers.”⁵⁹ In other words, if a question is best resolved by a political branch (i.e., the legislature or the executive), courts should not try to take that power away. Second, it is a jurisdictional question rooted in the Article III case or controversy requirement (i.e., a *judicial* case or controversy).⁶⁰ Given that courts only have jurisdiction over judicial questions, the other branches answer political questions.⁶¹

Although these constitutional justifications are independently important for application, they also suggest a broader goal. Separation of powers and Article III are not merely ends in themselves, but they are also means to protect individual rights.⁶² The theories are rooted in the idea that if power is distributed across branches, it will be harder for any one body to consolidate enough power to impose its arbitrary

⁵⁴ See *infra* Part III.

⁵⁵ See *supra* note 17.

⁵⁶ Justice Sotomayor has articulated that the first *Baker* factor reflects a textual commitment away from the judicial branch, the second and third *Baker* factors represent areas where decision-making extends beyond “courts’ competence,” and the last three *Baker* factors represent prudential concerns. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 202–06 (2012) (Sotomayor, J., concurring). Other judges have characterized the last four as prudential factors. *Al-Tamimi v. Adelson*, 916 F.3d 1, 12 (D.C. Cir. 2019).

⁵⁷ See *Baker v. Carr*, 369 U.S. 186, 211–16 (1962); see also *supra* Section I.A.

⁵⁸ However, justifications for the doctrine often reflect on multiple of the *Baker* factors and, therefore, are also discussed here.

⁵⁹ *Baker*, 369 U.S. at 210.

⁶⁰ See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

⁶¹ However, these two strands, may, in turn blend together. See *Bandes, supra* note 2, at 232 n.32.

⁶² See, e.g., *Sierra Club v. Trump*, 929 F.3d 670, 704 (9th Cir. 2019) (noting that separation of powers aims to protect “individual rights and liberties—not merely separation for separation’s sake”).

will.⁶³ The Founders were particularly worried that the judicial branch would interfere with the other branches because the Court is the least democratic branch. When the Court strikes down the goals of the legislature (or executive), it runs against democracy's protection of liberty; collectively, this is referred to as "the countermajoritarian difficulty."⁶⁴ The constitutional justification for the justiciability doctrines—and the political question doctrine specifically—represents a core response to this problem.⁶⁵

2. *Protecting Competency*

Beyond merely deferring to democratic branches for structural protection, the political question doctrine is prudential.⁶⁶ This theory argues that courts should not answer certain questions because they are not the best actor to do so.⁶⁷

Especially regarding the second and third *Baker* factors, some political questions ask courts to engage in "decision-making beyond courts' competence."⁶⁸ For example, courts competently weigh equities of injunctive relief,⁶⁹ interpret the meaning of laws, and apply precedent to facts because those are the types of things judges are trained to do well.⁷⁰ In fact, it is well enshrined that the judiciary has the supreme power to declare "what the law is."⁷¹

In contrast, courts resolve questions outside of their competency when they engage in domestic and foreign policy decisions because those decisions require determinations based on skills and information the judiciary does not have.⁷² For example, the executive branch

⁶³ See generally Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303 (1989) (explaining Justice Brandeis's view that the purpose of separation of powers was "to preclude the exercise of arbitrary power" (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting))).

⁶⁴ Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–43 (1998).

⁶⁵ See *id.* at 405–07.

⁶⁶ Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 848 (2017); see also *id.* at 877–90 (arguing that the Court has, at times, conflated the prudential requirements as constitutional).

⁶⁷ Jay Shapiro, *Terrorism, the Constitution, and the Courts*, 18 N.Y.L. SCH. J. HUM. RTS. 189, 198 (2002) (framing certain political questions as those where the "judiciary is not the best branch" to provide answers).

⁶⁸ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 202–06 (2012) (Sotomayor, J., concurring in part and concurring in the judgment).

⁶⁹ *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 829 (9th Cir. 2017).

⁷⁰ See Lisa Rudikoff Price, Note, *Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine*, 38 N.Y.U. J. INT'L L. & POL. 323, 344–45 (2006).

⁷¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁷² See Price, *supra* note 70, at 345–47.

is tasked with dealing with extradition requests because the branch is responsible for understanding relations between America and foreign nations.⁷³ Whether in the scope of foreign relations, national security, or ordinary policy, political questions require judgments about the nation's interest.⁷⁴ Thus, these political questions ask what the law *ought* to be rather than “what the law *is*.”⁷⁵

3. *Protecting Efficiency*

Some courts even admit that the doctrine promotes judicial economy.⁷⁶ For situations in which issues will likely reoccur, courts risk constantly needing to relitigate an issue. Thus, political questions can become more than an isolated question with which courts engage; instead, by opening the door to engaging with political decisions, courts run the risk of turning into a political body with the constant need of reengaging on those political issues.⁷⁷ Accordingly, the Supreme Court declared that “[c]ourts ought not . . . enter . . . political thicket[s].”⁷⁸

Additionally, the Founders assumed that policymaking would be slow and gridlock would ensue.⁷⁹ In fact, the Framers believed that this gridlock would force factions to come together, which would require compromise to follow.⁸⁰ Yet the same institutional constraints are likely not present with courts that need to decide individual rights. It seems undesirable for judges to compromise parties' rights in one case for an outcome in a different case. Thus, the goal of avoiding repetitive questions is unique for a judiciary that should resolve the case in front of it rather than considering the scope of possible questions that might arise again.⁸¹

⁷³ Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 249–50 (2002).

⁷⁴ *Id.* at 250.

⁷⁵ *Marbury*, 5 U.S. (1 Cranch) at 177 (emphasis added).

⁷⁶ *Sw. Pub. Serv. Co. v. Thunder Basin Coal Co.*, 978 P.2d 1138, 1142 (Wyo. 1999) (quoting *Reiman Corp. v. City of Cheyenne*, 838 P.2d 1182, 1186 (Wyo. 1992)); see also Transcript of Oral Argument at 20, *Rucho v. Common Cause*, 588 U.S. 684 (2019) (No. 18–422) (Breyer, J. trying to find a test to avoid “every judge in the country” needing to get involved in gerrymandering claims).

