

FOREWORD

Proportionality in Administrative Law

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ABSTRACT

In this era of rapid change in administrative law—both at the Supreme Court and from the White House—the foreword to The Law Review's annual administrative law issue presents a timely opportunity to take stock of the future of regulatory governance. This Foreword argues that, especially in this time of flux, we should seek to embrace proportionality as an organizing principle in administrative law. The more important or impactful a regulatory action, the more involved Congress should be in making the major value judgments, the more procedure we should require from agencies, and the more searching review we should expect from courts. The converse is also true. For minor regulatory actions where agencies merely fill up the details of a statutory scheme, we should depederalize at the agency level and expect light-touch judicial review. In between the major and minor actions, the role of Congress, the extent of agency procedures, and the scope of judicial review should be calibrated, where possible, to be proportional to the importance of the regulatory action.

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*There have been hints of proportionality in recent years. The Supreme Court, for instance, has introduced a major questions doctrine, which requires a clear statement from Congress to delegate significant value judgments to federal agencies. It has also focused on proportionality when it comes to statutory interpretation and agency delegations, arbitrary-and-capricious review of agency policymaking under the Administrative Procedure Act, and officer status under Article II of the U.S. Constitution. In October Term 2024, the Court recognized the importance of proportionality when it limited the scope of injunctive relief in *Trump v. CASA* and rebuffed a nondelegation doctrine challenge in *Federal Communications Commission v. Consumers' Research*. Within the executive branch, we have also seen some embrace of proportionality. For instance, in the first Trump Administration, the Department of Transportation via internal administrative law adopted formal rulemaking for its most important rules. And in the Biden Administration, the Office of Information and Regulatory Affairs doubled the threshold for centralized review of agency rulemaking to significant rules that have at least a \$200 million economic impact. This Foreword argues that the Supreme Court and the executive branch can and should embrace proportionality on their own in many respects and documents the ways they have already done so. To fully implement this vision, however, Congress must get involved to ingrain proportionality in administrative law and regulatory practice.*

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INTRODUCTION

When there is great flux in the law, there is also great opportunity to revisit and strengthen the law's foundation. This Foreword to *The George Washington Law Review's* Annual Review of Administrative Law makes the case that it is time to adopt proportionality as an organizing principle in administrative law and regulatory practice. Simply put, the more important or impactful a regulatory action, the more involved Congress should be in making the major value judgments, the more procedure we should require from agencies, and the more searching review we should expect from courts. The converse is also true. For minor regulatory actions where agencies merely fill up the details of a statutory scheme, we should deproceduralize at the agency level and expect light-touch judicial review. In between the major and minor actions, the role of Congress, the extent of agency procedures, and the scope of judicial review should be calibrated, where possible, to be proportional to the importance of the regulatory action.

And make no mistake: We are living in a revolutionary era in administrative law, one that has taken an "anti-administrativist" turn.¹ It has become a two-front attack from the Supreme Court and the White House. On the judicial front, the Court eliminated *Chevron* deference²—a bedrock doctrine in administrative law that federal agencies, not courts, should be the primary interpreters of the statutory scheme Congress has charged them to implement.³ The Court has also limited Congress's ability to delegate policymaking authority to federal

¹ Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 44, 47 (2017) (declaring that the administrative state is "under siege" and dividing the field of administrative law into two camps: defenders of a robust, modern administrative state and the "anti-administrativists").

² *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

³ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); see also Kent Barnett & Christopher J. Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475, 475–76 (2024) (describing why *Chevron* deference was a bedrock principle in administrative law and how it advanced rule-of-law values such as expertise, deliberative process, political accountability, and stability and uniformity in federal law).

agencies. Although it declined to revive the nondelegation doctrine in 2025,⁴ the Court had arguably already cabined Congress's power to delegate broadly by eliminating *Chevron* deference⁵ and by developing a new major questions doctrine,⁶ which requires Congress to provide clear authorization for agencies to regulate on matters of great economic or political significance.⁷ On the agency adjudication front, the Court cut back on agencies' authority to enforce statutory and regulatory requirements in-house, shifting power to impose certain civil penalties from federal agencies to civil juries and Article III courts.⁸

As I have argued elsewhere, these judicial reforms do not just limit the policymaking authority of federal agencies; they also seek to rein in the President's substantive power.⁹ But the Court has also increasingly

⁴ *FCC v. Consumers' Rsch.*, 606 U.S. 656, 680, 688, 698 (2025) (upholding a statutory delegation under the Court's traditional intelligible principle test of the nondelegation doctrine and refusing to recognize a more exacting test for revenue-raising statutory delegations).

⁵ See *Loper Bright*, 603 U.S. at 412.

⁶ Since 2021, the Court has struck down four agency actions on major questions doctrine grounds. See *Biden v. Nebraska*, 600 U.S. 477, 483 (2023) (invalidating the Department of Education's student loan cancellation program); *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (invalidating Environmental Protection Agency's Clean Power Plan); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 113 (2022) (enjoining the Occupational Safety and Health Administration's mandate of employee COVID-19 testing or vaccines for large employers); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 759–60 (2021) (enjoining the Center for Disease Control's COVID-19 nationwide eviction moratorium); see generally Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) (discussing the development of the major questions doctrine and its narrowing impact on the Court's interpretation of broadly worded statutes when those statutes grant broad agency authority, but do not explicitly address a challenged agency action). As this Foreword was in production, three members of the Court joined an opinion that invalidated President Trump's tariffs on major questions doctrine grounds. *Learning Res., Inc. v. Trump*, 607 U.S. 229, 248 (2026).

⁷ Indeed, in October Term 2024, both Justice Brett Kavanaugh and Justice Neil Gorsuch observed that *Loper Bright* and the major questions doctrine address many of the excessive delegation concerns that a reinvigorated nondelegation doctrine would be designed to cabin. See *Consumers' Research*, 606 U.S. at 697, 705 (Kavanaugh, J., concurring) (observing that "many of the broader structural concerns about expansive delegations have been substantially mitigated by this Court's recent case law in related areas—in particular (i) the Court's rejection of so-called *Chevron* deference and (ii) the Court's application of the major questions canon of statutory interpretation"); *id.* at 745 (Gorsuch, J., dissenting) ("To its credit, the Court has sometimes mitigated its failure to police legislative delegations by deploying other tools, like the major questions doctrine and *de novo* review of statutory terms . . .").

⁸ *SEC v. Jarkesy*, 603 U.S. 109, 140 (2024). As this Foreword was in production, the Court held that an adjudication scheme that "do[es] not definitively resolve the parties' legal obligations" without a jury does not violate the Seventh Amendment. *FCC v. AT&T*, 146 S. Ct. 1418, 1427 (2026).

⁹ Christopher J. Walker, *Congress and the Shifting Sands in Administrative Law*, 34 WIDENER COMMONWEALTH L. REV. 187, 192 (2025); accord Daniel Farber, *The Major Question Doctrine, Nondelegation, and Presidential Power*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 2, 2022), <https://www.yalejreg.com/nc/synposium-shane-democracy-chief-executive-07/> [<https://perma.cc/6QMK-FNXV>] (observing that the Supreme Court's reform strategy with the major questions

embraced a more unitary executive view of separation of powers that vests the President with greater control over executive branch personnel and policy outcomes. This embrace has led to substantial changes in precedents on the President's appointment and removal powers under the Constitution.¹⁰ Indeed, in June 2026, the Court overruled *Humphrey's Executor v. United States*¹¹—its longstanding precedent that blessed Congress's constitutional authority to require for-cause removal for the heads of certain multimember independent agencies.¹²

To be sure, this judicial revolution has not been entirely anti-administrativist. In some instances, the Supreme Court has cut back on judicial review of agency actions and required less of agencies when making policy. In 2025, for instance, the Court effectively eliminated the nationwide injunction, removing a potent tool of challengers to government actions.¹³ In another case, it also cast some doubt on the breadth of judicial remedies against federal agencies, suggesting that courts should take harmless error more seriously.¹⁴ And, at least when it comes to agency policy changes, the Court crystallized the "change-in-position doctrine" that calibrates how much explanation an agency must give based on the extent of the reliance interests engendered by the existing policy.¹⁵

This judicial revolution in administrative law no doubt finds some roots in the White House, through judicial appointments in the first Trump Administration. At the Supreme Court, President Trump replaced Justices Antonin Scalia, Anthony Kennedy, and Ruth Bader Ginsburg with Justices Neil Gorsuch, Brett Kavanaugh, and Amy

doctrine is "not so much . . . a way of preventing Congress from giving away too much power as a way to prevent Presidents from snatching powers they were not given").

¹⁰ See *Collins v. Yellen*, 594 U.S. 220, 250 (2021) (finding that restrictions on the President's power to remove the Federal Housing Finance Agency Director violate the separation of powers); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 222 (2020) (concluding that the Consumer Financial Protection Bureau Director must be removable at will); *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (concluding that administrative law judges are "officers" of the United States under the Appointments Clause). See generally Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. 1013, 1034–43 (2025) (detailing the unitary executive precedents from the Roberts Court).

¹¹ 295 U.S. 602 (1935).

¹² *Trump v. Slaughter*, 146 S. Ct. 2283, 2302 (2026) ("If anything more is left of *Humphrey's*, we overrule it.").

¹³ *Trump v. CASA, Inc.*, 606 U.S. 831, 837 (2025); cf. Christopher J. Walker, *What Trump v. CASA Means for the Future of Universal Relief in Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (June 29, 2025), <https://www.yalejreg.com/nc/what-trump-v-casa-means-for-the-future-of-universal-relief-in-administrative-law/> [<https://perma.cc/F9XL-LUHQ>] (discussing four exceptions or work-arounds for providing nationwide relief that the Court left open after *Trump v. CASA*).

¹⁴ See *FDA v. Wages & White Lion Invs., LLC*, 604 U.S. 542, 586–90 (2025).

¹⁵ See *id.* at 567–71.

Coney Barrett respectively,¹⁶ shifting the Court from a 5–4 conservative court with Justice Kennedy as the swing vote to one with a 6–3 conservative supermajority.¹⁷ Importantly, two of the new Justices are intellectual thought leaders on different aspects of anti-administrativism. In particular, Justice Gorsuch is arguably the leading judicial voice in favor of a robust nondelegation doctrine and against judicial deference to federal agencies.¹⁸ And Justice Kavanaugh has been a chief architect of the judicial embrace of unitary executive theory when it comes to separation of powers and presidential power.¹⁹ The changes in judicial personnel in the lower federal courts, moreover, mirrored those at the Supreme Court, with President Trump appointing fifty-four federal courts of appeals judges and 174 federal district court judges during his first term.²⁰ With the rise of forum shopping, the impact of these lower-court appointments has had profound first-mover and anchoring effects, with challenges to the administrative state shopped to more anti-administrativist forums.²¹ For example, the U.S. Court of Appeals for the Fifth Circuit—with President Trump’s appointment of judges like James Ho, Andrew Oldham, and Don Willett²²—has become a

¹⁶ *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/5KB5-ZA63>] (last visited June 15, 2026); see BARRY J. McMILLION, CONG. RSCH. SERV., R45622, JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. CIRCUIT AND DISTRICT COURTS, 1977–2024, at 6 (2025).

¹⁷ See Daniel Kiel, *A Bolt of Lightning: Measuring the Impact of Modern Transitions on the Supreme Court*, 42 CARDOZO L. REV. 2813, 2833, 2860 (2021).

¹⁸ See ANDREW NOLAN, JENNIFER K. ELSEA, JARED P. COLE & BRANDON J. MURRILL, CONG. RSCH. SERV., R44778, JUDGE NEIL M. GORSUCH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 30–34, 88 (2017).

¹⁹ See 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, 964 (2020).

²⁰ John Gramlich, *How Trump’s Judicial Appointments Compare with Other Recent Presidents*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/3YTF-7YPG>].

²¹ See, e.g., Libby Dimenstein, Donald L.R. Goodson & Tyler Szeto, *Major Rules in the Courts: An Empirical Study of Challenges to Federal Agencies’ Major Rules*, 13 TEX. A&M L. REV. 1, 7 (2025) (finding that federal judges appointed in President Trump’s first term were far less likely to include *Chevron* citations in controlling opinions addressing challenges to major rules than appointees of any prior administration).

²² Emma Platoff, *Senate Confirms a Top Abbott Adviser, Andrew Oldham, to the 5th Circuit Court of Appeals*, TEX. TRIB. (July 18, 2018, at 13:50 CT), <https://www.texastribune.org/2018/07/18/andrew-oldham-governor-greg-abbott-adviser-confirmed-5th-circuit/> [<https://perma.cc/LP6F-ST6S>]; see also David Smith, *How Trump Reshaped the Fifth Circuit to Become the ‘Most Extreme’ US Court*, GUARDIAN (Nov. 15, 2021, at 03:00 ET), <https://www.theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us> [<https://perma.cc/TP6V-GEVM>] (noting that Trump “named six judges to the [Fifth Circuit]” in his first term, “more than a third of its total composition”).

hotbed for anti-administrativist challenges.²³ Based on the Fifth Circuit's record to date, it is fair to conclude that the Fifth Circuit is much more anti-administrativist than the current Supreme Court majority.²⁴

The White House's role in this anti-administrativist revolution has not been limited to judicial appointments, as demonstrated by substantively anti-administrative actions in both the first and second Trump Administrations.²⁵ In the first months of the second Trump Administration, for example, the White House embraced a muscular version of unitary executive theory and attacked head-on various aspects of agency independence. Heads of several so-called independent agencies have been fired without cause, contrary to statutory for-cause removal protections.²⁶ Those fired agency officials challenged their removal in court,²⁷ leading the Supreme Court to overturn *Humphrey's Executor* and rule that the for-cause removal protections at issue are unconstitutional.²⁸ Indeed, in May 2025, the Court stayed lower court orders that had preliminarily enjoined the firings of a member of the National Labor Relations Board and a member of the Merit Systems Protection Board.²⁹ In dissent, Justice Kagan accused the majority of "either overturning or narrowing" *Humphrey's Executor* on the emergency docket.³⁰ President Trump also fired some seventeen inspectors general across the administrative state without adhering to statutory requirement to provide Congress with thirty days' notice.³¹ Similarly, the Department of Justice decided that it would not defend the removal protections for administrative law judges ("ALJs"), opening the door for agency heads

²³ See, e.g., Robert Iafolla, *Employers Fight NLRB Rulings with Fifth Circuit Forum Shopping*, BLOOMBERG L. (Dec. 23, 2025, at 05:05 ET), <https://news.bloomberglaw.com/daily-labor-report/employers-fight-nlrp-rulings-with-fifth-circuit-forum-shopping> [<https://perma.cc/W4DP-JQNM>].

²⁴ See, e.g., *FCC v. Consumers' Rsch.*, 606 U.S. 656, 664, 697–98 (2025) (reversing the Fifth Circuit's ruling that the FCC's Universal Service Fund is unconstitutional on nondelegation doctrine grounds).

²⁵ See, e.g., Exec. Order No. 13,771, 82 C.F.R. 9339 (2017) (requiring that "for every one new regulation issued, at least two prior regulations be identified for elimination").

²⁶ See, e.g., Andrea Hsu, *Trump Fires EEOC and Labor Board Officials, Setting Up Legal Fight*, NPR (Jan. 28, 2025, at 18:07 ET), <https://www.npr.org/2025/01/28/nx-s1-5277103/nlrp-trump-wilcox-abruzzo-democrats-labor> [<https://perma.cc/X6HK-HQYA>].

²⁷ See, e.g., Zach Montague, *Appeals Court Reinstates 2 Leaders of Federal Boards Fired by Trump*, N.Y. TIMES (Apr. 7, 2025), <https://www.nytimes.com/2025/04/07/us/politics/labor-relations-merit-systems-board.html> [<https://perma.cc/77YJ-86ZB>].

²⁸ *Trump v. Slaughter*, 146 S. Ct. 2283, 2302 (2026).

²⁹ *Trump v. Wilcox*, 145 S. Ct. 1415, 1416 (2025).

³⁰ *Id.* at 1418 (Kagan, J., dissenting) (discussing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)).

³¹ See Charlie Savage, *8 Inspectors General Fired by Trump File Lawsuit Seeking Reinstatement*, N.Y. TIMES (Feb. 12, 2025), <https://www.nytimes.com/2025/02/12/us/politics/inspectors-general-trump-lawsuit.html> [<https://perma.cc/Q37X-AUTZ>].

to fire ALJs at will.³² With the help of Elon Musk and his novel Department of Government Efficiency, federal agencies have fired thousands of career civil servants and cut back on—or outright eliminated—government programs and infrastructure that house and facilitate the use of scientific and other technical experience in regulatory governance.³³ In August 2025, President Trump fired Lisa Cook from the Board of Governors of the Federal Reserve based on her allegedly lying to secure a more favorable mortgage rate on a second home.³⁴ And finally, in June 2026, the Supreme Court overruled *Humphrey's Executor* in *Trump v. Slaughter*.³⁵ It is hard to keep track of all of the second Trump Administration's challenges to the administrative state.

This era of rapid change creates an opening to transform the future of administrative law. There are various theoretical approaches.³⁶ For some, the future is anti-administrativist, where much of the modern administrative state is unconstitutional, and there are strong constraints on whatever remains.³⁷ For others, it is a defense of a robust administrative state, where federal agencies have a measure of decisional independence from the political branches to make major policy judgments.³⁸ Some even argue that the modern administrative state as it has evolved in the last century is now constitutionally required or is

³² See Charlie Savage, *Trump Claims Power to Fire Administrative Law Judges at Will*, N.Y. TIMES (Feb. 20, 2025), <https://www.nytimes.com/2025/02/20/us/politics/trump-power-administrative-law-judges.html> [<https://perma.cc/JHG2-VXWK>].

³³ See, e.g., Meg Kinnard, *A Comprehensive Look at DOGE's Firings and Layoffs So Far*, AP NEWS (Feb. 21, 2025, at 19:08 ET), <https://apnews.com/article/doge-firings-layoffs-federal-government-workers-musk-d33cdd7872d64d2bdd8fe70c28652654> [<https://perma.cc/6KZR-2YHP>]; Alex Lemonides, Seamus Hughes, Mattathias Schwartz, Lazaro Gamio & Camille Baker, *Tracking the Lawsuits Against Trump's Agenda*, N.Y. TIMES (Jan. 16, 2026, at 13:10 ET), <https://www.nytimes.com/interactive/2025/us/trump-administration-lawsuits.html> [<https://perma.cc/N6H6-42JM>].

³⁴ See Tony Romm, Colby Smith & Ben Casselman, *Trump, in a Move with Little Precedent, Says He Is Firing a Fed Governor*, N.Y. TIMES (Aug. 27, 2025), <https://www.nytimes.com/2025/08/25/us/politics/lisa-cook-fired-trump-fed.html> [<https://perma.cc/32JQ-5NSN>]. In June, the Supreme Court ruled in favor of Cook on review of a preliminary injunction order, finding that she is likely to prevail on the merits. *Trump v. Cook*, 146 S. Ct. 2234, 2246 (2026). Among other things, the Court rejected the government's arguments that the removal is not judicially reviewable, that the statutory for-cause standard is a very low bar, and that Cook is not entitled to stay in office while litigation over the firing is ongoing. *Id.* "To accept any one of those arguments," the Court held, "would in effect transform the Federal Reserve's for-cause protection into at-will employment—an interpretive leap out of step with the statute Congress enacted and our Nation's tradition of central banking protected from political interference." *Id.*

³⁵ *Trump v. Slaughter*, 146 S. Ct. 2283, 2302 (2026).

³⁶ See generally Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2019) (disaggregating the field of administrative law into four theoretical camps, which he labels (1) administrative supremacy, (2) administrative skepticism, (3) neoclassical administrative law, and (4) administrative pragmatism).

³⁷ See *id.* at 869.

³⁸ See *id.* at 862–63.

more democratically accountable than Congress.³⁹ Others have joined the center-left abundance movement, which advances the dual aims of reducing regulatory burdens for a pro-growth agenda and building state capacity to help advance that agenda.⁴⁰ Of course, most scholars—this Author included—find themselves somewhere between the skeptics and the absolutists. We are administrative pragmatists who share a vision of rules and doctrines that balance the interests in empowering agencies to fulfill their statutory mandates and constraining them from abusing the discretion Congress has delegated to them.⁴¹ These scholars seek to maximize rule-of-law values in regulatory governance, such as consistency, effectiveness, efficiency, fairness, predictability, stability, and uniformity. Many of us are also formalists who care deeply about the formal separation of powers between legislative, executive, and judicial functions. But some, myself included, are pragmatic formalists, who recognize that bright lines cannot always be drawn, and standards may be necessary to advance the proper separation of powers while still seeking to promote administrability and predictability.⁴²

This Foreword advances a pragmatic vision that embraces proportionality as an organizing principle in administrative law and regulatory practice.⁴³ The gist of the argument is straightforward: The

³⁹ See Metzger, *supra* note 1, at 87–91 (arguing that the modern administrative state with broad delegation is a constitutionally mandatory corollary to the president’s duty to “take care” that the laws be faithfully executed).

⁴⁰ See generally EZRA KLEIN & DEREK THOMPSON, *ABUNDANCE* (2025) (advocating the dual aims of reducing regulatory burdens for a pro-growth agenda and building state capacity to help advance that agenda). Although fully developing this suggestion is outside this Foreword’s scope, the abundance movement would also benefit from embracing proportionality in its reform agenda.

⁴¹ See Christopher J. Walker, *Constraining Bureaucracy Beyond Judicial Review*, 150 *DAEDALUS* 155, 157 (2021) (observing that “[t]he vast majority of administrative law scholars . . . are administrative pragmatists”); see also Andrew Hammond & Christopher J. Walker, *The End of Administrative Pragmatism?*, 56 *LOX. U. CHI. L.J.* (forthcoming 2026) (manuscript at 5) (on file with the George Washington Law Review) (arguing that although “administrative pragmatism . . . has been the leading theory of administrative law . . . a majority of the Court has abandoned administrative pragmatism as a unifying theory of federal administrative law, shifting to administrative skepticism and to some degree neoclassical administrative law”).

⁴² See, e.g., Shalev Gad Roisman, *The Limits of Formalism in the Separation of Powers*, 16 *J. LEGAL ANALYSIS* 178, 179 (2024) (arguing that although “formalism can answer a number of straightforward separation of powers questions, it cannot resolve the difficult separation of powers disputes that . . . arise in areas of overlapping power where both branches have constitutional power to act, but come into conflict”). In that sense, at times perhaps there is not a lot of daylight between a pragmatic formalist and a rules-centered version of separation of powers functionalism. See Shalev Gad Roisman, *Balancing Interests in the Separation of Powers*, 91 *U. CHI. L. REV.* 1331, 1340 (2024) (arguing that neither formalism nor functionalism answer the hardest separation of powers questions and advancing an interests-balancing approach instead).

⁴³ In this Foreword, I use the term “proportionality” to capture this call to action. In so doing, however, I do not intend to borrow from the rich literature on the constitutional and international law concept of a proportionality review, see, e.g., Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3096–97 (2015), which Professor Jud Mathews,

more important or impactful a regulatory action, the more involved Congress should be in making the major value judgments, the more procedure and reason-giving we should require from agencies, and the more searching review we should expect from courts. The converse is also true. For minor regulatory actions where agencies are merely filling up the details of a statutory scheme, we should depederalize at the agency level and expect light-touch judicial review. In between the major and minor regulatory actions, the role of Congress, the extent of agency procedures, and the scope of judicial review should be calibrated, where possible, to be proportional to the importance or impact of the regulatory action. Part I of this Foreword illustrates this vision for proportionality through a case study on the nondelegation doctrine and the Court's decision in October Term 2024 in *Federal Communications Commission v. Consumers' Research*.⁴⁴

As detailed in Part II, embracing proportionality in the judiciary would not be unprecedented. The Roberts Court has embraced proportionality in administrative law in several respects. It has introduced a new major questions doctrine, which requires a clear statement from Congress to delegate major value judgments to federal agencies.⁴⁵ It has also focused on proportionality when it comes to statutory interpretation and agency delegations, arbitrary and capricious review of agency policymaking under the Administrative Procedure Act of 1946 ("APA"),⁴⁶ and officer status under Article II of the Constitution.⁴⁷ In October Term 2024, the Court embraced proportionality when it limited the scope of injunctive relief in *Trump v. CASA*⁴⁸ and rebuffed a nondelegation doctrine challenge in *Consumers' Research*.⁴⁹ And in *Food & Drug Administration v. Wages & White Lion Investments*,⁵⁰ the Court suggested that courts should take the APA's harmless error provision more seriously.⁵¹

among others, has applied to U.S. administrative law. Jud Mathews, *Agency Discretion, Judicial Review and 'Proportionality' in US Administrative Law*, in *THE JUDGE AND THE PROPORTIONATE USE OF DISCRETION* 160, 160–61 (Sofia Ranchordás & Boudewijn de Waard eds., 2016); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 *EMORY L.J.* 797, 801–02 (2011). There may well be some parallels between my call to embrace proportionality in administrative law and this literature. But I do not endeavor to draw those connections in this Foreword and encourage the reader to apply the ordinary meaning of proportionality here—not some term of art developed in existing literature.

⁴⁴ 606 U.S. 656 (2025).

⁴⁵ See *infra* Section II.A.

⁴⁶ 5 U.S.C. §§ 551–559, 701–706.

⁴⁷ See *infra* Section II.B.

⁴⁸ 606 U.S. 831 (2025).

⁴⁹ *Id.* at 837.

⁵⁰ 604 U.S. 542 (2025).

⁵¹ *Id.* at 586–90.

Within the executive branch, embracing proportionality in administration seems commonsensical. Yet, we seem to have seen less of an express focus on proportionality in recent administrations. Part III details two exceptions to that trend. The first is from the first Trump Administration, when the Department of Transportation voluntarily adopted formal rulemaking for its most important rules.⁵² The second is from the Biden Administration, when the Office of Information and Regulatory Affairs raised the threshold for centralized review of agency rulemaking to significant rules that have at least a \$200 million impact, reducing the procedural review for less impactful rules.⁵³ Part III then surveys other ways that federal agencies can use internal administrative law to further embrace proportionality in regulatory practice.

Part IV then tackles three main counterarguments: one about defining majorness and proportionality, one from the right, and then another from the left. What constitutes major (or minor) and proportionality will vary by context. To be clear, majorness focuses on value judgments, not just matters of great economic or political significance. Economic impact is neither necessary nor sufficient. The meaning of majorness will also vary across regulatory contexts and which actors (courts, Congress, the President, or federal agencies) are charged with determining majorness in that context. The same is true of defining proportionality. Proportionality can involve the nature and extent of procedures an agency is required to engage when regulating (the amount of reason-giving, deliberation, and analysis an agency must provide); the amount of participation by the President or the public in the agency decision-making process; the standard and scope of judicial review; or the specificity and detail Congress must include in statutory delegations and directives—to provide a few examples. In any given context, proportionality may just involve one of these examples or a combination of many, and, like majorness, it may well differ based on which actors are charged with establishing them.

Judicial conservatives will be concerned that embracing proportionality shifts administrative law away from bright-line rules and toward less predictable standards. This is not an unjustified concern, but the benefits outweigh the costs, and there are ways to create bright-line administrable rules based on proportionality. Proregulatory liberals will be concerned that this proportional approach will be developed asymmetrically in a deregulatory fashion, only making it harder to regulate.⁵⁴

⁵² See *infra* notes 298–304 and accompanying text.

⁵³ See *infra* notes 305–15 and accompanying text.

⁵⁴ See, e.g., Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 461 (2020) (explaining that the asymmetrical treatment of interpretive error in administrative law theory and practice “will threaten the legitimacy of administrative law” in the long run).

That too is a reasonable concern. When it comes to proportionality, it is critical that judicial doctrine and agency procedure be symmetrically calibrated. When it comes to filling up the details, agencies should not be required to use extensive procedures or fear exacting judicial review. And proportionality should matter with respect to agency action and inaction, regulation and deregulation, and enforcement and nonenforcement.

Part V concludes by underscoring the critical importance of Congress in this reform effort. The Supreme Court and the executive branch can embrace—and have embraced—proportionality on their own in many respects, as this Foreword documents. But to fully implement this vision, Congress must also get involved to modernize administrative law and render it more proportional. The APA contained several key hallmarks of proportionality that have been lost over the decades. Congress can and should restore proportionality as an organizing principle in the APA, in terms of both agency procedure and judicial review of agency actions.

To be sure, this Foreword does not mean to overclaim. Proportionality has always been in the background of administrative law. And sometimes it has been in the foreground. In the 1960s and 1970s during the *Goldberg v. Kelly*⁵⁵ due process revolution, the Supreme Court increasingly recognized a right to a predeprivation hearing even for public benefits, making it more costly and difficult for federal agencies to administer public benefits programs.⁵⁶ During that anti-administrativist moment, Judge Henry Friendly delivered the Owen J. Roberts lecture at the University of Pennsylvania Law School.⁵⁷ Entitled “Some Kind of Hearing,” Judge Friendly urged a proportional approach to the process due before the government can deprive an individual of some right or interest.⁵⁸ He notably invoked Bernard Schwartz’s observation that requiring a predeprivation oral hearing makes no sense when the dispute is over whether someone is entitled to \$17.00 instead of \$14.10.⁵⁹

⁵⁵ 397 U.S. 254 (1970).

⁵⁶ *Id.* at 271; *see, e.g.*, Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1316 (2012) (“For the millions of individuals who have received public benefits since the 1970s, the fair hearing system established in the wake of *Goldberg* and *Mathews* represents the real-world legacy of the Supreme Court’s due process revolution.”); Michael Asimow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 ADMIN. L. REV. 395, 397 (2001).

⁵⁷ Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1267 & n.* (1975).

⁵⁸ *See id.* at 1276 (“It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving.”).

⁵⁹ *See id.* at 1275 (citing BERNARD SCHWARTZ & HENRY WILLIAM RAWSON WADE, *LEGAL CONTROL OF GOVERNMENT* 123 (1972)).

One year later, in *Mathews v. Eldridge*,⁶⁰ the Supreme Court relied on Judge Friendly's "Some Kind of Hearing" when it introduced a proportional approach to procedural due process.⁶¹ We currently face another anti-administrativist revolution, and it is time once again to emphasize proportionality in administrative law.

I. CASE STUDY: PROPORTIONAL APPROACH TO NONDELEGATION

This Part explores the current debate around the nondelegation doctrine to illustrate a proportional approach in administrative law. Nondelegation is a doctrine that purports to limit Congress's ability to delegate legislative authority to the executive branch or any other entity. Nearly a century ago, the Supreme Court articulated an intelligible principle test for when Congress delegates policymaking authority to federal agencies. "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."⁶² Over the decades, this intelligible principle test has provided little to no constraint on delegation. As Justice Scalia, writing for the Court in *Whitman v. American Trucking Ass'n*s,⁶³ observed, "[i]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes."⁶⁴

In 2019, however, as many as five Justices on the Supreme Court expressed interest in reinvigorating the nondelegation doctrine. In *Gundy v. United States*,⁶⁵ Justice Gorsuch's dissent offered an originalist vision of the nondelegation doctrine that would limit Congress's power to delegate to three types of situations: (1) "fill[ing] up the details" of a statutory scheme, (2) making the application of rules "depend[ent] on

⁶⁰ 424 U.S. 319 (1976).

⁶¹ See *id.* at 343, 348 (citing Friendly, *supra* note 57, at 1281, 1303).

⁶² *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁶³ 531 U.S. 457 (2001).

⁶⁴ *Id.* at 474. Although the nondelegation doctrine itself has not been used to invalidate a congressional delegation since 1935, courts have recognized a number of canons of statutory interpretation—"nondelegation canons"—that construe statutes more narrowly to avoid nondelegation concerns. See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (describing these nondelegation canons). The major questions doctrine arguably is the most recent variant of a nondelegation canon. See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (articulating a presumption, based on "both separation of powers principles and a practical understanding of legislative intent," that federal agencies do not have the authority to regulate major policy questions without clear congressional authorization); *id.* at 735 (Gorsuch, J., concurring) (arguing that the major questions doctrine "operates to protect foundational constitutional guarantees," including the nondelegation doctrine). But see *Biden v. Nebraska*, 600 U.S. 477, 508 (2023) (Barrett, J., concurring) (arguing that the major questions doctrine is not a substantive canon aimed at avoiding nondelegation concerns but instead a textualist "tool for discerning—not departing from—the text's most natural interpretation"). Section II.A *infra* returns to the major questions doctrine.

⁶⁵ 588 U.S. 128 (2019).

executive fact-finding,” and (3) “assign[ing] the executive and judicial branches certain non-legislative responsibilities.”⁶⁶ Both Chief Justice John Roberts and Justice Clarence Thomas joined that dissent in full. Justice Samuel Alito, concurring in the judgment, noted that in the future “[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”⁶⁷ Justice Kavanaugh, who was recused in *Gundy*, later praised “Justice Gorsuch’s thoughtful *Gundy* opinion” because it “raised important points that may warrant further consideration in future cases.”⁶⁸ Although Justice Barrett was not on the Court for *Gundy* and had not yet addressed the nondelegation doctrine from the bench, her scholarly work indicates sympathy for departing from the intelligible principle test.⁶⁹

With hints from six Justices supporting a more exacting nondelegation doctrine, it seemed only a matter of time until the Court would revisit the intelligible principle test and possibly reinvigorate the nondelegation doctrine. And yet it has not. Perhaps the biggest challenge for reviving the nondelegation doctrine is one of administrability. As Justice Kavanaugh has put it, “The intelligible principle test has had staying power—perhaps because of the difficulty of agreeing on a workable and constitutionally principled alternative.”⁷⁰

The time for potential reconsideration arrived in 2025. As detailed in Section I.A, the Court in a 6–3 decision rejected the nondelegation doctrine challenge in *Federal Communications Commission v. Consumers’ Research*, and in so doing suggested that there is no longer a majority on the Court interested in revisiting the intelligible principle test anytime soon.⁷¹

In upholding the statutory delegation at issue, the *Consumers’ Research* Court emphasized that the intelligible principle test embraces

⁶⁶ *Id.* at 157–60 (Gorsuch, J., dissenting). For an originalist criticism of Justice Gorsuch’s approach, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021) (“Our conclusion is straightforward. The nondelegation doctrine has nothing to do with the Constitution as it was originally understood. You can be an originalist or you can be committed to the nondelegation doctrine. But you can’t be both.”); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to Critics*, 122 COLUM. L. REV. 2323 (2022) (expanding on the originalist criticism of the nondelegation doctrine).

⁶⁷ *Gundy*, 588 U.S. at 148–49 (Alito, J., concurring in the judgment).

⁶⁸ *Paul v. United States*, 589 U.S. 1087, 1088 (2019) (Kavanaugh, J., respecting the denial of certiorari).