⁷⁷ *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946), *implied overruling recognized by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁷⁸ *Id.* at 556.

⁷⁹ Franita Tolson, Essay, *The Union as a Safeguard Against Faction: Congressional Gridlock as State Empowerment*, 88 NOTRE DAME L. REV. 2267, 2275 (2013).

⁸⁰ See *id.*

⁸¹ Some scholars argue for other justifications for the doctrine or reject it entirely. See Dodson, *supra* note 31, at 681 (arguing that the substantive law of relevant issue makes decisions nonjusticiable); G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 IND. L.J. 1295, 1295–99 (2020) (arguing that the standing doctrine, equitable remedies doctrine, and common law remedies of tailoring all justify the political question doctrine); Martin H. Redish & Matthew Heins, *Premodern Constitutionalism*,

II. THE MATHEMATICAL QUESTION

This Essay, through the “mathematical question,” proposes a seemingly simple proposition: too much math implicates the political question doctrine. This Essay justifies the hypothesis by showing a well-founded hesitancy of math in the law. Then, it seeks to answer the next logical question: how much is “too much” math? The Essay suggests factors that derive from doctrine. Finally, Part III shows the advantage of the mathematical question as an easier tool to evaluate justiciability.

A. *From Justifications to Hesitancy*

Courts express hesitancy when approaching math.⁸² As Justice Breyer argued, courts ought not to try to “find[] answers to complex empirically based questions of a kind that legislatures are better able than courts to make.”⁸³ These “empirically based questions” represent the kinds of questions mathematicians often answer.⁸⁴ For example, Justice Breyer imagined a scenario where “after a gun regulation’s adoption[,] the murder rate went up.”⁸⁵ Determining whether “the murder rate [would] have risen even faster” if there was not the regulation is a question of causal inference that can be answered with directed acyclic graphs.⁸⁶ Considering the effect of “the local recession which has left numerous people unemployed” is a question of confounding variables that might be answered with adjusting log odds ratios or pairwise models.⁸⁷ Justice Breyer likely did not consider using directed acyclic graphs or pairwise models, but he knew that the type of question required a complex answer that the courts should not answer.⁸⁸ Even more broadly, courts hesitate to do math even when something is as simple as counting

57 WM. & MARY L. REV. 1825, 1881 (2016) (arguing that the doctrine is not actually justified at all). Because the Court has not embraced this opinion, this Essay saves this discussion for a different day.

⁸² See *supra* note 14.

⁸³ *McDonald v. City of Chicago*, 561 U.S. 742, 922 (2010) (Breyer, J., dissenting).

⁸⁴ *Id.*

⁸⁵ *Id.* at 923.

⁸⁶ *Id.*; see also, e.g., Thomas C. Williams, Cathrine C. Bach, Niels B. Matthiesen, Tine B. Henriksen & Luigi Gagliardi, *Directed Acyclic Graphs: A Tool for Causal Studies in Paediatrics*, 84 PEDIATRIC RSCH. 487, 487 (2018) (discussing causal inference).

⁸⁷ *McDonald*, 561 U.S. at 923 (Breyer, J., dissenting); see also Daniel Westreich & Sander Greenland, *The Table 2 Fallacy: Presenting and Interpreting Confounder and Modifier Coefficients*, 177 AM. J. EPIDEMIOLOGY 292 (2013) (discussing confounding variables).

⁸⁸ *McDonald*, 561 U.S. at 925–26 (Breyer, J., dissenting) (“Judges cannot easily make empirically based predictions . . . [T]here is no institutional need to send judges off on this ‘mission-almost-impossible.’”).

the number of years to determine the applicability of the statute of limitations.⁸⁹

Still, that hesitancy is not without reason. First, courts are slower at getting the right answer than the policy branches. They are often slow to catch mathematical errors.⁹⁰ Even when they do catch errors, stare decisis pressures may limit their ability to correct prior wrongs by emphasizing consistency over accuracy.⁹¹ And even if it is not an error in the traditional sense but a shift in knowledge, stare decisis may make it difficult for judges to adapt to a change in the field.⁹² Second, courts are less able to get the right answer. Courts can only deal with the data in front of them.⁹³ In contrast, legislatures and the executive are better at gathering data necessary for accurate mathematical analyses.⁹⁴ Similarly, the judiciary does not have the capacity for “finding and evaluating the technical material submitted by others.”⁹⁵ Additionally, legislatures can hire technical staff and bring witnesses into committee hearings for their perspectives; judges, in contrast, often yield to the arguments the advocates present.⁹⁶ Moreover, legislatures are not tied to the single record before them; they can constantly seek to supplant technical data.⁹⁷

B. From Hesitancy to a Categorical Answer

Section II.A argues that *too much* math implicates the political question doctrine. But how much is *too much*? At first blush, the answer might be something categorical; for example, *any* reliance on

⁸⁹ See, e.g., *Albritton v. Morris*, No. 13-CV-3708, 2016 WL 1267799, at *11 (S.D.N.Y. Mar. 30, 2016) (noting the court applied the statute of limitations only “at the risk of breathing further life into tired stereotypes about lawyers’ aptitude for math”).

⁹⁰ See LEILA SCHNEPS & CORALIE COLMEZ, *MATH ON TRIAL: HOW NUMBERS GET USED AND ABUSED IN THE COURTROOM 2* (2013) (describing “mathematics’ disastrous record of causing judicial error”).

⁹¹ See Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 939–40 (2021).

⁹² See *id.*

⁹³ See, e.g., *Cicchetti v. Davis*, No. 07-CIV-10546, 2008 WL 619013, at *4 (S.D.N.Y. Mar. 5, 2008) (noting how the decision was confined by limited information before the judge).

⁹⁴ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (“On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems.”); see also *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 665–66 (1994) (“As an institution, moreover, Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon an issue as complex and dynamic as that presented here.” (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985))).

⁹⁵ *McDonald v. City of Chicago*, 561 U.S. 742, 925 (2010) (Breyer, J., dissenting).