⁶⁹ Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014).

⁷⁰ *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 704 (2025) (Kavanaugh, J., concurring). Justice Kavanaugh’s second potential explanation, which is not discussed further in this Foreword, is that “it has been thought that a stricter test [than the intelligible principle standard] could diminish the President’s longstanding Article II authority to implement legislation.” *Id.*; see also *id.* at 707–08 (arguing that “[c]ongressional delegations to independent agencies, as distinct from delegations to the President and executive agencies, raise substantial Article II issues”).

⁷¹ *Id.* at 664 (majority opinion).

a proportional approach. “The ‘guidance’ needed is greater,” the Court explained, “when an agency action will ‘affect the entire national economy’ than when it addresses a narrow, technical issue.”⁷² Justices Gorsuch and Kavanaugh, in their separate opinions, also emphasized the importance of proportionality under the current test.⁷³ In other words, the current Court is unanimous in embracing a proportional nondelegation doctrine. This emphasis did not appear out of thin air. At the merits stage, the Chamber of Commerce of the United States of America (“U.S. Chamber”)—with this Author as one of its legal counsel⁷⁴—filed an amicus brief in support of neither party “to offer an administrable approach to the public nondelegation doctrine” that “demand[s] [legislative] guidance in proportion to the significance of the authority granted.”⁷⁵ After Section I.A details the Court’s decision in *Consumers’ Research*, Section I.B describes and expands on the U.S. Chamber’s proportional approach to the nondelegation doctrine.

A. *The Supreme Court’s Decision in Consumers’ Research*

Consumers’ Research came to the Supreme Court from the Fifth Circuit, which had struck down the Universal Service Fund as a violation of the separation of powers.⁷⁶ By way of background, Congress has long commanded that the Federal Communications Commission (“FCC”) make communications services accessible and affordable for all Americans.⁷⁷ In 1996, Congress amended the statutory scheme to introduce a fund for universal service.⁷⁸ As Justice Elena Kagan explained, writing for the Court in *Consumers’ Research*, “the FCC would use required payments, called contributions, from telecommunications companies to subsidize basic communications services for consumers in certain underserved communities—particularly, rural and low-income areas.”⁷⁹ “To carry out that mandate,” Justice Kagan continued, “the Commission established discrete subsidy programs for the consumers Congress had identified, set up a special fund to receive and disburse

⁷² *Id.* at 673 (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 475 (2001)).

⁷³ *See id.* at 705 (Kavanaugh, J., concurring) (agreeing with “both the Court and Justice Gorsuch [that], under the intelligible principle test, ‘the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred’” (quoting *Whitman*, 531 U.S. at 475)).

⁷⁴ *See supra* note *.

⁷⁵ Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Neither Party at 1–3, *FCC v. Consumers’ Rsch.*, 606 U.S. 656 (2025) (No. 24-354) [hereinafter *U.S. Chamber Amicus Br.*].

⁷⁶ *See Consumers’ Rsch. v. FCC*, 109 F.4th 743, 782–83 (5th Cir. 2024) (en banc), *rev’d and remanded*, 606 U.S. 656 (2025).

⁷⁷ *Consumers’ Research*, 606 U.S. at 662–63.

⁷⁸ *Id.* at 663, 698.

⁷⁹ *Id.* at 663–64.

the companies' payments, and enlisted a private corporation, called the Universal Service Administrative Company, to help manage that fund's operations."⁸⁰

The Fifth Circuit struck down this universal-service scheme based on it violating a combination of the nondelegation doctrine and the so-called private nondelegation doctrine.⁸¹ The problem, in the Fifth Circuit's view, was the "double-layered delegation"⁸² that found "no foothold in history or tradition" and was "incompatible with our constitutional structure."⁸³ In the briefing before the Supreme Court, however, the challengers separated out these two challenges as distinct and independent grounds for invalidating the universal-service scheme.⁸⁴ They called on the Court to abandon its longstanding intelligible principle test for the nondelegation doctrine—a test under which the Court has not struck down a statutory delegation in some ninety years—and reinvigorate the nondelegation doctrine to further limit Congress's constitutional power to delegate lawmaking discretion.⁸⁵

In a 6–3 decision, the Supreme Court reversed. Writing for the Court, Justice Kagan crisply summarized the issues and the Court's holding:

The question in this case is whether the universal-service scheme—more particularly, its contribution mechanism—violates the Constitution's nondelegation doctrine, either because Congress has given away its power to the FCC or because the FCC has given away its power to a private company. We hold that no impermissible transfer of authority has occurred. Under our nondelegation precedents, Congress sufficiently guided and constrained the discretion that it lodged with the FCC to implement the universal-service contribution scheme. And the FCC, in its turn, has retained all decision-making authority within that sphere, relying on the Administrative Company only for non-binding advice. Nothing in those arrangements, either separately or together, violates the Constitution.⁸⁶

In reaching this conclusion, the six-Justice majority rejected the call to revisit the intelligible principle test, even in the unique context of revenue-raising or taxing legislation. Among other things, the Court noted that "[t]he alternative test *Consumers' Research* and the dissent propose . . . would throw a host of federal statutes into doubt. Relying

⁸⁰ *Id.* at 664.

⁸¹ *Consumers' Research*, 109 F.4th at 793.

⁸² *Id.* at 782.

⁸³ *Id.* (quoting *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 222 (2020)).

⁸⁴ *Consumers' Research*, 606 U.S. at 672, 702.

⁸⁵ *See id.*

⁸⁶ *Id.* at 664.

on this Court's nondelegation precedents, Congress has often enacted statutes empowering agencies to raise revenue without specifying a numeric cap or tax rate."⁸⁷ Applying the intelligible principle test and the Court's precedents, the Court easily concluded that the statutory delegation at issue is constitutional, finding that Congress "imposed ascertainable and meaningful guideposts for the FCC to follow when carrying out its delegated function of collecting and spending contributions from carriers."⁸⁸ In particular, Congress provided guidance on "how much money can the FCC raise through contributions" and "on what things can it spend those funds."⁸⁹

There are a number of important takeaways from *Consumers' Research*, including the role of proportionality discussed below. Perhaps the biggest takeaway is that the Court's interest in reinvigorating the nondelegation doctrine seems to be losing steam. That may be because no one has identified an administrable standard to replace the intelligible principle test. But the more likely explanation is that the Court has made other reforms to administrative law that address the majority's concerns about excessive congressional delegation: the elimination of *Chevron* deference and the rise of the new major questions doctrine.⁹⁰ Section II.A explores those doctrinal developments in greater detail. Regardless of the reasons, with the Chief Justice and Justices Kavanaugh and Barrett joining the majority, it seems like only Justices Thomas, Alito, and Gorsuch still have the appetite to revisit the nondelegation doctrine, at least in the near future.

⁸⁷ *Id.* at 675.

⁸⁸ *Id.* at 681.

⁸⁹ *Id.* at 680–81.

⁹⁰ In his concurrence, Justice Kavanaugh suggested at least two potential reasons why this project seems to be losing steam. The first is about administrability: "The intelligible principle test has had staying power—perhaps because of the difficulty of agreeing on a workable and constitutionally principled alternative . . ." *Id.* at 704 (Kavanaugh, J., concurring). Despite the Justices' calls for litigants, lower courts, and scholars to articulate an administrable nondelegation doctrine that is more searching than the intelligible principle test, none appears to have emerged. It may never happen. After all, this case would have been a great vehicle to articulate a new doctrine, in a case where the Court could apply the doctrine to uphold the statutory delegation. To be sure, Justice Gorsuch has not given up. "When it comes to other aspects of the separation of powers," he observed in his *Consumers' Research* dissent, "we have found manageable ways to honor the Constitution's design. This one requires no less of us." *Id.* at 747 (Gorsuch, J., dissenting).

Second, Justice Kavanaugh suggested that other developments at the Supreme Court have "substantially mitigated" "many of the broader structural concerns about expansive delegations," such as "(i) the Court's rejection of so-called *Chevron* deference [in *Loper Bright*] and (ii) the Court's application of the major questions canon of statutory interpretation." *Id.* at 705 (Kavanaugh, J., concurring). Justice Gorsuch echoed this second explanation, observing that "the Court has sometimes mitigated its failure to police legislative delegations by deploying other tools, like the major questions doctrine and *de novo* review of statutory terms, to ensure the Executive 'act[s] within the confines set by Congress.'" *Id.* at 745 (Gorsuch, J., dissenting) (alteration in original) (quoting *id.* at 705 (Kavanaugh, J., concurring)).

In articulating the intelligible principle test, it is important to underscore that the Court recognized at least four limits on statutory delegations. First, Congress must address the ends and boundaries: “[I]n examining a statute for the requisite intelligible principle, we have generally assessed whether Congress has made clear both ‘the general policy’ that the agency must pursue and ‘the boundaries of [its] delegated authority.’”⁹¹ Second and related, there is an ascertainability requirement that assesses “if Congress has provided sufficient standards to enable both ‘the courts and the public [to] ascertain whether the agency’ has followed the law.”⁹² Third, the Court emphasized that context matters: “Of course, our cases did not examine those statutory phrases in isolation but instead looked to the broader statutory contexts, which informed their interpretation and supplied the content necessary to satisfy the intelligible principle test.”⁹³

Finally, and most important for present purposes, the Court underscored that the intelligible principle test is a proportional approach:

Under th[e] [intelligible principle] test, “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.” The “guidance” needed is greater, we have explained, when an agency action will “affect the entire national economy” than when it addresses a narrow, technical issue (e.g., the definition of “country [grain] elevators”).⁹⁴

With respect to proportionality, Justice Kavanaugh in his concurring opinion echoed the majority, quoting the same line from Justice Scalia’s opinion for the Court in *Whitman*: “[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”⁹⁵ Or as Justice Gorsuch put it in his dissent, joined by Justices Thomas and Alito, “To survive the intelligible principle test, a delegation involving such a significant power must supply more significant limits on an agency’s discretion than when Congress confers some lesser authority.”⁹⁶ He elaborated:

On top of all that, the Court and I agree that the intelligible principle test is not one size fits all. Instead, “context[t]” matters. Among other things, that means that the “degree of agency

⁹¹ *Id.* at 673 (majority opinion) (alteration in original) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

⁹² *Id.* (alteration in original) (quoting *Opp Cotton Mills, Inc. v. Adm’r of Wage & Hour Div.*, 312 U.S. 126, 144 (1941)).

⁹³ *Id.* at 684.

⁹⁴ *Id.* at 673 (third alteration in original) (citation omitted) (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 475 (2001)).

⁹⁵ *Id.* at 705 (Kavanaugh, J., concurring) (quoting *Whitman*, 531 U.S. at 475).

⁹⁶ *Id.* at 723 (Gorsuch, J., dissenting).

discretion that is acceptable” depends on “the scope of the power congressionally conferred.” So, for instance, Congress might permissibly give an agency wide leeway in designing a tax stamp. But Congress must give far more detailed instructions if it wants an agency to regulate an entire industry.⁹⁷

To be sure, all four of these guardrails are found in the Supreme Court’s prior precedents, and as Justice Kagan observed, the Court has “almost always” found that Congress delegated within these limits.⁹⁸ But it is noteworthy that the three main opinions in *Consumers’ Research* all emphasized the importance of proportionality.⁹⁹ Perhaps the lower courts will take up the call to embrace proportionality in statutory delegations, or the Court itself will have an opportunity. If that occurs, the U.S. Chamber’s amicus brief in *Consumers’ Research*, discussed below, elaborates on how a proportional approach to nondelegation could function.

B. *The U.S. Chamber’s Amicus Brief in Consumers’ Research*

Reference to proportionality in the *Consumers’ Research* majority opinion, Justice Kavanaugh’s concurrence, and Justice Gorsuch’s dissent echoed much of the vision set forth in the amicus brief that the U.S. Chamber filed in *Consumers’ Research*. The U.S. Chamber summarized the core of its argument in the introduction:

This case presents an opportunity for this Court to return to first principles and ground the public nondelegation doctrine more firmly in the structure and history of the Constitution and its separation of powers. Under a proper conception of the doctrine, Congress may assign modest administrative tasks to an agency with little or no guidance. Once the authority granted to an agency becomes more significant, however, Congress must provide more specificity by supplying both an object and

⁹⁷ *Id.* at 721–22 (alteration in original) (citations omitted) (first quoting *id.* at 673; then quoting *id.* at 684; and then quoting *id.* at 673).

⁹⁸ *Id.* at 673. The Court’s approach to nondelegation in *Consumers’ Research* echoes to some degree Professor Cary Coglianese’s vision that nondelegation has multiple dimensions that “concern[] both the degree of *discretion* afforded to the holder of lawmaking power and the extent of the underlying *power* itself.” Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019).

⁹⁹ By “main opinions,” this Foreword focuses on the opinions addressing the public nondelegation doctrine. In a fourth opinion, Justice Ketanji Brown Jackson concurred with two paragraphs to “express [her] skepticism that the *private* nondelegation doctrine—which purports to bar the Government from delegating authority to private actors—is a viable and independent doctrine in the first place.” *Consumers’ Research*, 606 U.S. at 710 (Jackson, J., concurring) (emphasis added). This Foreword does not endeavor to analyze the private nondelegation doctrine holding in *Consumers’ Research*.

a route to guide the agency's discretion. And when it comes to the most important policy questions, Congress cannot delegate the hard choices to the agency at all, and instead must answer those questions itself—a constraint that complements the existing major-questions doctrine.¹⁰⁰

Under this proportional approach, courts “need not demand that Congress decide every minute policymaking detail,” but they cannot allow Congress to “abdicate[] its lawmaking authority in favor of mere *goal-making*.”¹⁰¹ In other words, courts “should require Congress to provide more instruction as it vests the Executive with the authority to make more and more important judgment calls.”¹⁰² Moreover, “it should follow the guidance from early sources on how Congress can properly grant authority to other branches: by supplying both an *object* to achieve and a *route* to get there.”¹⁰³

Because “[p]erhaps the most frequently expressed concern about a revitalized nondelegation doctrine is administrability,”¹⁰⁴ the U.S. Chamber’s amicus brief explained in detail how a proportional approach to the nondelegation doctrine would be administered on the ground. The following dozen paragraphs are reproduced from the brief with minor alterations.¹⁰⁵

* * *

As a practical matter, a proportionality principle can be operationalized into three categories: administrative and implementation power, significant decisions, and major decisions. Revitalizing the nondelegation doctrine would have little effect at either extreme. Grants of administrative and implementation authority would continue to pass muster, while delegations of the most important questions are already scrutinized under the separate (but related) major questions doctrine. A proportional approach to nondelegation would primarily impose a reasonable constraint in the middle.

1. Minimal Guidance Category: Fill Up the Details

When Congress grants the executive branch the authority to carry out administrative or implementation tasks, minimal guidance will suffice. No one disputes that Congress can authorize another branch to “fill

¹⁰⁰ U.S. Chamber Amicus Br., *supra* note 75, at 2.

¹⁰¹ *Id.* at 3.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 18 (citing Sunstein, *supra* note 64, at 326–27; Richard H. Fallon Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1302–03 (2006)).

¹⁰⁵ See *id.* at 18–23.

up the details” on minor questions.¹⁰⁶ When Congress does so, it need only supply the “great outlines,” such as an object to achieve.¹⁰⁷

So, for example, Congress may authorize the Secretary of Labor to define what an “outside salesman” is for purposes of exemptions to the Fair Labor Standards Act.¹⁰⁸ Congress can likewise authorize the Attorney General to ascertain whether the facts in a visa petition are true.¹⁰⁹ Or it can give an agency the power to set a deadline for submitting bids on a procurement contract.¹¹⁰ Nondelegation challenges to such administrative and implementation delegations will be infrequent and unsuccessful. Federal agencies regularly make interstitial decisions about how to carry out government programs, and under a proportional approach, the nondelegation doctrine is not concerned with those minor subjects.

2. *Middle Ground Category: Object and Route Delegations*

Where, however, Congress grants more than minor gap-filling authority, Congress must also “prescribe the manner” of execution to keep the executive branch from pure policymaking.¹¹¹ In other words, it is not enough for Congress to provide the agency with a destination to work toward (or, an object to achieve)—which is all that the current intelligible principle test requires. Congress must also prescribe a route for the agency to get there.

Of course, Congress can use a variety of verbal formulations to provide a route for the Executive. In navigation, a route can take different forms. It can consist of step-by-step instructions (“go forward 20 paces and then turn 90 degrees”); it can provide waypoints (“go to the mountaintop and then you’ll see the cabin”); it can give a backstop (“if you see the river, you need to turn around”); or it can be conditioned on the existence of outside facts (“walk along the trail, so long as it is clear”). Similarly, there is more than one way for Congress to chart a path for an agency. It can give step-by-step instructions; it can establish milestones; it can set boundaries or guardrails that narrow the path; it can tell the agency to apply a particular standard to the facts that it finds; or it can tell the agency to proceed with a specified activity only

¹⁰⁶ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). Section II.A returns to this “fill up the details” point when it comes to statutory interpretation.

¹⁰⁷ *Wayman*, 23 U.S. at 43–45.

¹⁰⁸ See 29 U.S.C. § 213(a)(1); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 153 (2012).

¹⁰⁹ 8 U.S.C. § 1154(b).

¹¹⁰ 41 U.S.C. § 1708(e)(2).

¹¹¹ *Wayman*, 23 U.S. at 45–46.

so long as certain conditions are satisfied.¹¹² Whatever the formulation, Congress must provide enough instruction to tell the agency where to go and how to get there, even if it does not prescribe every step along the way.¹¹³

Such instructions are commonplace and varied. Congress, for example, has directed the Administrator of the Environmental Protection Agency (“EPA”) to establish effluent limitations when he determines that the discharge of pollutants “would interfere with the attainment or maintenance of that water quality” necessary to ensure five different outcomes.¹¹⁴ Elsewhere, Congress has directed the Secretary of Transportation to “conduct a study comparing the safety of” different methods of transporting certain radioactive materials by train and to “consider[] the results of the study” when issuing amendments to existing regulations “appropriate to provide for the safe rail transportation” of such materials.¹¹⁵ Employing still a different formulation, Congress has directed the Board of Governors of the Federal Reserve to consider seven factors when evaluating a bank holding company’s acquisition of a bank, along with a backstop: “The Board may not approve” an acquisition if the resulting entity would control more than thirty percent of bank deposits in a single State or ten percent of all bank deposits nationwide.¹¹⁶ These routes, although differently formulated, each provide enough instruction to concretely guide the agency on how to proceed.

3. *Nondelegable Category: The Most Important Subjects*

For the most “important subjects” with vast political and economic significance, Congress must “entirely regulate[]” for itself.¹¹⁷ As Chief Justice John Marshall recognized, any delegation of decision-making authority on such subjects would amount to an impermissible transfer of the legislative power.¹¹⁸ Under the nondelegation doctrine, Congress therefore must “expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce.”¹¹⁹

¹¹² See *Biden v. Nebraska*, 600 U.S. 477, 512 (2023) (Barrett, J., concurring) (explaining that instructions can vary with context).

¹¹³ *Id.* at 514.

¹¹⁴ 33 U.S.C. § 1312(a); see *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 603 n.6 (2024).

¹¹⁵ 49 U.S.C. § 5105(b)–(c).

¹¹⁶ 12 U.S.C. § 1842(c), (d)(2).

¹¹⁷ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

¹¹⁸ See *id.* at 42–43.

¹¹⁹ *Paul v. United States*, 589 U.S. 1087, 1087 (2019) (Kavanaugh, J., respecting the denial of certiorari).

For those exceptionally important questions, the Supreme Court already patrols the line between the legislature and the executive under the major questions doctrine. The two doctrines are “closely related.”¹²⁰ “Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.”¹²¹

The doctrines simply approach the line between legislative and executive power from different perspectives. The major questions doctrine is usually concerned with the problem of the Executive’s “exploit[ing]” unclear statutory language to overreach.¹²² The nondelegation doctrine, meanwhile, kicks in only if Congress intentionally passes the buck on its constitutional obligations to the Executive “to ‘reduc[e] the degree to which they will be held accountable for unpopular actions.’”¹²³ The major questions doctrine, moreover, functions more like a substantive canon of interpretation or clear statement rule, such that it often may sweep in statutory delegations that are at the upper end of the middle category that can be delegated with detailed instructions, as opposed to the most significant value judgments that Congress cannot delegate at all.¹²⁴

As a real-world matter, the major questions doctrine will likely continue to be more salient than the nondelegation doctrine. After all, we typically assume that Congress does not willingly give the Executive the authority to decide the most consequential issues of the day. Indeed, that is one of the justifications for the major questions doctrine: “Congress normally ‘intends to make major policy decisions itself, not leave those decisions to agencies.’”¹²⁵ But where Congress does clearly authorize the executive branch to make major policy decisions, the nondelegation doctrine acts as an important and independent backstop.

Whatever garb a challenge comes in, the results under the major questions doctrine and a proportional nondelegation doctrine converge: Congress must give an agency “clear” authority to act.¹²⁶ An agency may

¹²⁰ Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring).

¹²¹ *Id.*

¹²² *Id.* at 125.

¹²³ *Id.* at 124 (first alteration in original) (quoting Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL’Y 147, 154 (2017)); see Cass, *supra* note 123, at 153–55 (contrasting “encroachment” with “delegation” as reciprocal separation of powers concerns).

¹²⁴ This sentence was not in the U.S. Chamber’s amicus brief, and as such does not necessarily reflect the U.S. Chamber’s view.

¹²⁵ Biden v. Nebraska, 600 U.S. 477, 514 (2023) (Barrett, J., concurring) (quoting U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)); see West Virginia v. EPA, 597 U.S. 697, 721–23 (2022) (collecting cases); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

¹²⁶ *West Virginia*, 597 U.S. at 723.

not seize—nor be given—the unbounded power to decide, for example, whether to criminalize physician-assisted suicide or to require all American workers to get a vaccine.¹²⁷ Congress must make those decisions itself and must bind the agency's discretion over any ancillary issues with an object and a route.

* * *

With respect to administrability, the U.S. Chamber conceded that “any test based on proportionality will (and should) require more nuanced analysis than the current intelligible-principle test,”¹²⁸ but that this Court routinely applies comparable tests. The U.S. Chamber provided four examples,¹²⁹ with a fifth example from another constitutional context:

- **Officer Status.** The constitutionally required method for appointing an officer turns in part on the significance of the power the officer wields. When evaluating whether someone is an officer subject to the Appointments Clause, courts ask whether an individual “exercise[s] significant authority.”¹³⁰ And when distinguishing between inferior and principal officers, the Court looks to several factors, including whether the officer has final decision-making authority.¹³¹
- **Fourth Amendment Searches and Seizures.** Under the Fourth Amendment, the applicability of the warrant requirement turns in part on the interests of the government in conducting a search and the interests of private parties in the property being searched. For example, a warrant is not required when “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.”¹³²
- **Procedural Due Process.** For procedural due process claims, courts weigh the strength of the asserted private and governmental interests alongside “the risk of an erroneous deprivation” and the “probable value” of additional procedures.¹³³ Where the private interest “weigh[s] heavily,” the risk of error is “unacceptabl[y]” high, and requiring additional

¹²⁷ See *Gonzales v. Oregon*, 546 U.S. 243, 262–63 (2006); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117–18.

¹²⁸ U.S. Chamber Amicus Br., *supra* note 75, at 23.

¹²⁹ These bullet points are reproduced with some minor changes from U.S. Chamber Amicus Br., *supra* note 75, at 23–24.

¹³⁰ *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

¹³¹ *United States v. Arthrex, Inc.*, 594 U.S. 1, 13–14 (2021).

¹³² *Lange v. California*, 594 U.S. 295, 301 (2021) (alteration in original) (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

¹³³ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

procedures “creates no significant administrative burden,” more process is due.¹³⁴

- **First and Fourteenth Amendments.** For claims under the First Amendment and Equal Protection Clause of the Fourteenth Amendment, some statutes are subject to “most exacting scrutiny,” although others receive only “an intermediate level of scrutiny,” or even rational basis review, depending on the nature of the interest at stake.¹³⁵
- **Eighth Amendment Excessive Fines Clause.** A fifth example, not included in the U.S. Chamber’s brief,¹³⁶ involves the Excessive Fines Clause of the Eighth Amendment. As the Supreme Court has acknowledged, the “touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”¹³⁷ This proportional approach “is deeply rooted and frequently repeated in common-law jurisprudence,”¹³⁸ and it was grounded in the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”¹³⁹ The Court has “repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment,” including in proceedings arising under state law.¹⁴⁰

As the U.S. Chamber acknowledged, “There will no doubt be some hard cases in determining whether Congress has provided enough instruction to satisfy nondelegation concerns, just as there are hard cases under all of the doctrines above. But experience has proved that courts are comfortable applying such tests in the vast majority of cases.”¹⁴¹ A proportional approach to nondelegation does not present more difficulties.¹⁴²

In advancing this proportional approach to nondelegation, the U.S. Chamber contrasted it with the current intelligible principle test, arguing that the U.S. Chamber’s proposal should replace the intelligible

¹³⁴ *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54–59 (1993).

¹³⁵ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (First Amendment); *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985) (Equal Protection).

¹³⁶ This example is presented in another U.S. Chamber amicus brief for which I served as counsel. *See Brief of the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner at 1, 20, Pung v. Isabella Cnty.*, 146 S. Ct. 1964 (2026) (No. 25-95).

¹³⁷ *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

¹³⁸ *Solem v. Helm*, 463 U.S. 277, 284 (1983).

¹³⁹ *Weems v. United States*, 217 U.S. 349, 367 (1910).

¹⁴⁰ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

¹⁴¹ U.S. Chamber Amicus Br., *supra* note 75, at 25.

¹⁴² *Id.* at 23–25.

principle test.¹⁴³ After *Consumers' Research*, however, it is quite clear that the proportional approach would also fit nicely within the intelligible principle framework. No precedent would need to be overruled. The U.S. Chamber's amicus brief detailed how "[d]emanding guidance in proportion to the significance of the authority granted has roots in our constitutional structure and in this Court's earliest cases,"¹⁴⁴ as well as "with how Congress originally framed its grants of authority."¹⁴⁵ The brief also detailed how a proportional approach would better advance constitutional values, such as political accountability, liberty, and federalism.¹⁴⁶ This Foreword does not discuss the historical record at length,

¹⁴³ See, e.g., *id.* at 25–26 ("A shift from today's intelligible-principle test to a proportionality-centered approach will prompt modest additional work for litigants, courts, and Congress.").

¹⁴⁴ *Id.* at 2–3; see also *id.* at 5–8 (arguing that "the Constitution envisions a real distinction between legislative policymaking and permissible executive discretion" and detailing how the constitutional structure supports a proportionality principle); *id.* at 8–11 (discussing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), and *Field v. Clark*, 143 U.S. 649 (1892)).

¹⁴⁵ The U.S. Chamber's amicus brief provided examples of the lower extreme of statutes that delegated fill-up-the-details implementation authority. *Id.* at 3, 11–12 (discussing statutory delegations for judicial procedures in the Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83, and the same for citizenship determinations in the Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103, 103–04). It provided examples from the middle category of significant yet delegable authority. *Id.* at 12–15 (discussing statutory delegations for war pensions in the Act of April 30, 1790, ch. 10, § 11, 1 Stat. 119, 121, for the capital's location in the Act of July 16, 1790, ch. 28, §§ 1–2, 1 Stat. 130, 130, and for the postal system in the Act of February 20, 1792, ch. 7, §§ 1–3, 7, 1 Stat. 232, 232–35). And it provided examples of "the most significant questions, [for which] Congress recognized that it was the proper decision-maker." *Id.* at 15–17 (discussing the Act of July 9, 1798, ch. 70, § 8, 1 Stat. 578, 585, and the Act of July 14, 1798, ch. 75, §§ 1–2, 1 Stat. 596, 597–98, for tax on all real property, and the Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24, 25–26, and the Act of July 31, 1789, ch. 5, § 1, 1 Stat. 29, 30–34, for customs).

In footnote two, the U.S. Chamber noted that "[t]he government cites various other statutes concerning domestic policy from early Congresses" and responded:

[The government's] various examples generally involve narrow authority and ample instructions, and thus fit the taxonomy here. See, e.g., Act of Mar. 3, 1791, ch. 15, § 58, 1 Stat. 213 (administrative statute authorizing the President to set "reasonable and proper" salaries for customs employees so long as "the aggregate amount" of those salaries does "not exceed seven per cent" of customs duties on "spirits distilled in the United States"); Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 209 (authorizing the Secretary of the Treasury to return seized property if he makes certain findings, and authorizing him to impose "reasonable" "terms and conditions" in the narrow circumstance where he is returning seized "spirits" to "proprietors"); Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109–110 (authorizing certain executive officers to grant 14-year patents, with the instruction that a patent is warranted only for an "invention or discovery" that is "sufficiently useful and important" and shown to be "not before known or used"); Act of Aug. 12, 1790, ch. 47, §§ 1–2, 1 Stat. 186 (authorizing the Executive to allocate surpluses toward the purchase of debt securities and to regulate such purchases, with the instruction that purchases must be "made openly, and with due regard to the equal benefit of the several states," and must be at "market price, if not exceeding the par or true value thereof").

Id. at 17 n.2.

¹⁴⁶ See *id.* at 26–30.

nor does it attempt to make a comprehensive originalist argument for a proportional approach to nondelegation. The goal here is not to establish that a proportional approach to nondelegation is constitutionally required; that is a distinct project. It suffices to articulate—as a case study for this Foreword’s larger reform project—how the proportional approach would work and how that approach to nondelegation finds some support in Founding-era statutory delegations and the Supreme Court’s early precedents.

As part of rethinking administrative law during this time of rapid change, courts (and Congress) should adopt this proportional approach to the nondelegation doctrine (and to statutory delegations). To conclude, borrowing again from the U.S. Chamber’s amicus brief:

This proportional approach to nondelegation will change little about how the Court treats cases at both extremes. Statutes directing the Executive to fill up details have always survived scrutiny and will continue to do so, while ostensible delegations on extremely important and politically sensitive issues will often fail anyway under the related major-questions doctrine. Where a revitalized nondelegation doctrine will have the most impact is in the middle, for questions that are significant but not so significant that it is implausible that Congress granted the agency the authority to answer them. [In that middle category, a proportional nondelegation doctrine would require Congress to prescribe both the object of the delegation and the route for the agency to get there—in a level of detail proportional to the importance of the delegated authority.] For those cases, a faithful application of nondelegation principles protects political accountability and individual liberty while still preserving regulatory flexibility. And although the test would be more rigorous—and thus might pose more edge cases—than the current intelligible-principle test, it is still an administrable standard akin to other constitutional tests that courts regularly apply.¹⁴⁷

II. THE SUPREME COURT AND PROPORTIONALITY

Consumers’ Research is one example of the Roberts Court recognizing the value of proportionality in administrative law. But it is not a singular example. The Roberts Court has imbued principles of proportionality into a variety of administrative law doctrines. This Part focuses on four contexts: (1) judicial review of statutory interpretation

¹⁴⁷ *Id.* at 4 (sentence in brackets added).

and agency delegations after *Loper Bright Enterprises v. Raimondo*,¹⁴⁸ including the major questions doctrine; (2) the Court's freshly coined "change-in-position" doctrine in *Wages & White Lion* for APA arbitrary and capricious review of regulatory flip-flops; (3) various administrative remedies issues, including the call for increased focus on harmless error review in *Wages & White Lion* and the purported elimination of nationwide injunctions in *Trump v. CASA*; and (4) officer status under Article II for presidential appointment and removal powers.

To be sure, the argument here is not that the Supreme Court has already fully embraced proportionality as an organizing principle in administrative law. One could reasonably respond that this Part overreads the role of proportionality in the Roberts Court's administrative law jurisprudence—that it is more normative or aspirational than purely descriptive.¹⁴⁹ Fair enough. The main objective of invoking these examples is to show that it would not be unprecedented or revolutionary for the Court and the federal judiciary more generally to embrace proportionality in administrative law. There is, however, also a more normative angle to this discussion in Part II: Courts should not do this in a one-sided way, only requiring more agency procedure and more searching review for the major policy questions. They should also, where appropriate, seek to engage in lighter-touch review when it comes to minor implementation decisions where an agency is merely filling up the details in its statutory and regulatory schemes.

A. Statutory Interpretation and Agency Delegations

In surveying the Roberts Court's jurisprudence, the obvious example of embracing proportionality is the major questions doctrine, discussed in Part I, where the Court requires more clarity from Congress if an agency is attempting to regulate on matters of great economic and political significance.¹⁵⁰ Until recently, the major questions doctrine was understood as an exception from *Chevron* deference.¹⁵¹ Courts apply

¹⁴⁸ 603 U.S. 369 (2024).

¹⁴⁹ For an alternative perspective, see Daniel T. Deacon & Leah M. Litman, *Two Takes on Administrative Change from the Roberts Court*, 62 HARV. J. ON LEGIS. 63, 71–75 (2024) (arguing that diverging developments in the Roberts Court's statutory interpretation and change in position jurisprudence may be motivated by differing views on democratic norms and strict formalistic concerns over specific types of agency action).

¹⁵⁰ For a general overview of this doctrinal development, see Deacon & Litman, *supra* note 149.

¹⁵¹ See, e.g., *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (declining to apply *Chevron* deference to the Treasury Department's interpretation of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.)).

the major questions doctrine¹⁵² to construe statutes to not allow agencies to regulate on matters of great economic or political significance, absent clear congressional authorization.¹⁵³ This canon could be viewed as a substantive canon—or clear statement rule¹⁵⁴—motivated by separation of powers (Chief Justice Roberts¹⁵⁵) and nondelegation doctrine concerns (Justice Gorsuch¹⁵⁶). Or it could be viewed as a textual, contextual canon (Justice Barrett¹⁵⁷), centering the assumption that context matters and congress does not “hide elephants in mouseholes” in the process of statutory interpretation (Justice Scalia¹⁵⁸). Either way, it is an obvious and clear example of the Court adopting a proportional approach and ratcheting up judicial review for the most important, impactful regulatory actions.

The less obvious, but perhaps more important, example is *Loper Bright Enterprises v. Raimondo*, the 2024 decision that overruled *Chevron* deference.¹⁵⁹ Much of the academic and popular attention has

¹⁵² As Justice Kavanaugh has observed, labeling this as the major questions *doctrine* is confusing; it is better categorized as “the major questions *canon* of statutory interpretation.” *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 705 (2025) (Kavanaugh, J., concurring) (emphasis added).