⁹⁶ There are some procedures for federal judges to appoint experts, but the procedures are rarely used. See, e.g., Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. REV. 1113, 1190 (noting rarity of judges using FED. R. EVID. 706).

⁹⁷ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

math might be too much. No doubt this is a workable standard. The idea also seems to be rooted in general human nature where a lack of confidence can manifest itself in avoidance.⁹⁸ But courts should not categorically reject mathematical evidence because of fear that it will be misapplied or improper. Courts, through *Daubert*⁹⁹ hearings, can gate-keep the introduction of the evidence. In turn, they can exclude the source of potentially problematic technical testimony.¹⁰⁰

Similarly, considering math in deciding whether there is too much math raises another metaproblem: are courts even qualified to do this analysis? This metaproblem, however, has been solved elsewhere in the political question sphere: courts are qualified to answer jurisdictional questions. For example, in *Zivotofsky ex rel. Zivotofsky v. Clinton*,¹⁰¹ the Court held that resolving the threshold question of who was able to answer an interbranch dispute did not raise a political question even if deciding the policy question may have.¹⁰² Likewise, courts can answer the threshold question of whether they can answer a question—i.e., whether the political question is implicated—even if they cannot answer underlying questions.¹⁰³ Returning to Justice Breyer, courts can recognize something involves too much math even if they do not know exactly what kind of math is necessary.¹⁰⁴ Therefore, a categorical rejection of math is inappropriate.

On the flip side, some argue that certain issues are so important that courts must engage regardless of how much math is needed; in other words, courts “*can* address [an issue] because it *must*.”¹⁰⁵ Although that may sound compelling, it misstates the doctrine.¹⁰⁶ No matter how important the issues, harmed the parties, or necessary the courts, a political question is beyond the reach of courts.¹⁰⁷ The corollary to the mathematical question is simply that even if math is the only way to understand an issue, it may still present problematic jurisdiction.¹⁰⁸

⁹⁸ Lisa Milot, *Illuminating Innumeracy*, 63 CASE W. RES. L. REV. 769, 769–73 (2013).

⁹⁹ 509 U.S. 579 (1993).

¹⁰⁰ See, e.g., *Raskin v. Wyatt Co.*, 125 F.3d 55 (2d Cir. 1997).

¹⁰¹ 566 U.S. 189 (2012).

¹⁰² *Id.* at 196, 201–02.

¹⁰³ *Id.*

¹⁰⁴ See *supra* notes 83–88 and accompanying text. Moreover, a similar argument could be made for *Baker’s* broader “judicially manageable standards” outside of any technical context because those, too, require the court to analyze whether something they do not have the competency to judge is, in fact, judgeable. See *id.*

¹⁰⁵ *Gill v. Whitford*, 585 U.S. 48, 64 (2018).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 68–69.

¹⁰⁸ This did not need to be the rule. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring in the judgment) (upholding a constitutional cause of action where it would allow for the *only* remedy); *United States v.*

Thus, despite the appeal of these categorical answers, they are ultimately irrelevant.

C. *From Hesitancy to Factors*

To return to the question of Section II.A, how much is *too much* math? No categorical answer will do, and much like other areas of the law, “no one factor is dispositive.”¹⁰⁹ However, this Essay proposes that complexity, numerosity, and quantifiability can determine when there is too much math for courts to handle.

1. *Complexity*

“Judicial history is replete with examples of misapplied statistics”¹¹⁰ Yet some misapplication can be solved through the evidentiary gatekeeping rules.¹¹¹ Nonetheless, as math becomes more complex or novel, it becomes more likely that math’s usage will raise problems. For instance, judges are likely to be intrinsically impressed and not understand problems in math.¹¹² This is especially true if the experts are unique within that field of law or if the reliability of the evidence cannot be checked by experts with less-vested legal incentives.¹¹³ As a note, mathematical complexity differs from legal complexity that discusses math. For example, although the sentencing guidelines require “engaging with . . . math,” the true complexity comes from determining legal assumptions; the math itself is simpler.¹¹⁴

Complexity, as a factor, reflects the underlying political question justifications. First, complex legal questions are often answered by courts, so they fall within standard judicial competence; complex mathematical questions, as above, slip beyond the standard skills judges possess.¹¹⁵ Second, simple math used in complex legal cases can provide an efficient solution. For example, the sentencing guidelines give judges a way to aggregate diverse perspectives on the philosophy of sentencing

Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (noting that constitutional rules may be different when the underlying issues implicate the political process). Nonetheless, it is.

¹⁰⁹ *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992). Likewise, not all factors will be relevant in every case. *See id.*

¹¹⁰ *Hull v. United States*, 404 U.S. 893, 895 n.3 (1971) (Douglas, J., dissenting from denial of certiorari).

¹¹¹ *See supra* Section II.B.

¹¹² *See* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1332–34 (1971) (discussing how judges are easily impressed by math).

¹¹³ *Cf.* FED. R. EVID. 702 advisory committee’s notes to 2000 amendment (discussing amendments to codify *Daubert* and noting that whether expert testimony within litigation was as rigorous as experts perform in the field regardless of litigation is an important factor in expert admissibility).

¹¹⁴ *United States v. Felder*, No. 18-2294 (3d Cir. Feb. 13, 2019) (per curiam).

¹¹⁵ *See supra* notes 110–13 and accompanying text.

and allow judges to apply law uniformity¹¹⁶ by translating legal complexity into simple math. Finally, defined complexity (e.g., sentencing guidelines) is within the control of another branch. This means that the other democratically responsible branches determine the substantive scope, and power does aggregate in courts. Mathematical complexity, in contrast, does not have a backstop of another branch.

Thus, courts should be careful to limit mathematical complexity and look more favorably at math used outside of just the specific legal issue.