¹⁵³ In October Term 2021, the Supreme Court issued a series of cases that refashioned or reinvented the major questions doctrine. *See West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (invalidating the Obama EPA’s Clean Power Plan); *Nat’l Fed’n Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022) (enjoining the Occupational Safety and Health Administration’s mandate of COVID-19 testing or vaccination for large employers); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (enjoining the Center for Disease Control’s COVID-19 nationwide eviction moratorium). The following Term, the Court struck down another regulatory action on major questions doctrine grounds, this one dealing with the Biden Administration’s student loan cancellation program. *Biden v. Nebraska*, 600 U.S. 477, 506 (2023). In October Term 2025, the Court struck down certain Trump Administration regulatory actions regarding tariffs, with Chief Justice Roberts and Justices Barrett and Gorsuch joining the majority and finding the tariffs inconsistent with the major questions doctrine. *Learning Res., Inc. v. Trump*, 607 U.S. 229, 248 (2026) (Roberts, C.J., joined by Gorsuch & Barrett, JJ.).

¹⁵⁴ *See, e.g., Deacon & Litman, supra* note 6, at 1012 (arguing that “the ‘new’ major questions doctrine operates as a clear statement rule”).

¹⁵⁵ *West Virginia*, 597 U.S. at 700 (“Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to ‘clear congressional authorization’ for the authority it claims.” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

¹⁵⁶ *Id.* at 753 (Gorsuch, J., concurring) (arguing that the major questions doctrine “helps safeguard that foundational constitutional promise” that “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives”).

¹⁵⁷ *Nebraska*, 600 U.S. at 508 (Barrett, J., concurring) (rejecting the argument that the major questions doctrine is a substantive canon and instead arguing that it is “a tool for discerning—not departing from—the text’s most natural interpretation”—one that “emphasize[s] the importance of context when a court interprets a delegation to an administrative agency”).

¹⁵⁸ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001), *cited in Nebraska*, 600 U.S. at 518 (Barrett, J., concurring).

¹⁵⁹ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (“*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.”). This discussion of *Loper Bright* draws substantially from

focused on overruling *Chevron v. Natural Resources Defense Council*,¹⁶⁰ instituting independent judgment review, and puzzling over the murky role of the respect due for agency statutory interpretation going forward under *Skidmore v. Swift & Co.*¹⁶¹ But the more interesting questions, in my view, concern *Loper Bright*'s footnotes five and six and accompanying text on what constitutes a policymaking delegation.¹⁶²

In particular, the *Loper Bright* Court recognized that the best reading of a statute could be that Congress authorized the agency to exercise a degree of policymaking discretion. *Loper Bright* recognized two categories of such delegations of authority: (1) when Congress specifically and expressly instructs the agency to define or give meaning to a statutory term; and (2) when Congress grants the agency general rulemaking authority, and the agency "'fill[s] up the details' of a statutory scheme, or . . . regulate[s] subject to the limits imposed by a [statutory] term or phrase that 'leaves [the] agenc[y] with flexibility,' such as 'appropriate' or 'reasonable.'"¹⁶³ When a reviewing court concludes that the best reading of a statute is that Congress has delegated policymaking authority to an agency, the court must still ensure that the delegation is consistent with the Constitution, that the agency's policymaking does not exceed the boundaries of the statutory delegation, and that the agency's policymaking complies with the reasoned decision-making requirements of the APA.¹⁶⁴ But when it comes to filling up the details of a statutory scheme, judicial review will be comparatively light-touch.

For this Foreword's purposes, the second category of general rulemaking delegations is what reflects a proportional approach to statutory interpretation—but as light-touch judicial review on the opposite end of the major questions doctrine. The *Loper Bright* Court offered

another U.S. Chamber amicus brief for which this Author served as counsel of record. See Brief for the U.S. Chamber of Commerce as Amicus Curiae Supporting Neither Party at 12–41, *United States v. Lesko*, 161 F.4th 1352 (Fed. Cir. 2025) (en banc) (No. 2023-1823). In *Lesko*, the en banc majority and dissent both embraced the U.S. Chamber's approach to assessing statutory delegations after *Loper Bright*. See *Lesko*, 161 F.4th at 1359–60; *id.* at 1365–66 (Stoll, J., dissenting).

¹⁶⁰ 467 U.S. 837 (1984).

¹⁶¹ 323 U.S. 134 (1944).

¹⁶² See *Loper Bright*, 603 U.S. at 394–95, 395 nn.5–6 (“In a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes ‘expressly delegate[]’ to an agency the authority to give meaning to a particular statutory term. *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (emphasis omitted). Others empower an agency to prescribe rules to ‘fill up the details’ of a statutory scheme, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that ‘leaves agencies with flexibility,’ *Michigan v. EPA*, 576 U.S. 743, 752 (2015), such as ‘appropriate’ or ‘reasonable.’” (alteration in original) (footnote omitted)).

¹⁶³ See *id.* (first quoting *Wayman*, 23 U.S. (10 Wheat.) at 43; and then quoting *Michigan*, 576 U.S. at 752).

¹⁶⁴ See *id.* at 395–96.

the following two types of delegations that fit within general rulemaking authority.

1. *Fill Up the Details*

When Congress enacts a regulatory scheme, it typically charges an agency with implementing Congress's policy decisions. That implementation often requires agencies to fill up the minor details in the statutory scheme. To vest an agency with this implementation authority, Congress includes a general rulemaking or standards-setting provision in the statute.¹⁶⁵ In *Loper Bright*, the Supreme Court recognized that when Congress has granted an agency such general rulemaking authority, a reviewing court exercising its independent judgment may conclude that the best interpretation of the statute authorizes the agency to fill up statutory details.¹⁶⁶

With respect to filling up the details, the *Loper Bright* Court referred to *Wayman v. Southard*.¹⁶⁷ As Justice Gorsuch has explained, "In *Wayman v. Southard*, this Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain 'alterations and additions.'"¹⁶⁸ "[B]ecause Congress had announced the controlling general policy when it ordered federal courts to follow state procedures," Justice Gorsuch observed, "the residual authority to make 'alterations and additions' did no more than permit courts to fill up the details."¹⁶⁹ Or as the *Wayman* Court put it, the Constitution draws a line between "important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."¹⁷⁰

In his *Gundy* dissent, Justice Gorsuch provided several other helpful examples of statutes filling up the details:

In *In re Kollock*,¹⁷¹ for example, the Court upheld a statute that assigned the Commissioner of Internal Revenue the

¹⁶⁵ See, e.g., 5 U.S.C. § 5548(a) (granting the Office of Personnel Management ("OPM") general rulemaking authority to "prescribe regulations, subject to the approval of the President, necessary for the administration of this subchapter"); *id.* § 1104(b)(1) (granting OPM standards-setting authority to "establish standards which shall apply to the activities of the Office"); 26 U.S.C. § 7805(a) (granting the Treasury Secretary general rulemaking authority to "prescribe all needful rules and regulations for the enforcement of this title").

¹⁶⁶ See *Loper Bright*, 603 U.S. at 394–96.

¹⁶⁷ 23 U.S. (10 Wheat.) 1 (1825); *Loper Bright*, 603 U.S. at 395 (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43).

¹⁶⁸ *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 41).

¹⁶⁹ *Id.* at 157–58.

¹⁷⁰ *Wayman*, 23 U.S. (10 Wheat.) at 43.

¹⁷¹ 165 U.S. 526 (1897).

responsibility to design tax stamps for margarine packages. Later still, and using the same logic, the Court sustained other and far more consequential statutes, like a law authorizing the Secretary of Agriculture to adopt rules regulating the “use and occupancy” of public forests to protect them from “destruction” and “depredations.” Through all these cases, small or large, runs the theme that Congress must set forth standards “sufficiently definite and precise to enable Congress, the courts, and the public to ascertain” whether Congress’s guidance has been followed.¹⁷²

From these various examples, it becomes clear that fill-up-the-details delegation does not concern interpreting or providing meaning to particular terms in a statute. Instead, this category involves filling the interstitial gaps in a statutory scheme. A common approach Congress takes to authorize such gap-filling is to authorize the agency to set standards to implement a particular statutory program.

To be sure, the reviewing court must still engage in independent judgment. Applying the traditional tools of statutory interpretation, courts must ensure that agencies use their general rulemaking authority to truly fill up minor implementation details in their statutory scheme and that such interstitial gap-filling is permissible under “the particular statutory language at issue, as well as the language and design of the statute as a whole.”¹⁷³

2. *Flexible Terms*

In *Loper Bright*, the Supreme Court also recognized that Congress sometimes uses capacious statutory terms like “appropriate” or “reasonable” that “‘leave[] agencies with flexibility.’”¹⁷⁴ For example, the Court referred to a provision of the Clean Air Act,¹⁷⁵ construed in *Michigan v. Environmental Protection Agency*,¹⁷⁶ that directs the EPA to regulate power plants “if the Administrator finds such regulation is *appropriate and necessary*.”¹⁷⁷ With respect to “appropriate and necessary,” the Court has observed that “[o]ne does not need to open up a dictionary in order to realize the capaciousness of this phrase.”¹⁷⁸ In other words, the

¹⁷² *Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting) (footnotes omitted) (first quoting *United States v. Grimaud*, 220 U.S. 506, 522 (1911); and then quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

¹⁷³ *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

¹⁷⁴ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

¹⁷⁵ 42 U.S.C. §§ 7401–7671q.

¹⁷⁶ 576 U.S. 743 (2015).

¹⁷⁷ 42 U.S.C. § 7412(n)(1)(A) (emphasis added).

¹⁷⁸ *Michigan*, 576 U.S. at 752.

best interpretation of “appropriate and necessary” is that Congress has delegated a degree of policymaking authority to the agency in deciding whether to regulate, subject to a reviewing court’s independent judgment of the limits of what “appropriate and necessary” means.¹⁷⁹

When it comes to flexible statutory terms or phrases, the reviewing court must exercise its independent judgment to ensure that the agency “regulate[s] subject to the limits imposed by a term or phrase.”¹⁸⁰ The *Loper Bright* Court’s invocation of *Michigan v. EPA* is instructive.¹⁸¹ In *Michigan v. EPA*, the Supreme Court reviewed a statutory delegation that commanded the “EPA to add power plants to [a regulatory] program if (but only if) the Agency finds regulation ‘appropriate and necessary.’”¹⁸² The Court concluded that the term “appropriate” is capacious and “leaves agencies with flexibility,” but that “an agency may not ‘entirely fai[l] to consider an important aspect of the problem’ when deciding whether regulation is appropriate.”¹⁸³ The Court held that, “[r]ead naturally in the present context, the phrase ‘appropriate and necessary’ requires at least some attention to cost.”¹⁸⁴ It was thus “unreasonable for EPA to read § 7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate power plants.”¹⁸⁵

Although judicial review still plays a role when Congress has delegated general rulemaking authority to fill up the details in a statutory scheme or to regulate subject to the limits imposed by a statutory term that leaves the agency with some flexibility, the *Loper Bright* Court made clear that such review is quite limited, subject to the deferential scope of arbitrary and capricious review under the APA.¹⁸⁶ As the Court explained in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*,¹⁸⁷ “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”¹⁸⁸ When combined with the major questions doctrine, one can see that the Roberts Court’s embrace of proportionality at the extremes when it comes to statutory delegations of regulatory authority. *Loper Bright* is the other side of the major questions doctrine coin.

¹⁷⁹ See *id.*; *Loper Bright*, 603 U.S. at 395.

¹⁸⁰ *Loper Bright*, 603 U.S. at 395.

¹⁸¹ See *id.*

¹⁸² *Michigan*, 576 U.S. at 752 (quoting 42 U.S.C. § 7412(n)(1)(A)).

¹⁸³ *Id.* (alteration in original) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 759.

¹⁸⁶ *Loper Bright*, 603 U.S. at 395 (describing the reviewing court’s role under the APA “[w]hen the best reading of a statute is that it delegates [policymaking] authority to an agency”).

¹⁸⁷ 463 U.S. 29 (1983).

¹⁸⁸ *Id.* at 43.

What about the middle ground between minor implementation details and the most important, major questions? There too the *Loper Bright* Court establishes an intermediate level of judicial review: The reviewing court must exercise independent judgment, with some *Skidmore* respect for agency statutory interpretations that are longstanding, consistent, well-reasoned, or otherwise have the power to persuade.¹⁸⁹ To be sure, many may view this intermediate approach as not deferential enough to federal agencies.¹⁹⁰ That may well be the case; time will tell. It is certainly less deferential than the prior *Chevron* deference regime. Perhaps the Court—or Congress—will need to further calibrate judicial review to be more proportional to the impact of the regulatory authority or agency's action. But it is still an intermediate, proportional level of judicial review compared with the major questions inquiry on the one hand and arbitrary and capricious review for filling up the details on the other.

*B. Arbitrary and Capricious Review and Agency
Change-in-Position Doctrine*

Ever since its 1983 foundational decision in *State Farm*, the Supreme Court has struggled to calibrate APA arbitrary and capricious review of agency policymaking, especially when an agency changes its policy in light of changed circumstances, such as a change in presidential administration. In *FCC v. Fox Television Stations*,¹⁹¹ for instance, a majority of the Court seemed to reject any heightened review in this context.¹⁹² Over the years since, however, the Roberts Court has increasingly recognized that arbitrary and capricious review must be at least to some extent proportional to the impact of the change in agency policy. A short primer on the doctrine's evolution helps underscore this point.

¹⁸⁹ *Loper Bright*, 603 U.S. at 394 (“The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance’ consistent with the APA. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute’s meaning.” (citation omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

¹⁹⁰ See, e.g., Barnett & Walker, *supra* note 3, at 491–94 (defending *Chevron* deference because the doctrine advanced rule-of-law values like comparative expertise, accountability, and uniformity in federal law).

¹⁹¹ 556 U.S. 502 (2009).

¹⁹² *Id.* at 514 (“We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard.”).

The APA directs courts to “hold unlawful and set aside agency action” that is “arbitrary, capricious, [or] an abuse of discretion.”¹⁹³ That means agency actions must be “reasonable and reasonably explained.”¹⁹⁴ An agency violates the APA’s requirements to consider evidence and offer reasoned explanations when its justification for acting is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁹⁵ Courts must “ensure, among other things, that the agency has offered ‘a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.’”¹⁹⁶ The Supreme Court has long recognized that when an agency wants to change course and abandon a position the agency has previously embraced, the agency must “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”¹⁹⁷

In 2025, in *Food & Drug Administration v. Wages & White Lion Investments*, the Supreme Court reiterated that agency policy changes raise distinctive arbitrary and capricious concerns under the APA. Conceptualizing a “change-in-position doctrine” from its existing case law on the subject, the Court reaffirmed that “[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change, ‘display awareness that [they are] changing position,’ and consider ‘serious reliance interests.’”¹⁹⁸

The change-in-position doctrine does not always require agencies to “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”¹⁹⁹ But the Court has recognized two instances when a “more substantial justification” for a new position is warranted: (1) when the agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy,” and (2) when the agency’s “prior policy has engendered serious reliance interests that must be taken into account.”²⁰⁰ In these circumstances, the agency cannot merely acknowledge its change in position and explain its new stance. Rather, it must provide a meaningful account of why and how

¹⁹³ 5 U.S.C. § 706(2)(A).

¹⁹⁴ *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

¹⁹⁵ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also* *Ohio v. EPA*, 603 U.S. 279, 294 (2024) (explaining that an agency’s failure to balance the real-world circumstances with the burdens imposed both fails to consider “an important aspect of the problem” and “supply ‘a satisfactory explanation for its action’” (citation omitted) (quoting *State Farm*, 463 U.S. at 43)).

¹⁹⁶ *Ohio*, 603 U.S. at 293 (alteration in original) (quoting *State Farm*, 463 U.S. at 43).

¹⁹⁷ *State Farm*, 463 U.S. at 42.

¹⁹⁸ *FDA v. Wages & White Lion Invs., LLC*, 604 U.S. 542, 568 (2025) (alterations in original) (quoting *Encino Motorcars v. Navarro*, 579 U.S. 211, 221–22 (2016)).

¹⁹⁹ *Encino Motorcars*, 579 U.S. at 221 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

²⁰⁰ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 106 (2015) (quoting *Fox*, 556 U.S. at 515).

its assessment of the facts has changed—and why it believes the new policy’s benefits outweigh the reliance interests of regulated parties.

The intuition motivating the change-in-position doctrine is, again, one of proportionality. If the reliance interests in the prior policy are substantial—or the prior rulemaking factual record is substantial—the agency must engage in more reasoning and analysis to survive arbitrary and capricious review. Conversely, if the reliance interests are minimal—or the prior factual record is thin—the agency is not required to do more than if the agency were regulating on a blank slate. This proportional approach makes a lot of policy sense. The Supreme Court—and Congress—should consider embracing a similar proportional approach to the APA’s reasoned decision-making requirement more generally. In particular, the more impactful the proposed rule, the more reasoning the agency should provide. Conversely, for less impactful rules, the reasoned decision-making requirement should be minimal. Reviewing courts arguably often do this, as the terms arbitrary and capricious seem to capture proportionality. But these proportionality principles should be expressly recognized and more uniformly followed. The evolution of the Court’s change-in-position doctrine provides a helpful roadmap.

C. *Administrative Remedies: Harmless Error Review and Nationwide Injunctive Relief*

When it comes to administrative remedies—i.e., the remedies that courts reviewing federal actions can issue to litigants—the Roberts Court has also embraced proportionality. Unlike the prior examples, however, reforms to administrative remedies have been proregulatory, as opposed to anti-administrativist. These reforms address the lower end of the importance continuum, to make it easier for federal agencies to regulate. This Part will focus on two doctrinal developments from October Term 2024: harmless error review and nationwide injunctive relief.

1. *Ordinary Remand Rule and Harmless Error Review*

In its 1943 decision in *Securities & Exchange Commission v. Chenery Corp.* (“*Chenery I*”),²⁰¹ the Supreme Court announced that if a court concludes that an agency’s decision is erroneous, the general rule is to remand to the agency to consider the issue anew—as opposed to the court deciding the issue itself.²⁰² “[T]he guiding principle,” as the

²⁰¹ 318 U.S. 80 (1943).

²⁰² *Id.* at 95 (remanding the matter to the agency because the “administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained”); accord *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947).

Court reiterated several years after *Chenery I*, “is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.”²⁰³ Over the years, the Court has rearticulated what has become known as the “ordinary remand rule” in a variety of administrative law contexts.²⁰⁴

As this Author has explored in two prior volumes of *The George Washington Law Review*, the ordinary remand rule applies not only to questions of fact, but also to questions of the application of law to fact, policy judgments, and even certain questions of law.²⁰⁵ It is the ordinary, bright-line rule, “except in rare circumstances.”²⁰⁶ Those rare exceptions should be limited to four narrow circumstances: (1) when “the only [agency] error is in a finding relied on in greater or less degree, along with other solid ones, as a predicate for the ultimate conclusion”;²⁰⁷ (2) when the agency would not have jurisdiction or relevant authority to act on remand;²⁰⁸ (3) when Congress has charged the reviewing court to conduct a trial de novo, and thus the APA relieves the court of deferring to the agency’s decision and confining itself to the administrative record;²⁰⁹ and (4) “where the Government joins the claimant in asking

²⁰³ Fed. Power Comm’n v. Idaho Power Co., 344 U.S. 17, 20 (1952).

²⁰⁴ See, e.g., *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“When the [Board of Immigration Appeals (“BIA”)] has not spoken on ‘a matter that statutes place primarily in agency hands,’ our ordinary rule is to remand to ‘giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise.’” (second alteration in original) (quoting *INS v. Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam))).

²⁰⁵ See Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1561–79 (2014) (tracing the evolution of the ordinary remand rule); Christopher J. Walker & James R. Saywell, *Remand and Dialogue in Administrative Law*, 89 GEO. WASH. L. REV. 1198, 1204–18 (2021).

²⁰⁶ *Ventura*, 537 U.S. at 16 (“[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985))).

²⁰⁷ Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 223; see also *Smith v. Berryhill*, 578 U.S. 471, 488 n.21 (2019) (recognizing this exception in those “rarer cases . . . where remand would serve no meaningful purpose”). The APA specifically approves this kind of decision-making by codifying a harmless error standard for certain agency determinations. See 5 U.S.C. § 706 (2018) (“In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”).

²⁰⁸ The first two exceptions align with those that Judge Friendly identified in his 1969 article. See Friendly, *supra* note 207, at 222–25. This explains the Court’s failure to remand when setting aside an agency action in *City of Yonkers v. United States*, 320 U.S. 685, 691–92 (1944).

²⁰⁹ Congress arguably codified the third exception in the APA itself. Section 706 of the APA provides an “unwarranted by the facts” standard of review when “the facts are subject [by statute] to trial de novo by the reviewing court.” 5 U.S.C. § 706(2)(F). As Stephanie Hoffer and I explained elsewhere, “Logically, then, if the reviewing court is empowered to conduct a trial de novo, the court is not required to remand (though it retains discretion to do so) because de novo review allows the court to take the unusual step of substituting its judgment for that of the agency.” Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221,

the court to reach the merits.”²¹⁰ After *Loper Bright*, a fifth exception (or variant on the second exception) could be when a reviewing court exercises its independent judgment to determine the best meaning of a statute an agency administers,²¹¹ though even then some courts may still remand to the agency to leverage the agency’s comparative expertise.²¹²

To be sure, the ordinary remand rule is not without controversy. Lower courts have expressed frustration with the rule, especially when it leads to the government continuing to violate the law and thus implicates fairness and perhaps due process.²¹³ The Ninth Circuit, for instance, has compared the remand rule in the context of immigration adjudication with “Tegwar” — “The Exciting Game Without Any Rules.”²¹⁴ In another immigration case, the Ninth Circuit remarked that “any remand in such circumstances would be extremely unfair to litigants, potentially triggering multiple determinations and repeated appeals,” and leading to “a sort of Zeno’s Paradox in which the arrow could never reach the target.”²¹⁵

A related concern is that remand in many cases will likely *not* make a difference; as such, the error should be deemed harmless under the APA’s “rule of prejudicial error.”²¹⁶ In “Remedial Restraint in Administrative Law”—a provocative article published in 2017 in the pages of the *Columbia Law Review*—my now-colleague Professor Nick Bagley argued that courts should pay more attention to harmless error review in the remand context. He concluded:

In the *Chenery* context, too, harmless error should come into play more often Vacating is wasteful, at least when the

267 (2014). Although this is a narrow exception—because Congress seldom provides for trial de novo of agency action—one prominent example is the tax court’s trial de novo review of Internal Revenue Service tax deficiency determinations. *See id.* at 254–56, 267–68.

²¹⁰ *Berryhill*, 578 U.S. at 488 n.21.

²¹¹ *Cf. Walker & Saywell*, *supra* note 205, at 1216–17 (explaining that this exception includes when an agency is not owed *Chevron* deference).

²¹² *See Pac. Gas & Elec. Co. v. FERC*, 113 F.4th 943, 951 (D.C. Cir. 2024) (“We remand for Fed. Energy Regul. Comm’n to interpret the grandfathering clause because the application of the statutory text to the meaning of the Tariff may ‘rest[] on factual premises within the agency’s expertise.’” (alteration in original) (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024))). For further discussion of this D.C. Circuit case, see Haley Proctor, *D.C. Circuit Review—Reviewed: Loper Bright in Action*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 26, 2024), <https://www.yale-jreg.com/nc/d-c-circuit-review-reviewed-loper-bright-in-action/> [<https://perma.cc/V3JF-CU42>].

²¹³ *See Walker*, *supra* note 205, at 1582–85 (detailing lower court frustration with the ordinary remand rule).

²¹⁴ *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 368 (9th Cir. 2003) (en banc) (citing MARK HARRIS, *BANG THE DRUM SLOWLY* 8, 48, 60–64 (1956)).

²¹⁵ *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 n.9 (9th Cir. 2000).

²¹⁶ *See* 5 U.S.C. § 706 (2018) (“In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”).

agency confirms to a reviewing court that it prefers its interpretation to other available options. The courts should also hold errors harmless more often when agency decisions rest on inappropriate or incorrect factual determinations, but the weight of the record evidence demonstrates that the agency's error did not affect its ultimate decision. Although the courts engage in harmless error review more often than is commonly appreciated, they do so haphazardly and in the shadow of *Chenery*. The practice should be acknowledged, defended, and regularized.²¹⁷

Professor Bagley's call to remand less and find errors harmless more is part of a broader project to encourage courts to be more deferential to federal agencies when patrolling the procedures used or reasons given for regulatory activities.²¹⁸ He has since expanded that project to target what he views as overproceduralism in administrative law and regulatory practice.²¹⁹

My invited response to "Remedial Restraint in Administrative Law," entitled "Against Remedial Restraint in Administrative Law," pulled few punches. At the outset, I noted agreement with Professor Bagley's observation that there has been far too little attention paid to judicial remedies in administrative law, and then indicated that "this is roughly the point at which my agreement with *Remedial Restraint in Administrative Law* ends."²²⁰ "For those of us who are less trusting of the federal bureaucracy," the article explains, "we are much less likely to find agency errors harmless—especially errors related to the structures and procedures that attempt to compensate for the regulatory state's democratic deficits. The current rule-based approach of the ordinary remand rule better accounts for this distrust."²²¹ It then detailed the benefits of judicial review—and the ordinary remand rule, in particular—for regulatory policymaking and agency adjudication that Professor Bagley had seemingly undervalued.²²² My article concluded that "the rule-based ordinary remand rule plays an important role in preserving a proper separation of powers, in ensuring agencies exercise

²¹⁷ Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 317 (2017).

²¹⁸ See, e.g., *id.* at 265–92 (calling for more remedial discretion when it comes to courts reviewing notice-and-comment rulemaking).

²¹⁹ Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 401 (2019) ("[M]inimalism should be the watchword. New procedures should be greeted with suspicion; old procedures should be revisited, with an eye to cutting them back or eliminating them altogether. Administrative law could achieve more by doing less.").

²²⁰ Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 109 (2017).

²²¹ *Id.* at 110; see *id.* at 111–20.

²²² See *id.* at 120–24.

their congressionally delegated discretion in a nonarbitrary manner, and in facilitating a richer court-agency dialogue that helps courts have a systemic effect on the administrative process.”²²³

Nearly a decade later, the Supreme Court weighed in on the remand debate. In October Term 2024, in *Food & Drug Administration v. Wages & White Lion Investments*—the same decision that announced the agency change-in-position doctrine discussed in Section II.B—the Court expressed some doubt about the breadth of this ordinary remand rule. Although recognizing that “[c]ommentators have long puzzled over this tension and proposed ways to bridge the divide,” the Court indicated that it would “not attempt to provide a complete answer to this vexing problem here.”²²⁴ In *Wages & White Lion*, the Fifth Circuit had rigidly applied the ordinary remand rule, even though the error of the Food and Drug Administration (“FDA”) seemed harmless.²²⁵ The Supreme Court reversed, explaining that the Fifth Circuit had misread prior Supreme Court precedent “to mean that there is only one exception to the remand rule”—i.e., “[w]here the agency ‘was required’ to take a particular action.”²²⁶ Yet the Court also rejected the FDA’s argument that “the APA incorporates ‘the same kind of “harmless-error” rule that courts ordinarily apply in civil cases.”²²⁷ “That principle, taken to its logical extreme,” the Court explained, “could permit a reviewing court to sustain a flawed agency decision whenever it finds that the agency would have reached the same result absent the initial error. Understood in that way, harmless error might swallow the remand rule.”²²⁸

Instead, the Court merely agreed with the FDA that “a remand may not be necessary when an agency’s decision is supported by a plethora of factual findings, only one of which is unsound,” and remanded the case to the Fifth Circuit to apply that more agency-friendly harmless error standard.²²⁹ In that sense, the Supreme Court—at least to some degree—embraced Professor Bagley’s call for courts to take the APA’s harmless error standard more seriously. In other words, when it comes to a minor error among an otherwise sound agency decision such that the error is highly unlikely to affect the outcome on remand, the Court embraces remedial restraint and a more deferential approach to judicial review.

From a proportionality perspective, this may seem like an incremental move at the margins. But it could signal a broader trend in

²²³ *Id.* at 125.

²²⁴ *See id.* at 589–90 (citing Friendly, *supra* note 207, at 222–25; Bagley, *supra* note 217, at 302–07; Walker, *supra* note 220, at 115–20).

²²⁵ *See id.*

²²⁶ *Id.* at 589 (quoting *Calcutt v. Fed. Deposit Ins. Corp.*, 598 U.S. 623, 630 (2023) (per curiam)).

²²⁷ *Id.* (quoting *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009)).

²²⁸ *Id.*

²²⁹ *Id.* at 590.

administrative remedies to not vacate or remand agency actions where the errors are harmless or the reviewing court is confident that the agency would reach the same outcome after addressing the identified error. In other words, we could see a major reworking of *Chenery I*. Although I have long argued for bright-line rules when it comes to administrative remedies,²³⁰ I now see more value in a proportional approach to harmless error review—at least when it comes to very minor implementation details where courts are confident any errors would not affect the regulatory outcome on remand.

2. *Nationwide Injunctive Relief*

In recent years, there has been a fierce debate in the literature, spilling into the courtroom, about the constitutionality, lawfulness, and wisdom of nationwide or universal injunctions—with some prominent defenders, like Professor Mila Sohoni,²³¹ and opponents, like Professor Sam Bray.²³² In October Term 2024, the Supreme Court attempted to settle the debate in a challenge to the Trump Administration's executive order purporting to limit birthright citizenship. In a 6–3 decision in *Trump v. CASA*, the Court held that universal, or nationwide, injunctions likely exceed the equitable authority that the Judiciary Act of 1789²³³ vested in courts.²³⁴ Accordingly, the Court granted partial stays of the district courts' preliminary injunctions that had enjoined the executive order.²³⁵

Writing for the Court, Justice Barrett began by explaining that the Judiciary Act of 1789 provides “federal courts with jurisdiction over ‘all suits . . . in equity,’” language authorizing federal courts to issue equitable remedies.²³⁶ Under its precedents, the Court must “ask whether universal injunctions are sufficiently ‘analogous’ to the relief issued ‘by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.’”²³⁷

²³⁰ See, e.g., Walker, *supra* note 205, at 1620.

²³¹ See generally Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020) (defending the use of nationwide injunctions); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018) (similar); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017) (similar); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019) (similar).

²³² See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (opposing the use of nationwide injunctions); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019) (similar).

²³³ Act of Sep. 24, 1789, ch. 20, 1 Stat. 73.

²³⁴ *Trump v. CASA, Inc.*, 606 U.S. 831, 837 (2025).

²³⁵ *Id.* at 861–62.

²³⁶ *Id.* at 841 (alteration in original) (quoting Act of Sep. 24, 1789, ch. 20, § 11, 1 Stat. at 78).

²³⁷ *Id.* at 841–42 (quoting *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)).

Justice Barrett made quick work of the argument that such equitable relief was available at the Founding, concluding that “[t]he universal injunction was conspicuously nonexistent for most of our Nation’s history.”²³⁸ “Had federal courts believed themselves to possess the tool,” she continues, “surely they would not have let it lie idle.”²³⁹

Justice Sotomayor, joined by Justices Kagan and Jackson, dissented. She first expressed disappointment that “[t]he majority ignores entirely whether the President’s Executive Order is constitutional, instead focusing only on the question whether federal courts have the equitable authority to issue universal injunctions.”²⁴⁰ (Last Term, the Supreme Court struck down the Executive Order as unconstitutional.²⁴¹) Justice Sotomayor then disputed the majority’s conclusion that every overbroad universal injunction causes irreparable harm to the government, observing that “by enjoining the Government from violating settled law, the District Courts’ orders do not cause the Government any harm.”²⁴² On the historical debate about equity, Justice Sotomayor sided with Professor Sohoni. “In their pursuit of complete justice,” she argued, “equity courts could award injunctive and other equitable relief to parties and nonparties alike.”²⁴³ This included through “bills of peace,” which early American courts adopted and extended.²⁴⁴ She then chronicled the various federal cases involving universal relief that Professor Sohoni had identified in her historical work.²⁴⁵ Justice Sotomayor concluded with a warning about the majority’s decision:

The Court’s decision is nothing less than an open invitation for the Government to bypass the Constitution. The Executive Branch can now enforce policies that flout settled law and violate countless individuals’ constitutional rights, and the federal courts will be hamstrung to stop its actions fully. Until the day that every affected person manages to become party to a

²³⁸ *Id.* at 845; *see also id.* at 841–45 (detailing history).

²³⁹ *Id.* at 846.

²⁴⁰ *Id.* at 880 (Sotomayor, J., dissenting); *see also id.* at 880–87 (detailing how “every conceivable source of law confirms” that “birthright citizenship is the law of the land”). Justice Sotomayor focuses on the constitutional question in part to underscore how the executive order’s “patent unlawfulness reveals the gravity of the majority’s error and underscores why equity supports universal injunctions as appropriate remedies in this kind of case.” *Id.* at 880.

²⁴¹ *Trump v. Barbara*, 146 S. Ct. 2438, 2458 (2026) (“Citizenship, then and now, was the right to have rights—to freely participate in our political community. The Framers of the Fourteenth Amendment extended that promise to ‘every free-born person in this land.’ We keep that promise today.” (quoting CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (statement of Sen. Trumbull))).

²⁴² *CASA*, 606 U.S. at 893 (Sotomayor, J., dissenting).

²⁴³ *Id.* at 896.

²⁴⁴ *Id.*

²⁴⁵ *See id.* at 897–900.

lawsuit and secures for himself injunctive relief, the Government may act lawlessly indefinitely.²⁴⁶

Trump v. CASA marks a landmark shift in administrative law; especially in recent years, nationwide injunctions had been a core tool to constrain administrative actions. But the decision also recognized important exceptions, or work-arounds, that could potentially limit the decision's impact on the ground. Importantly, three of these work-arounds calibrate the scope of the injunctive relief proportionally to the impact the government's action will have on the country.²⁴⁷ Each will be addressed in turn.

First, in *Trump v. CASA* all of the Justices agreed that principles of equity allow for a court to enter an injunction that benefits those beyond the moving party "to the extent necessary and appropriate to afford [the moving party] complete relief."²⁴⁸ Justice Barrett, writing for the Court, emphasized at length that "[c]omplete relief is not a guarantee—it is the maximum a court can provide."²⁴⁹ Justice Thomas, joined by Justice Gorsuch, concurred to underscore that "the complete-relief principle operates as a ceiling: In no circumstance can a court award relief beyond that necessary to redress the plaintiffs' injuries."²⁵⁰ Neither Justice Barrett nor Justice Thomas offered a coherent approach for deciding when complete relief requires relief that benefits nonparties. Lower courts will be left to grapple with how to shape the complete relief principle.²⁵¹ But it is easy to see that any complete relief principle will involve proportionality. Justice Barrett suggested as much by underscoring that "the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be."²⁵² Post-*CASA* scholarly commentary has echoed this proportional approach to the complete-relief

²⁴⁶ *Id.* at 917.