2. Numerosity

Beyond just considering the complexity of the analysis, courts need to consider the numerosity of the analysis or the number of variables to analyze. In part, this restates the concerns of complexity.¹¹⁷ As courts consider more variables, they need to make more assumptions.¹¹⁸ Yet, when judges seek to make assumptions, even under the veil of objectivity, they might also “substitute their own values” despite labeling final decisions as a mathematical output.¹¹⁹ This is not an intentional misrepresentation, but it is still problematic.¹²⁰

Hiding behind math removes questions from traditional public debate because it phrases them as decided calculations of mathematical certainty rather than policy concepts that can be debated.¹²¹ That should not be surprising; it is one thing to have profound disagreements on policy—that is what democracy strives for—it is another thing to vigorously disagree with an abstract rule of math. This problem confounds as the number of variables increases because once parties start to go through mathematic calculations, studies have found that they

¹¹⁶ Robin L. Lubitz & Thomas W. Ross, *Sentencing Guidelines: Reflections on the Future*, SENTENCING & CORR., June 2001, at 1.

¹¹⁷ See *supra* Section II.C.1.

¹¹⁸ Cf. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1631–39 (1995) (discussing the unintentional “science charade” when regulators aim to engage in mathematical and scientific analysis but allow policy and political preference to creep in). Wagner shows that, to some degree, these are intrinsic problems in any mathematical analysis whether by the courts or another branch. *Id.* However, as she explains, the problems are exacerbated with a “deficient understanding” of the underlying issue. *Id.* at 1632. Thus, courts’ unique limitations would seem to show a higher likelihood of error. See *supra* Section II.A.

¹¹⁹ Cf. Wagner, *supra* note 118, at 1632.

¹²⁰ See *id.* at 1631–39. But see *id.* at 1644–49 (noting that the use of mathematics and science also opens the door to intentional and premediated mischaracterizations, where actors purposefully misrepresent policy judgments as technical judgments).

¹²¹ See *id.* at 1676–77 (discussing how the public often stays away from weighing in on decisions “disguised as issues of scientific judgment”).

continue to use math for other questions.¹²² The phenomenon is most pronounced when parties need to do more math upfront.¹²³

This factor also touches on the anticommandeering doctrine. For example, in *New York v. United States*,¹²⁴ the Court emphasized that one constitutional problem with commandeering was that it shifted blame away from the ultimately responsible party.¹²⁵ In other words, the doctrine recognizes that the electorate will blame who they perceive as responsible even if that actor is not actually responsible. There, the Court was afraid that the electorate would blame state legislatures even though the federal government pushed its values to the states.¹²⁶ The mathematical question poses a similar problem: the electorate will blame the alleged culprit—“math”—even if policy considerations drive the analysis. And this problem takes an even more problematic turn when citizens feel helpless against the force of math.¹²⁷

Thus, courts should be careful to limit the number of variables they consider and assumptions that the numerosity causes.

3. Quantifiability

Attempting to quantify variables—a task oft required throughout a mathematical analysis—raises a few problems for courts. First, courts may conflate political judgments for mathematical law.¹²⁸ Second, there is a problem of the “[d]warfing of [s]oft [v]ariables.”¹²⁹ When parties attempt to quantify some variables, there is a natural emphasis toward focusing on variables that are easiest to quantify, and analysts tend to ignore variables that are harder to quantify.¹³⁰ Third, legal theories are more difficult to quantify because courts are bad at determining what

¹²² See M. Asher Lawson, Richard P. Larrick & Jack B. Soll, *When and Why People Perform Mindless Math*, 17 JUDGMENT & DECISION MAKING 1208 (2022) (discussing the principle of “mindless math,” where after using math to solve a math-appropriate question, parties continue to apply math inappropriately, and finding the phenomenon is most pronounced when parties do more complex math upfront).

¹²³ *Id.* at 1211.

¹²⁴ 505 U.S. 144 (1992).

¹²⁵ *Id.* at 168–69.

¹²⁶ *Id.*

¹²⁷ See *supra* note 120.

¹²⁸ See *supra* Section II.C.2.

¹²⁹ Tribe, *supra* note 112, at 1361.

¹³⁰ See *id.* at 1362; see also Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1579–80 (2002).

they should be measuring.¹³¹ Yet mathematicians cannot “be successful unless” they know what they are “testing *for*.”¹³²

As an example in the probable cause realm, imagine a judge is trying to evaluate whether a dog sniff was accurate enough to justify probable cause of drug use.¹³³ Most judges would inquire into the “correctness” of the dog sniffs; for instance, a dog that correctly alerts seventy-five percent of the time when drugs are present might be sufficient for probable cause. But that is not the measurement that courts should consider. The Fourth Amendment is principally focused on limiting intrusions on innocent individuals, so instead, courts should determine a dog’s “false-positive” rate; for example, a dog that barks every time it sees a person likely will correctly identify lots of drugs but will also incorrectly target innocent individuals. This example is representative of just the last problem; courts often fail in translating ordinary problems into measurable questions. That is confounded by the other limitations; principally, even if the “equation” was translated correctly, it is hard to quantify the underlying elements.

This is unlike when math is just the means of implementing existing substantive law. For example, courts use math to determine how to recalibrate damages after insolvency because “[t]here is no way to articulate or conceptualize the rules related to reallocation in a joint and several liability [jurisdiction] without using math.”¹³⁴ In cases like this, the substantive law defines the standard, so courts are not attempting to quantify legal principles; instead, they are just applying a legal standard.¹³⁵

Because the math, when used in this way, is just applying an existing standard, it will not expand judicial power because the standard is what could expand the court’s power. In other words, if a political branch defines a standard, a court’s application—with or without math—of that standard honors the political branch’s intent. When the courts instead define the standard, they are controlling the substantive scope; for example, determining what causes a violation of a law is the same as

¹³¹ See generally Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 795 (2013) (explaining in the Fourth Amendment context that “courts already incorporate quantifiable evidence into the [probable cause] inquiry; they are just not doing so in a standardized way”).

¹³² *Vieth v. Jubelirer*, 541 U.S. 267, 297 (2004) (plurality opinion).

¹³³ See Goldberg, *supra* note 131, at 808–09 (providing this hypothetical).