²⁴⁷ A fourth potential workaround that the Court did not disturb—at least not yet—is the availability of universal vacatur of an agency action under the APA. *See id.* at 847 n.10 (majority opinion) ("Nothing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action." (citing 5 U.S.C. § 706(2), which authorizes courts to "hold unlawful and set aside agency action")); *see also id.* at 869 (Kavanaugh, J., concurring) (observing that a reviewing court still has the power to "preliminarily set[] aside or declin[e] to set aside an agency rule under the APA").

²⁴⁸ *Id.* at 861 (majority opinion); *see id.* at 862–63 (Thomas, J., concurring); *id.* at 866–67 (Alito, J., concurring); *id.* at 868 (Kavanaugh, J., concurring); *id.* at 892 (Sotomayor, J., dissenting); *id.* at 929 (Jackson, J., dissenting).

²⁴⁹ *Id.* at 854 (majority opinion).

²⁵⁰ *Id.* at 862 (Thomas, J., concurring).

²⁵¹ Indeed, they already have. *See, e.g., Nat'l TPS All. v. Noem*, 166 F.4th 739, 767–68 (9th Cir. 2026) (analyzing complete preliminary relief in the APA vacatur context); *Am. Council of Learned Soc'ys v. McDonald*, 792 F. Supp. 3d 448, 496–98 (S.D.N.Y. 2025) (analyzing complete preliminary relief for prospective class actions).

²⁵² *CASA*, 606 U.S. at 854 (quoting Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1797 (2022)).

principle that “both authorize[s] and limit[s] remedial scope based on the nature and the extent of the violation.”²⁵³ Put differently, one could reasonably argue that “space remains for nonparty relief to continue providing ‘complete justice’ when harms recognized within the courthouse can only be understood with an eye to harms occurring outside it.”²⁵⁴

Second, all of the Justices also agreed that class actions under Federal Rule of Civil Procedure 23 may be used to obtain an injunction that protects a class of individuals beyond the representative plaintiffs—perhaps even a nationwide class—against a particular government action.²⁵⁵ Justice Barrett, writing for the Court, emphasized the constraints on class actions, including that “Rule 23 requires numerosity (such that joinder is impracticable), common questions of law or fact, typicality, and representative parties who adequately protect the interests of the class.”²⁵⁶ Justice Alito, joined by Justice Thomas, concurred to underscore that “today’s decision will have very little value if district courts award relief to broadly defined classes without following ‘Rule 23’s procedural protections’ for class certification.”²⁵⁷

Accordingly, Justice Alito counseled that “district courts should not view today’s decision as an invitation to certify nationwide classes without scrupulous adherence to the rigors of Rule 23.”²⁵⁸ Proportionality is ever present in class actions, particularly injunctive-relief class actions. As Professor Maureen Carroll has observed, “Class treatment has particular value when there is a gap between the remedy needed to cure an individual’s injury and the remedy needed to cure the defendant’s violation.”²⁵⁹ “By matching the identity of the plaintiffs to the extent of the defendant’s violation,” she continues, “an injunction-only class action can close this gap between individualized and comprehensive remedies.”²⁶⁰

²⁵³ Note, *CASA’s Complete Relief Paradox*, 139 HARV. L. REV. 646, 648 (2025).

²⁵⁴ *Id.* at 668.

²⁵⁵ *CASA*, 606 U.S. at 849–50. Similarly, Professors Samuel Issacharoff and Derek Muller have argued that multi-district litigation can and should also be a key tool in a world without nationwide injunctions. See Samuel Issacharoff & Derek T. Muller, *Relocating Nationwide Injunctions*, JUST SEC. (June 9, 2025), <https://www.justsecurity.org/114260/relocating-nationwide-injunctions/> [<https://perma.cc/AX4J-EN3U>].

²⁵⁶ *CASA*, 606 U.S. at 849 (citing FED. R. CIV. P. 23(a)).

²⁵⁷ *Id.* at 867 (Alito, J., concurring) (quoting *id.* at 849 (majority opinion)).

²⁵⁸ *Id.* at 868. Not surprisingly, the plaintiffs in one of these challenges filed a motion for class certification just hours after the Court issued its decision. The district court certified the class and granted the preliminary injunction as to the whole class. See *CASA, Inc. v. Trump*, 793 F. Supp. 3d 687, 690–91 (D. Md. 2025).

²⁵⁹ Maureen Carroll, *Civil Rights, Access to Counsel, and Injunctive Class Actions in the United States*, in THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS 25, 32 (Brian T. Fitzpatrick & Randall S. Thomas eds., 2021).

²⁶⁰ *Id.*

Third, in eliminating the universal injunction, the *CASA* Court did not prohibit associations—including states—from suing on behalf of their members or citizens. Justice Alito's concurrence underscored that associational standing should not be easy to establish. Among other things, an association must demonstrate that it "has a 'close relationship' to the right holder and that there is some 'hindrance' to the right holder's ability to 'protect his own interests.'"²⁶¹ "Left unchecked," Justice Alito warned, "the practice of reflexive state third-party standing will undermine today's decision as a practical matter."²⁶² Associational standing, when properly cabined, also reinforces the concept of proportionality, as the association's claim and relief must align with its mission and its members' actual interests.

It will be interesting to see how litigants use, and lower courts and the Supreme Court respond to, these three methods of potentially obtaining nationwide relief in this post-*CASA* world. Each of them, if properly developed, should reflect the proportional importance of the nature of the violation and its aggregative impact on individuals. For instance, the challenge to the birthright citizenship executive order involved in *CASA* is a textbook example of an appropriate nationwide injunctive class action. No longer can one individual enjoin a government from acting nationwide—as opposed from acting just against the parties to the litigation—unless it can demonstrate one of three things: (1) that the nature and extent of the violation is severe enough such that a broader injunction is necessary to accord full relief to the moving party; (2) that the gap between the remedy needed to cure an individual's injury and the remedy needed to cure the defendant's violation is such that a class can be certified and class-wide injunctive relief can be granted; or (3) that the violation is severe enough to affect an association of individuals where the claim and relief align with the association's missions and members' interests.

The main objective here is to explain how the *CASA* Court eliminated the universal—or nationwide—injunction, yet preserved three work-arounds that all reflect proportional approaches to weighing the nature and extent of the government's violation and its impact on the regulated public. But I would be remiss if this Foreword did not zoom out, at least briefly, to the larger debate in *Trump v. CASA* about the role of the federal judiciary in our separation of powers framework. Justice Barrett's majority opinion and Justice Jackson's solo dissent present competing visions, and the Justices' disagreements produced lengthy and impassioned rebuttals. Justice Jackson spent some twenty pages articulating her vision, and Justice Barrett dedicated four or so

²⁶¹ *CASA*, 606 U.S. at 866–67 (Alito, J., concurring) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)).

²⁶² *Id.* at 867.

pages of the majority opinion in response. Neither vision, however, reflected a proportionality principle.

For Justice Jackson, the role of federal courts is absolutist: to say what the law is and prevent the political branches from violating the law. After *CASA*, she remarked, “a court’s power to prevent constitutional violations comes with an asterisk—a court can make the Executive cease its unconstitutional conduct **but* only with respect to the particular plaintiffs named in the lawsuit before them, leaving the Executive free to violate the constitutional rights of anyone and everyone else.”²⁶³ For Justice Barrett and the majority, by contrast, the role of federal courts is minimalist: to decide cases, not to regulate the other branches of government directly and universally. In her view, “the Judiciary does not have unbridled authority to enforce this obligation—in fact, sometimes the law prohibits the Judiciary from doing so.”²⁶⁴

No Justice joined Justice Jackson’s dissent that articulated the absolutist vision for the judiciary, but Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh all joined Justice Barrett’s opinion that articulated the minimalist vision. That said, Justice Kavanaugh wrote separately to advance a more proportional approach to judicial review.²⁶⁵ In his view, the district courts and courts of appeals have limited authority to universally enjoin the government from acting.²⁶⁶ But if the issue is important or “major” enough to meet the Court’s certiorari standard, the Supreme Court should review the case and universally enjoin the government action.²⁶⁷ “In justiciable cases,” Justice Kavanaugh explained, “this Court, not the district courts or courts of appeals, will often still be the ultimate decision-maker as to the interim legal status of major new federal statutes and executive actions—that is, the interim legal status for the several-year period before a final decision on the merits.”²⁶⁸ To be sure, that is not because the Judiciary Act authorizes the Supreme Court to order universal injunctive relief.²⁶⁹ Statutes and agency rules are not technically erased from the U.S. Code and Code of Federal Regulations when the Supreme Court finds them unlawful. Instead, it is because a decision by the Supreme Court binds all of the lower courts, and it is expected that the executive branch will similarly comply with that Supreme Court precedent. Justice Kavanaugh ends his articulation of a middle-ground vision of the judiciary by returning to the importance of proportionality:

²⁶³ *Id.* at 940 (Jackson, J., dissenting).

²⁶⁴ *Id.* at 858 (majority opinion).

²⁶⁵ *Id.* at 868–79 (Kavanaugh, J., concurring).

²⁶⁶ *Id.* at 869–70.

²⁶⁷ *Id.* at 870, 874.

²⁶⁸ *Id.* at 870.

²⁶⁹ *See id.* at 837 (majority opinion).

To reiterate, this Court should not insert itself into run-of-the-mill preliminary-injunction cases where we are not likely to grant certiorari down the road. But determining the nationally uniform *interim* legal status for several years of, say, the Clean Power Plan or Title IX regulations or mifepristone rules is a role that the American people appropriately expect this Court—and not only the courts of appeals or district courts—to fulfill.²⁷⁰

D. Officer Status, Appointment, and Removal

As discussed in Section I.B, the U.S. Chamber’s amicus brief in *Consumers’ Research* flagged officer status for Appointments Clause purposes as an example of a proportional approach. In particular, the constitutionally required method for appointing an officer turns in part on the significance of the power the officer wields. When evaluating whether someone is an officer subject to the Appointments Clause, courts ask whether an individual has “continuing and permanent” duties and “exercise[s] significant authority.”²⁷¹ This distinction between officer and mere employee has critical importance as to the constitutionality of the vast majority of the federal civil service.²⁷² The Court should continue to take a proportional approach to officer status, limiting the officer categorization for those government personnel who exercise significant authority on a nontemporary basis.

Proportionality also plays a role when distinguishing between inferior and principal officers. There, the Supreme Court looks to several factors concerning sufficient principal-officer control over the inferior officer, including whether the principal officer has final decision-making authority.²⁷³ The more important move here is to apply this proportional approach to the President’s or agency head’s removal power of inferior officers who enjoy for-cause removal protections. In October Term 2024, in *Kennedy v. Braidwood Management*,²⁷⁴ the Court continued its longstanding precedent to embrace such a proportional approach as to whether the President must have at will removal power over all officers of the United States.²⁷⁵ Critically, Justice Kavanaugh—arguably the chief proponent of a more formalist, unitary executive theory on

²⁷⁰ *Id.* at 877–78 (Kavanaugh, J., concurring).

²⁷¹ *Lucia v. SEC*, 585 U.S. 237, 245 (2018).

²⁷² See Aaron L. Nielson & Christopher J. Walker, *Article II and the Civil Service*, 113 VA. L. REV. (forthcoming 2027) (manuscript at 5) (working draft available at <https://ssrn.com/abstract=6474398> [<https://perma.cc/7VFB-VK7E>]).

²⁷³ *United States v. Arthrex, Inc.*, 594 U.S. 1, 13–14 (2021).

²⁷⁴ 606 U.S. 748 (2025).

²⁷⁵ See *id.* at 753–54.

the Court—authored the opinion for the 6–3 Court and embraced this more proportional approach.

Braidwood involved an Appointments Clause challenge to the U.S. Preventive Services Task Force at the Department of Health and Human Services (“HHS”). The Task Force plays a critical role under the Affordable Care Act²⁷⁶ to make public recommendations about preventive healthcare services, which the Act requires insurance companies to cover. The question presented was whether the Task Force members are principal officers under Article II, and thus unconstitutionally appointed by the HHS Secretary.²⁷⁷ The Supreme Court held that they are inferior—not principal—officers because “[t]he Task Force members were appointed by and are supervised and directed by the Secretary of HHS.”²⁷⁸

Joining Justice Kavanaugh’s six-Justice majority were Chief Justice Roberts—another proponent of a formalist, unitary executive theory on the Court—and Justice Barrett. To distinguish principal from inferior officers, Justice Kavanaugh emphasized three key features of the HHS Task Force arrangement, all focused on the power of the agency head. First, the agency head must have sufficient supervisory power over the members of the inferior officers—here, the Task Force. Sometimes that involves at-will removal power, but not always. If there is no at-will removal, Justice Kavanaugh recognized that the Court in *United States v. Arthrex, Inc.*²⁷⁹ held that it is sufficient if the agency head has final decision-making authority. Second, or put differently, each final agency action must be a “transparent decision for which a politically accountable officer must take responsibility.”²⁸⁰ Finally, the agency head who takes responsibility for each final agency action must be removable at will by the President. In other words, this structure is consistent with separation of powers because “the Task Force members remain subject to the Secretary of HHS’s supervision and direction, and the Secretary remains subject to the President’s supervision and direction.”²⁸¹

As Professor Zachary Price argues, “the Court recognized congressional power to assign duties and calibrate relationships within the executive branch, so long as the arrangements in question preserve some mechanism of top-down control and accountability.”²⁸² This is

²⁷⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

²⁷⁷ *Braidwood Mgmt.*, 606 U.S. at 754. To be fair, the majority and dissent also disagreed whether the Secretary had authority to appoint the Task Force members. *Id.* at 786.

²⁷⁸ *Id.* at 794.

²⁷⁹ 594 U.S. 1, 16–17, 25–26 (2021).

²⁸⁰ *Braidwood Mgmt.*, 606 U.S. at 775 (quoting *Arthrex*, 594 U.S. at 16).

²⁸¹ *Id.* at 793–94.

²⁸² Zachary S. Price, *Moderating the Unitary Executive Branch in Kennedy v. Braidwood Management*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 13, 2025), <https://www.yalejreg.com/>

inherently a proportional inquiry to determine whether there is sufficient control and accountability. To be sure, the Court has seemingly embraced a bright-line rule that agency-head final decision-making authority is sufficient for agency adjudicators to be considered inferior officers—instead of principal officers. But where such agency-head review is not required by statute, the Court will look to other factors that demonstrate sufficient control. And the Court would likewise be wise to require more control when an agency official is exercising more executive power—and less control when the agency official is exercising a less executive power. In that sense, the Court's proportional approach to principal-inferior officer status would parallel that for the officer-employee status discussed above.

Finally, elsewhere Professor Aaron Nielson and I make a similar argument about proportionality and removal when it comes to high-ranking civil servants and many inferior officers.²⁸³ We argue:

The key takeaway thus is that Congress can prevent removal based on political differences for inferior officers whose role does not allow them realistically to thwart the President. Importantly, this takeaway is also the best reading of current statutory law. Despite rhetoric about “resistance,” civil servants who refuse lawful orders can be fired. And [Senior Executive Service] employees and those excepted from the competitive service because they have policymaking authority have less job protection than those in the competitive service. An Article II holding along these lines would ensure that many senior scientists, engineers, adjudicators, and the like who provide critical information to agency decisionmakers can retain civil service protections, with the benefits that entails, while preventing insubordination with respect to policy decisions. Of course, we recognize that there is some fuzziness to this bright-line rule: At some point even officials who make recommendations may be able to thwart presidential control (for example, if an agency head lacks resources to use anyone else), and at some point an inferior officer in the field will have enough control that our reading of [*United States v.*] *Perkins*²⁸⁴ as limited to officers who cannot hinder the President's ability to faithfully execute the laws no longer is apt. Such difficulties may lead the Court to adopt either a maximalist view of the unitary executive theory

nc/moderating-the-unitary-executive-branch-in-kennedy-v-braidwood-management-by-zachary-s-price/ [https://perma.cc/7YYV-6LD4].

²⁸³ Nielson & Walker, *supra* note 272 (manuscript at 48–54).

²⁸⁴ 116 U.S. 483 (1886).

or a maximalist view of *Perkins*. Some line-drawing, however, should be manageable.²⁸⁵

In other words, some inferior officers have so much authority that the President must have plenary removal authority (think U.S. Attorneys), whereas others have confined or limited power (think administrative law judges), such that they can be insulated from the President's at-will removal power.²⁸⁶ In particular, Congress's decision to allocate the appointment power to a principal officer, instead of the President, would be strong evidence that the inferior officer's authority is proportionally limited enough to insulate the officer from the President's plenary removal power. Conversely, Congress's decision to require Senate confirmation for the inferior officer would be strong evidence that the inferior officer exercises substantial authority such that the President must have at-will removal power. These presumptions can be overcome based on the realities on the ground. But a proportional approach to for-cause removal for inferior officers would bring more coherence to the Court's current approach to separation of powers.

In that sense, this is a quintessential example of a proportional approach to administrative law. It is also a critical approach to limit the logical end of the Roberts Court's formalist adoption of unitary executive theory, which would require that the President have the authority to remove anyone who works in the executive branch—whoever exercises a sliver of executive power—including perhaps even employees like civil servants.²⁸⁷

III. THE EXECUTIVE BRANCH AND PROPORTIONALITY

Within the executive branch, there seems to have been less of an express focus on proportionality, though agencies on the ground obviously have incentives to allocate limited resources based on the proportional importance or impact of the regulatory activity.²⁸⁸ Agencies can more formally adopt a proportional approach to regulatory practice through internal administrative law.²⁸⁹ This Part briefly offers two recent examples of such internal administrative law—one in

²⁸⁵ Nielson & Walker, *supra* note 272 (manuscript at 53–54) (footnotes omitted).