¹³⁴ Erica Goldberg, *When and How Should Courts Use Math?*, IN A CROWDED THEATER (Nov. 26, 2017), <https://inacrowdedtheater.com/2017/11/26/when-and-how-should-courts-use-math> [<https://perma.cc/Y6ZP-4VZA>]; see also Tribe, *supra* note 112, at 1338 (listing other examples, like market control in antitrust, of scenarios where math just implements an existing legal rule).

¹³⁵ See *Rucho v. Common Cause*, 588 U.S. 684, 715–16 (2019) (discussing how a comparison to antitrust law that also requires substantial math is not applicable because the underlying legal standards come from common law and historical practice).

determining when a violation occurs. Accordingly, courts should limit scenarios where it is unclear what needs to be quantified or the range of potential inputs includes hard-to-quantify variables.¹³⁶

III. *RUCHO* REVISITED

Having laid out the contours of the mathematical question,¹³⁷ the Essay turns toward its application. In *Rucho*, the Supreme Court added partisan gerrymandering to a list of nonjusticiable political questions.¹³⁸ Yet the Court explained that one-person, one-vote claims were justiciable.¹³⁹ The Court dealt with this difference summarily, determining that the latter claims were “relatively easy to administer as a matter of math.”¹⁴⁰ However, as this Essay shows, “relative[] eas[e]” is not self-defining.¹⁴¹

Although the Supreme Court disposed of the difference in nine words, this Part fills in the gap and elaborates on the reasoning. First, it defines *Rucho* in the absence of the mathematical question.¹⁴² Specifically, it shows that the justifications emphasized in *Rucho* would also apply to one-person, one-vote cases. Second, with the incompleteness of the traditional doctrine, the Essay applies the factors of the mathematical question to *Rucho*, showing an easier path to *Rucho*’s conclusion.¹⁴³

A. *Traditional Political Question Conception*

In *Rucho*, the Court determined partisan gerrymandering posed a nonjusticiable political question, yet it differentiated one-person, one-vote claims.¹⁴⁴ However, the traditional discussion of the political question doctrine, as articulated in *Baker*, does not seem to fully resolve this issue, and, alternatively, does not apply more in gerrymandering cases than in one-person, one-vote cases.

First, the Court held that gerrymandering was “one of the most intensely partisan aspects of American political life” that should be resolved by state courts based on state statutes and state constitutions.¹⁴⁵ In turn, this reflects the deeply held structural arguments of separation

¹³⁶ As above, there may be other justifications for the doctrine, and those justifications could suggest different factors. See discussion *supra* note 81.

¹³⁷ See *supra* Part II.

¹³⁸ *Rucho*, 588 U.S. at 707.

¹³⁹ *Id.* at 708.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; see also *supra* Part II.

¹⁴² See *infra* Section III.A.

¹⁴³ See *infra* Section III.B.

¹⁴⁴ *Rucho*, 588 U.S. at 707–09.

¹⁴⁵ *Id.* at 718–19.

of powers and federalism.¹⁴⁶ Although courts generally resist their counter-majoritarian impulses, this justification is weakest for subsets of laws that interfere with “political processes” that “ordinarily . . . protect minorities.”¹⁴⁷

Second, the Court noted that if they found the claims justiciable, they “would recur over and over again around the country with each new round of districting, for state as well as federal representatives.”¹⁴⁸ The concern for efficiency is indeed an important one.¹⁴⁹ However, partisan gerrymandering claims arise no more often than one-person, one-vote claims.¹⁵⁰ Despite the risk of constantly involving courts, one-person, one-vote claims are justiciable.¹⁵¹

Third, the Court generally stated that there were no “limited and precise standards” within the “competence of the federal courts” to define partisan gerrymandering.¹⁵² At the abstract level, however, the same criticism of limitless and imprecise standards could be leveled at one-person, one-vote claims because the latter also involves open questions that might implicate policy.¹⁵³ Additionally, lower courts considering the merits of partisan gerrymandering claims did not seem to feel that the questions reigned beyond their core competencies.¹⁵⁴

The Court differentiated the types of claims in passing,¹⁵⁵ and the distinction may even appear clear on its face.¹⁵⁶ According to the Court, one-person, one-vote claims are obviously less challenging. But why?

¹⁴⁶ See *supra* Section I.B.1.

¹⁴⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (describing how courts ought to ordinarily defer to legislatures, but there should be more skepticism for laws that target the political process).

¹⁴⁸ *Rucho*, 588 U.S. at 719.

¹⁴⁹ See *supra* Section I.B.3.

¹⁵⁰ In fact, both arise in the same context of redistricting and courts often apply the principles in tandem. See Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 384–90 (2017).

¹⁵¹ *Baten v. McMaster*, 967 F.3d 345, 352 (4th Cir. 2020).

¹⁵² *Rucho*, 588 U.S. at 707.

¹⁵³ Compare Nicholas O. Stephanopoulos & Eric M. McGhee, Essay, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1505 (2018) (discussing different methods to quantify partisan gerrymandering), with R. Alta Charo, *Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 FORDHAM L. REV. 735, 765 (1985) (describing the mathematical analysis behind one-person, one-claim). In fact, the same authors whose work is instrumental in the partisan gerrymandering claims are equally involved in the one-person, one-vote arena. See, e.g., Jowei Chen & Nicholas O. Stephanopoulos, *Democracy's Denominator*, 109 CALIF. L. REV. 1019, 1065 (2021).

¹⁵⁴ See, e.g., Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 982–83 (2019).

¹⁵⁵ See *Rucho*, 588 U.S. at 707.

¹⁵⁶ See Eisler, *supra* note 154, at 998 n.107 (describing one-person, one-vote claims as easier questions at the “conceptual level”).

It cannot be because they involve math done by judges.¹⁵⁷ It cannot be because courts are relying on some specific and absolute text.¹⁵⁸ In fact, the Court explicitly stated that the key is not a categorical difference but a “relative[] eas[e].”¹⁵⁹

The traditional conception of the political question doctrine, as evidenced in *Rucho*, seems to address this by saying courts do not need to “attempt [to] further . . . define the kinds of” questions beyond justiciability, “[b]ut [they] know it when [they] see it.”¹⁶⁰ The mathematical question seeks a further definition.

B. Mathematical Question Conception

Given the limited analytical value of the traditional political question doctrine,¹⁶¹ this Essay reconceptualizes *Rucho* under the proposed mathematical question doctrine by redescribing the *Rucho* outcome under the proposed factors.

Complexity proposes the first hurdle for courts evaluating partisan gerrymandering claims. For example, the math is complicated in gerrymandering cases; in fact, some scientists have suggested gerrymandering calculations require up to 131,000 computer processors.¹⁶² Additionally, because gerrymandering suits seek to rectify partisan imbalances in elections, the mathematics behind them will be tied specifically, and only, to the redistricting context.¹⁶³ In other words, some of this complex math is specific to the field rather than generic across all mathematics, which makes it hard for judges to evaluate.¹⁶⁴ On the opposite side, one-person, one-vote claims propose a claim that, despite any complexity, can be boiled down to division.¹⁶⁵ And group population equality is not unique to bodies debating redistricting; it is deployed across

¹⁵⁷ See sources cited *supra* note 153 (discussing the math involved in both claims).

¹⁵⁸ See Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1003, 1012–14 (2005) (describing the variation of population districts allowed underneath one-person, one-vote claims).

¹⁵⁹ *Rucho*, 588 U.S. at 708.

¹⁶⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹⁶¹ See *supra* Section II.C.

¹⁶² See Yan Y. Liu, Wendy K. Tam Cho & Shaowen Wang, *PEAR: A Massively Parallel Evolutionary Computation Approach for Political Redistricting Optimization and Analysis*, 30 SWARM & EVOLUTIONARY COMPUTATION 78, 78 (2016). Even experts in the field describe the “exceedingly complex area of redistricting.” Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 885 (2015).

¹⁶³ See, e.g., Stephanopoulos & McGhee, *supra* note 162, at 831 (describing one statistic to measure partisan gerrymandering: the efficiency gap).

¹⁶⁴ See *supra* Section II.C.1.

¹⁶⁵ Lyle Denniston, *The New Look at “One Person, One Vote,” Made Simple*, SCOTUSBLOG (July 27, 2015, 12:01 AM), <https://www.scotusblog.com/2015/07/the-new-look-at-one-person-one-vote-made-simple> [<https://perma.cc/WZF5-VCHH>] (“[T]he starting point would be a state’s total population divided by the number of election districts . . .”).

economics and mathematics.¹⁶⁶ Moreover, in the one-person, one-vote context, some of the underlying complex questions come from external sources of law,¹⁶⁷ whereas the gerrymandering context requires courts to define the violation itself rather than solely determining whether a standard was met because the dispositive question is not whether there is political gerrymandering but whether it is too much.¹⁶⁸

Additionally, courts face problems with the quantity of variables within the partisan gerrymandering context. In fact, almost all the variables involve complex political assumptions. First, courts need to determine what variables should be used. Yet, for example, whether incumbency is something that should be protected is a political science question.¹⁶⁹ Additionally, even where there is agreement, like how most people agree states should consider “communities of interest” in their redistricting plans, there is still debate over defining variables.¹⁷⁰ That contrasts to something like one-person, one-vote, where there are minimal debates on *what* criteria should be used (population size); calculating those criteria (equal population) is relatively simple math, and there is a binary output (either population is equal, or it is not).

Likewise, partisan gerrymandering, but not one-person, one-vote, raises quantification problems. For example, gerrymandering claims are prone to “[d]warfing of soft variables.”¹⁷¹ Although quantifying variables like competitiveness may be challenging,¹⁷² it is easier than nontangible goals. For example, there is likely no way to quantify the goal of ease of administration, yet it is important in the districting context.¹⁷³

¹⁶⁶ See, e.g., Chao Fan, Xiangqi Jiang, Ronald Lee & Ali Mostafavi, *Equality of Access and Resilience in Urban Population-Facility Networks*, URBAN SUSTAINABILITY, Mar. 31, 2022, at 9 (employing the method to calculate “the distributions of urban populations and facilities in counties”).

¹⁶⁷ See *infra* note 181.

¹⁶⁸ *Rucho v. Common Cause*, 588 U.S. 684, 685 (2019) (“The question is one of degree: How to ‘provid[e] a standard for deciding how much partisan dominance is too much.’” (alteration in original) (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006))).

¹⁶⁹ Compare Justin Buchler, *The Social Sub-Optimality of Competitive Elections*, 133 PUB. CHOICE 439, 444–46 (2007) (arguing that protecting incumbents via redistricting ensures they are most invested in electoral outcomes and, therefore, constituents), and *White v. Weiser*, 412 U.S. 783, 793–97 (1973) (finding that protecting incumbency was a legislative state interest), with Sally Dworak-Fisher, Note, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131, 131 (1996) (arguing that incumbency protection entrenches groups with political power at the expense of minorities).

¹⁷⁰ See e.g., Sandra J. Chen, Samuel S.-H. Wang, Bernard Grofman, Richard F. Ober, Jr., Kyle T. Barnes & Jonathan R. Cervas, *Turning Communities of Interest into a Rigorous Standard for Fair Districting*, 18 STAN. J.C.R. & C.L. 101, 113–14 (2022) (describing debate over whether race and ethnicity should be considered within community of interest criteria).

¹⁷¹ *Tribe*, *supra* note 112, at 1361.

¹⁷² See *supra* Section II.C.3.

¹⁷³ See *After Redistricting Is Done: Election Processes and Implementation*, NAT’L CONF. STATE LEGISLATURES (Jan. 28, 2022), <https://www.ncsl.org/elections-and-campaigns/>

Partisan gerrymandering also requires courts to quantify legal theories in problematic ways.¹⁷⁴ First, considering the “community of interest” criteria, and even assuming everyone could agree on the important factors, there is substantial disagreement on how to measure it.¹⁷⁵ Second, partisanship itself is hard to measure. Most states do not have party registration data, so social scientists often need to use prior election data extrapolated toward current, or proposed, districts or modeled partisan behavior.¹⁷⁶ Even in states where there is party registration data or accurately estimated partisan behavior, partisan affiliation is not fixed nor does everyone vote at equal rates; thus, estimating the effect of gerrymandering requires mixing a multitude of imperfect statistics that are intertwined with politics (e.g., affiliation, turnout, ideology, etc.).¹⁷⁷ Third, even nonpolitical criteria can be hard to measure. Almost every state seeks to minimize the compactness of a district, but how to measure compactness is not universally agreed upon.¹⁷⁸ Fourth, assuming every criterion—both partisan and apolitical—could be accurately determined and measured, it still needs to be “converted” to a gerrymandering “level.” In turn, this requires quantifying the “amount of gerrymandering” and comparing that against a baseline of acceptable amount. But what is acceptable is not readily definable.¹⁷⁹ Thus, for partisan gerrymandering claims, courts need to answer a mathematical question without knowing their analysis’s end goal. Yet mathematical

after-redistricting-is-done-election-processes-and-implementation [https://perma.cc/LBW7-3FXT] (describing the impact of redistricting on the administrability of elections); *see also supra* note 169 (discussing the impact of incumbency on the hard to quantify goal of representation); *Rucho v. Common Cause*, 588 U.S. 684, 712–13 (2019) (discussing other hard-to-quantify factors like relative importance of local issues, incentives for turnout, ticket-splitting and more).

¹⁷⁴ *See, e.g., Rucho*, 588 U.S. at 712 (Certain proposed tests are problematic because “[j]udges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread.”).

¹⁷⁵ *See, e.g., Chen et al., supra* note 170, at 107, 112–17 (describing debate over how to measure communities of interest).

¹⁷⁶ *See* RUTH IGIELNIK, SCOTT KEETER, COURTNEY KENNEDY & BRADLEY SPAHN, PEW RSCH. CTR., COMMERCIAL VOTER FILES AND THE STUDY OF U.S. POLITICS 20 (2018).

¹⁷⁷ *See id.* at 20–32.

¹⁷⁸ *Carter v. Chapman*, 270 A.3d 444, 499 n.11 (Pa. 2022) (Brobson, J., dissenting) (noting the Polsby-Popper, Schwartzberg, Reock, Convex Hull, Population-Polygon, and Cut Edges methods for calculating compactness with each method having “strengths and weaknesses,” but cautioning that “[f]urther elucidation of this topic from a mathematical point of view is beyond the scope of this dissenting opinion”).

¹⁷⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004) (plurality opinion) (noting that legislatures have “districting discretion”). The *Rucho* majority also considered—and rejected—whether courts ought to first consider the criteria states use and then just apply math to determine which map best fits those criteria. *See Rucho*, 588 U.S. at 715–16. This is the type of problem that likely does not pose a mathematical question, in theory. However, the Court held that the theory is not justified in the Constitution, so even if it may be manageable, it is not textual. *Id.*

analysis generally cannot “be successful unless” the analyst knows what they are “testing for.”¹⁸⁰

One-person, one-vote questions do not suffer from these problems. The actual solution that needs quantification—population equality—only needs two variables: a numerator and a denominator. That is not a decision wholly without political assumptions.¹⁸¹ However, courts can still evaluate the question without deciding those alleged political questions because the political question—which population metric to use—is not wholly intertwined with the final question—equality.¹⁸²

Although the result in *Rucho* is consistent with the proposed mathematical question, courts looking to this analysis in future cases will be better served by knowing when math poses a political question.

CONCLUSION

Ultimately, gerrymandering claims and one-person, one-vote claims are different. The Court simply says that the latter are “relatively eas[ier].”¹⁸³ This Essay explains why: the former, but not the latter, raises every factor that makes math so triggering. The former, but not the latter, raises a mathematical question.

The mathematical question theory, proposed here, has its roots in the justifications courts currently use to determine political questions.¹⁸⁴ Its application does not lead to different results.¹⁸⁵ Yet it provides a

¹⁸⁰ *Vieth*, 541 U.S. at 297.

¹⁸¹ See Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 361 (2022) (discussing how the law has not clarified if states need to balance districts for voting age population or citizen voting age population). It is not clear whether determining which metric states ought to use would pose a political question. See *id.* at 436. The reference to an alleged political question merely demonstrates how courts do not always need to be the ones quantifying legal theories even if the theories need to be quantified.

¹⁸² Original one-person, one-vote case law was stricter around absolute equality; however, more recent cases have allowed for some deviations from equality. Raviv, *supra* note 158, at 1002–03. In *Brown v. Thompson*, the Court stated that population deviations within ten percent generally would be within acceptable deviations. 462 U.S. 835, 842 (1983). Although this sounds like one-person, one-vote may have discretion within the rule of law, it differs in a crucial way from the problematic discretion discussed in this Essay. First, the discretionary framework in one-person, one-votes is essentially a “means of allocating the burden of proof.” Raviv, *supra* note 158, at 1013. Deviations above or below ten percent will be presumed to be unconstitutional or constitutional, but the presumptions are rebuttable. *Id.* Second, the debate for where to draw the line is not intertwined with the debate for how to measure deviation. For one-person, one-vote claims, the Court will look to see if asserted state interests explain a deviation. See *id.* Partisan gerrymandering claims, however, do not have a specific goal (like equality) to look at, so they need to intertwine the state interest within the test itself.

¹⁸³ *Rucho*, 588 U.S. at 708.

¹⁸⁴ See *supra* Section II.A.

¹⁸⁵ See *supra* Section III.B (showing the application to *Rucho* and one-person, one-vote claims).

crucial framework. First, it “articulate[s] a standard” for answering what is too much math.¹⁸⁶ In doing so, it discusses and validates courts’ general hesitation when encountering potentially problematic jurisprudence,¹⁸⁷ but it rejects any categorical response.¹⁸⁸ It then converts that hesitation into factors to answer the question of what is too much math.¹⁸⁹

After defining the mathematical question, the Essay elaborates on its importance. *Rucho* summarily distinguishes two types of claims that are not as different as they first seem.¹⁹⁰ The Essay, in contrast, distinguishes the claims in detail by exploring not merely categorical differences but relative ones.¹⁹¹ In turn, this seeks to do what the Court claims is important: defining a standard that can be applied in future cases from first principles rather than just looking at a problem and intrinsically knowing what to do.¹⁹²

But beyond just clarifying *Rucho*, the mathematical question can resolve future complicated questions. The factors identified here may be implicated in ballot ordering cases and environmental tort claims.¹⁹³ Or they may be implicated in upcoming fights over racial gerrymandering.¹⁹⁴ Ultimately, courts can use these factors for a robust analysis while remaining tethered to the broader political question doctrine. By understanding the factors, courts can also simplify their analyses.

To return to where this began, justiciability is esoteric.¹⁹⁵ Mathematics, too, introduces esoteric concepts.¹⁹⁶ This may explain why judges and lawyers run from its application.¹⁹⁷ It might be why two claims can seem so obviously different.¹⁹⁸ Although *Rucho* may have raised unanswered questions, it hinted at where to go. The answer, according to

¹⁸⁶ See *Rucho*, 588 U.S. at 716.

¹⁸⁷ See *supra* Section II.A.

¹⁸⁸ See *supra* Section II.B.

¹⁸⁹ See *supra* Section II.C.

¹⁹⁰ See *supra* Section III.A.

¹⁹¹ See *supra* Section III.B.

¹⁹² *Rucho v. Common Cause*, 588 U.S. 684, 715–16 (2019) (rejecting the approach to gerrymandering that can summarily conclude what is “too much” because that approach does not lead to a standard that can be used in future cases).

¹⁹³ See *supra* note 17.

¹⁹⁴ One-person, one-vote cases were not the only cases that *Rucho* differentiated from partisan gerrymandering. In fact, *Rucho* held that racial gerrymandering cases also did not pose justiciability problems. *Rucho*, 588 U.S. at 699. Now, however, at least one Justice has suggested that “[t]he same logic” of *Rucho* means that racial gerrymandering claims are also nonjusticiable. *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1253 (2024) (Thomas, J., concurring in part). Although beyond the scope of this Essay, the mathematical question may provide a framework for differentiating partisan and racial gerrymandering.

¹⁹⁵ See *supra* notes 2–9 and accompanying text.

¹⁹⁶ Mike Townsend, *Implications of Foundational Crises in Mathematics: A Case Study in Interdisciplinary Legal Research*, 71 WASH. L. REV. 51, 53 (1996).

¹⁹⁷ See *supra* Section II.A.

¹⁹⁸ See *supra* notes 150–51 and accompanying text.

Rucho, is not categorical obviousness, it is a question of degree.¹⁹⁹ *Rucho* explains that too much math is a problem; the mathematical question answers what is “too much.”

¹⁹⁹ See *supra* Section III.A.

Family In Law.

In 1933, BNA first published *The United States Law Week*. With that first issue, BNA set a new standard for high-quality legal reporting and research. Following *Law Week*'s precedent, BNA has since launched a family of information services for legal professionals.

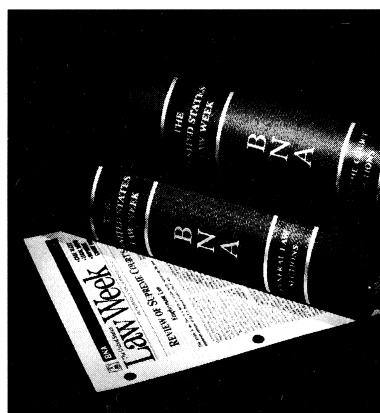
BNA's notification services cover key areas of the legal field. They include: *Family Law Reporter*; *BNA's Bankruptcy Law Reporter*; *Business Law Adviser*; *Corporate Governance Report*; *Mergers & Acquisitions Law Report*; *BNA's Patent, Trademark & Copyright Journal*; and *Criminal Law Reporter*.

Whichever publication you choose, you'll notice the family resemblance — comprehensive, accurate, in-depth coverage.

Ask your professor for details on low student rates for BNA information services.



The Bureau of National Affairs, Inc.
1231 25th Street, NW
Washington, DC 20037
Customer Relations: 1-800-372-1033
email: riskfree@bna.com
<http://www.bna.com>



The Benchmark

BNA's Criminal Law Reporter

It's what your opponents read every week. Don't be blind-sided.

The *Criminal Law Reporter* — long regarded as the criminal bar's publication of record. Now, it does even more for you:

- **Summary & analysis** of the week's most important cases and other developments
- **FREE full text** of reported cases on a Web site for subscribers
- **FREE e-mail alerts** of U.S. Supreme Court cases
- **Electronic availability** on the Web or Lotus Notes
- **E-mail** of Highlights with links to full text
- **A new, streamlined format** for faster reading, more depth

FREE TRIALS



BNA

Your Trusted Source for
Criminal Law Developments

Customer Relations: 1-800-372-1033

email: riskfree@bna.com ♦ www.bna.com

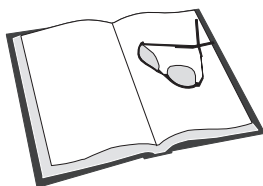
The Bureau of National Affairs ♦ 1231 25th Street, NW Washington, DC 20037

ORDER THROUGH HEIN!

Get your missing back volumes and issues
through Hein!

We have obtained the entire back stock,
electronic, reprint and microform rights to . . .

The George Washington Law Review



Complete sets to date are available now!
We can also furnish single volumes and issues!

BACK ISSUES ALSO AVAILABLE IN HEIN-ON-LINE!

<http://heinonline.org>



WILLIAM S. HEIN & CO., INC.

*Law Publisher / Serial & Subscription Agent / Micropublisher
New & Used Law Books / Preservation Printer / Bookbinder*
2350 North Forest Road, Getzville, New York 14068
(716) 882-2600 • TOLL FREE (800) 828-7571 • Fax (716) 883-8100
E-Mail mail@wshein.com • Web Site www.wshein.com