²⁸⁶ *Id.* at 50–51.

²⁸⁷ *See id.* at 4–8.

²⁸⁸ *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 16–18 (2008) (“[E]ven the leviathan that is the United States government is not exempt from the laws of nature and economics that dictate that resources are inherently limited. As the *Heckler* [*v. Chaney*, 470 U.S. 821 (1985)] court noted, no agency has limitless resources, and perfect enforcement of any statute is impossible.”).

²⁸⁹ *See generally* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (describing how internal administrative law can be used to maintain political accountability and bind the ways agencies choose to regulate).

Section III.A to further proceduralize the regulatory process for the most impactful rules, and the other in Section III.B to deproceduralize the regulatory review process for major yet not the most impactful rules. Section III.C concludes by surveying other ways that federal agencies can use internal administrative law to further embrace proportionality in regulatory practice.

A. *Formal Rulemaking for the Most Significant Rules*

As every law student learns in their administrative law course and as many scholars have chronicled over the years,²⁹⁰ the APA originally envisioned two types of rulemaking: “formal rulemaking” with an oral hearing and extensive procedures much like a judicial proceeding and “informal rulemaking” with a general public notice requirement and opportunity for public comment.²⁹¹ The Supreme Court, however, essentially eliminated formal rulemaking, culminating with its decision in *United States v. Florida East Coast Railway*.²⁹² Then, as I have detailed elsewhere, “over the next decades, the Court arguably rewrote the APA to reintroduce more-formal rulemaking procedures,” and federal agencies responded by shifting from rulemaking to agency guidance—which the APA exempts from notice-and-comment procedures—when it could justify that departure under the APA and existing precedent.²⁹³

Today, instead of having formal rulemaking, informal rulemaking, and agency guidance—three various levels of procedural requirements that could apply proportionally to the impact of the regulatory actions—courts and agencies have flattened regulatory procedures to just two: notice-and-comment rulemaking that falls between the procedural requirements of APA formal and informal rulemaking, and agency guidance that requires no procedures at all. Part V returns to this dynamic and argues that Congress should modernize the APA to recognize all four procedural categories of regulatory activities and calibrate which category applies proportionally to the impact or importance of the regulatory action.

²⁹⁰ See Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 740 (2021) (“Students of administrative law are no doubt quite familiar with the first chapter in this story—the death of formal rulemaking and the rise of informal, notice-and-comment rulemaking.”).

²⁹¹ Compare 5 U.S.C. § 553 (basic procedures for any rulemaking), with *id.* §§ 556–557 (heightened procedures for formal rulemaking).

²⁹² 410 U.S. 224 (1973); see *id.* at 237 (holding that the APA’s formal rulemaking provisions do not apply just because the agency’s organic statute requires a “hearing”; the organic statute must require rulemaking both “on the record” and “after . . . an agency hearing” (quoting 5 U.S.C. § 553(c))).

²⁹³ Walker, *supra* note 290, at 741; see *id.* at 740–46 (chronicling this development).

Although most administrative law scholars have been critical of APA formal rulemaking,²⁹⁴ Professor Nielson has long advocated for a return to formal rulemaking, at least in some contexts.²⁹⁵ “[W]hen a single rule can cost more than a billion dollars,” he has argued, “it is prudent to consider whether procedural reform might sometimes help the administrative process reach better outcomes.”²⁹⁶ In particular, Professor Nielson has encouraged “the political branches [to] move cautiously, with an eye towards experimentation.”²⁹⁷

In the first Trump Administration, the Department of Transportation took up Professor Nielson’s call for experimentation. In December 2019, the Department issued a comprehensive rule on rules that addressed transparency, regulatory procedures, and enforcement actions.²⁹⁸ As part of that rule on rules, the Department adopted formal rulemaking proceedings for economically significant and high-impact rules:

Consistent with the Department’s regulatory philosophy that rules imposing the greatest costs on the public should be subject to heightened procedural requirements, this final rule also incorporates the Department’s enhanced procedures for economically significant and high-impact rulemakings. Economically significant rulemakings are defined as those rules that would result in a total annualized cost on the U.S. economy of \$100 million or more, or a total net loss of at least 75,000 full-time jobs in the United States over 5 years. 49 CFR 5.17(a)(1). High-impact rulemakings would result in a total annualized cost on the U.S. economy of \$500 million or more, or a total net loss of at least 250,000 full-time jobs in the United States over 5 years. 49 CFR 5.17(a)(2). These costly rulemakings may be subject to enhanced rulemaking procedures, such as advance notices of proposed rulemakings and formal hearings.

²⁹⁴ See Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 257–58 (2014) (detailing scholarly criticism).

²⁹⁵ See *id.* at 259–90 (defending the role of formal rulemaking in modern regulatory practice).

²⁹⁶ *Id.* at 242.

²⁹⁷ *Id.* at 292.

²⁹⁸ Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. 71,714 (Dec. 27, 2019); see Tanya Snyder, *DOT’s New “Rule on Rules” Codifies Trump’s Deregulatory Actions*, POLITICO (Dec. 5, 2019, at 13:01 ET), <https://subscriber.politicopro.com/article/2019/12/dots-new-rule-on-rules-codifies-trumps-deregulatory-actions-3974704> [<https://perma.cc/436Q-BRN3>].

The procedures for economically significant and high-impact rulemakings are provided at 49 CFR 5.17.²⁹⁹

In the Biden Administration, the Department of Transportation rescinded much of this rule on rules,³⁰⁰ but the Department has largely reinstated it in the second Trump Administration.³⁰¹ In December 2020, the Administrative Conference of the United States also issued a recommendation of “rules on rulemakings.”³⁰² The Administrative Conference did not expressly recommend heightened procedures for economically significant or high-impact rules; instead, it urged all agencies to adopt a rule on rules that “authoritatively reflect[s] the agency’s position as to what procedures it will observe when adopting new rules.”³⁰³ Among other things, the Administrative Conference recommended that “[a]gencies should consider a broad range of means of seeking public input on rules on rulemakings, even if the Administrative Procedure Act does not require it.”³⁰⁴

B. Exceptions to Centralized Review of Significant Rules

In the Biden Administration, one prominent example of proportionality recalibration occurred with respect to presidential review of regulatory actions by the Office of Information and Regulatory Affairs (“OIRA”), which is housed within the White House’s Office of Management and Budget (“OMB”).³⁰⁵

In 1981, President Ronald Reagan issued Executive Order 12,291, which created procedures by which OIRA would review proposed agency regulations to improve quality and consistency.³⁰⁶ President Bill Clinton superseded President Reagan’s order in 1993 with Executive

²⁹⁹ Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. at 71,714.

³⁰⁰ See Administrative Rulemaking, Guidance, and Enforcement Procedures, 86 Fed. Reg. 17,292 (Apr. 2, 2021) (codified at 49 C.F.R. pts. 1, 5, 7).

³⁰¹ See DEP’T OF TRANSP., POLICIES AND PROCEDURES FOR RULEMAKINGS, DOT ORDER 2100.6B 17–21 (2025), <https://www.transportation.gov/sites/dot.gov/files/2025-03/Rulemaking%20Order%202100.6B%20Signed%203.10.2025.pdf> [<https://perma.cc/6QJR-5BDK>].

³⁰² Recommendations and Statement of the Administrative Conference of the United States, 86 Fed. Reg. 6613, 6613 (Jan. 22, 2021).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Although outside the scope of this Foreword, it is worth observing that a large literature on OIRA has developed with strong critics, strong supporters, and many in between. Compare Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV’T L. REV. 325, 325–27 (2014) (criticizing OIRA), with Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1838–44 (2013) (defending OIRA).

³⁰⁶ See Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

Order 12,866.³⁰⁷ But these best practices remained central.³⁰⁸ Under Executive Order 12,866, “[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.”³⁰⁹ Like its predecessor, Executive Order 12,866 declared that agencies must perform economic analysis and choose the regulatory approach that maximizes net benefits.³¹⁰ Each presidential administration since has employed OIRA and OMB to centralize review of proposed regulatory actions and insert the President directly into regulatory activities at federal agencies. Indeed, on his first day in office, President Biden issued a presidential directive that largely embraced these prior executive orders but also ordered regulatory review modernization to “promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations.”³¹¹

President Biden’s modernization effort culminated in Executive Order 14,094.³¹² This order largely maintained the structure and vision of centralized review from the prior administrations, but it made sweeping reforms in terms of public participation and revisions to economic analysis to better take into account distributive impacts and equity.³¹³ Relevant for our purposes, Executive Order 14,094 deproceduralized review for less impactful regulations. In particular, the Biden Administration raised the threshold for detailed economic analysis and centralized review of agency rulemaking to significant rules that have at least a \$200 million impact,³¹⁴ reducing the procedural review for less impactful rules. The threshold had previously been set at \$100 million.³¹⁵

³⁰⁷ See Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

³⁰⁸ See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6 (1995).

³⁰⁹ Exec. Order No. 12,866, § 1(a), 3 C.F.R. 638, 639 (1993).

³¹⁰ See Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 176–78 (1995) (comparing the Reagan and Clinton executive orders and concluding that “[t]he Clinton order focuses on a similar mandate, but describes it with greater nuance”).

³¹¹ Memorandum on Modernizing Regulatory Review, § 2(a), 86 Fed. Reg. 7223, 7223 (Jan. 26, 2021).

³¹² Exec. Order No. 14,094, 88 Fed. Reg. 21,879 (Apr. 6, 2023).

³¹³ This Foreword focuses on just one aspect of the executive order. The *Yale Journal on Regulation: Notice and Comment* blog hosted a symposium in 2023 with wide-ranging views on various aspects of this modernization effort. See *Symposium on Modernizing Regulatory Review*, YALE J. ON REGUL.: NOTICE & COMMENT, <https://www.yalejreg.com/topic/symposium-on-modernizing-regulatory-review/> [<https://perma.cc/LKH5-56CB>] (last visited June 15, 2026).

³¹⁴ See Exec. Order No. 14,094, § 1(a), 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023) (amending section 3(f) of Executive Order 12,866).

³¹⁵ See Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641–42 (1993).

President Trump revoked Executive Order 14,094 upon entering office for his second term.³¹⁶ And the Trump Administration has since also extended centralized regulatory review to economically significant regulations issued by so-called independent agencies.³¹⁷ OIRA review inherently reflects proportionality, as it has always had an economic-impact threshold to trigger the centralized review, in addition to other major values that trigger review.³¹⁸ The Biden Administration's decision to double the economic impact threshold recalibrated based on proportionality. The second Trump Administration's rescission of that change is a similar proportional approach to centralized review, just in the opposite direction.

C. *Internal Administrative Law and Proportionality*

These are just two relatively recent examples of the executive branch proportionally calibrating procedures and decision-making processes commensurate with the importance or impact of the regulatory action. There are no doubt many, many other ways to embrace proportionality via internal administrative law. That agenda exceeds the ambitions of this Foreword. Two additional observations, however, are worth making here.

First, the vision of proportionality in administrative law and regulatory practice advanced in this Foreword argues that Congress and courts should not impose significant procedural or decisional requirements on federal agencies at the low end of the importance continuum—i.e., when agencies are just filling up the details of their statutory and regulatory schemes. That does not mean agencies cannot or should not self-impose procedures and policies to better leverage agency expertise and increase consistency, effectiveness, efficiency, fairness, and predictability in their regulatory activities. Agencies can and should develop internal administrative law—“internal directives, guidance, and organizational forms through which agencies structure the discretion of their employees and presidents control the workings of the executive branch”³¹⁹—to help them regulate more effectively. When it comes to filling up the details, moreover, agencies have the comparative expertise—over Congress or courts—to tailor effective procedures

³¹⁶ See Exec. Order No. 14,148, § 2, 90 Fed. Reg. 8237, 8239 (Jan. 20, 2025).

³¹⁷ *Ensuring Accountability for All Agencies*, THE WHITE HOUSE (Feb. 18, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-accountability-for-all-agencies/> [<https://perma.cc/Z4Y9-3HRA>].

³¹⁸ See Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641–42 (1993) (listing other values beyond economic impact).

³¹⁹ Metzger & Stack, *supra* note 289, at 1239.

within *Vermont Yankee*'s³²⁰ "white space" that exists beyond what the APA or the agency's organic statute requires.³²¹

Second, as I have chronicled elsewhere, "federal agencies regulate us in many meaningful, and sometimes frightening, ways that either evade judicial review entirely or are at least substantially insulated from such review."³²² Accordingly, internal administrative law may be particularly important to develop for the regulatory activities that seldom make it to court—to "constrain[] bureaucracy beyond judicial review."³²³ In other words, up to this point, this Foreword has focused on how embracing proportionality in administrative law is about external checks on the agency action. But the proposed lack of judicial review over minimal-guidance issues should encourage agencies to build more internal checks and procedures. Elsewhere, Rebecca Turnbull and I have collected and developed a suite of potential internal administrative law innovations to better safeguard agency actions that often escape judicial review.³²⁴ These range from more public participation and accessibility in rulemaking to appellate review and quality assurance programs in mass agency adjudication to "Offices of Goodness"³²⁵ when it comes to agency enforcement and other regulatory activities. Many of these innovations involve agencies filling up the details, and as such, agencies themselves should decide whether and how to embrace additional safeguards. As that article argues, the Administrative Conference of the United States also does and should play a critical role in identifying, developing, and encouraging best practices in internal administrative law across the federal administrative state.³²⁶

³²⁰ See *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519 (1978).

³²¹ Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. LAND USE & ENV'T L. 523, 523–24 (2017) (citing *Vermont Yankee*, 435 U.S. at 524, and defining this "white space" as "the scope of agency discretion to experiment with procedures within the boundaries established by law (and thus beyond the reach of the courts)").

³²² Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1624 (2018); see *id.* at 1625–38 (detailing seven categories of agency actions insulated from judicial review: (1) agency guidance and regulation by compliance, (2) agency enforcement discretion, (3) informal agency adjudication, (4) formal agency adjudication, (5) agency rulemaking with *Chevron* policy space, (6) agency legislative drafting assistance, and (7) agency budgeting and appropriations).

³²³ Walker, *supra* note 41, at 155. See generally *id.* (discussing the importance of creating mechanisms to prevent abuses of power in agency actions that are effectively insulated from court oversight).

³²⁴ See Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1239–48 (2020) (suggesting internal administrative law innovations in the context of rulemaking, subregulatory guidance, formal adjudication, informal adjudication, and enforcement discretion).

³²⁵ Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 65 (2014).

³²⁶ See Walker & Turnbull, *supra* note 324, at 1237–38.

IV. RESPONSES TO COUNTERARGUMENTS

The purpose of this Foreword is *not* to set forth a detailed action plan for reforming administrative law and regulatory practice. It would be a mistake to read its examples and recommendations presented as concrete proposals, bulletproof from criticism and ready to implement on the ground now. Nor does this Foreword attempt to respond to every counterargument, unintended consequence, or competing theory. Instead, the aim here is much more modest and preliminary: to articulate a vision and hopefully spark a conversation in the literature and current debates about the future of administrative law. In other words, this is the conceptual design for the project, not its detailed blueprints.

That said, in receiving feedback on this project at various workshops and conferences and from other generous readers,³²⁷ three main counterarguments or concerns have often been raised that may cloud the vision and thus merit a corrective, albeit brief, response. One deals with definitional challenges when it comes to majorness and proportionality. Another concerns a right-of-center, formalist concern about moving away from bright-line rules and toward less administrable standards. And the final involves a left-of-center, proregulatory concern about the potential deregulatory effects of embedding proportionality in the way this Foreword has suggested. Each will be addressed in turn.

A. Defining Majorness and Proportionality

This Foreword's reform proposal is intended to be wide ranging, applying across diverse administrative law doctrines, rules, and practices. As such, I do not intend for the idea of what is major (or minor) and what proportionality requires to be universal. These terms will necessarily be context specific. One size cannot fit all. But there are some general responses as to the scope of what each concept means—and what it does not mean.

1. What Constitutes Major (and Minor)?

As noted in Section II.A, the major questions doctrine is an obvious example of the Roberts Court's embrace of proportionality in administrative law—at least when it comes to the most important value judgments. Yet as Professor Ron Levin has observed, “[c]ommentators have frequently and voluminously criticized the major questions doctrine for its indeterminacy and the resulting lack of guidance for lower

³²⁷ See *supra* note * (acknowledging the various venues where I presented earlier drafts of the Foreword and the readers who provided substantial comments on those earlier drafts).

courts and practitioners.”³²⁸ One might assume that the financial or economic impact is the predominant, if not exclusive, measure of majorness. But that would be a mistake under the major questions doctrine.

And it definitely does not capture majorness when it comes to this Foreword’s vision for embracing proportionality as an organizing principle in administrative law. My focus is on the most important *value* judgments, not just matters of great economic or political significance. Economic impact may be indicative of a major value judgment, especially if the regulatory action would “substantially restructure” an industry or nationwide market or would require “an unheralded power” representing a “transformative expansion in [the agency’s] regulatory authority.”³²⁹ But economic impact is neither a necessary nor sufficient condition. Major value judgments include much more than just issues of great economic or political significance. They include criminalizing conduct³³⁰ or authorizing confinement.³³¹ They include intruding on states’ rights through preemption or otherwise,³³² or on fundamental individual rights guaranteed by the Constitution.³³³ Simply put, majorness applies to the type of most important value judgments that one would expect

³²⁸ Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 966 (2024); see also Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 227 (2023) (“Defining these categories is probably the most difficult part of the doctrine to apply, and scholars have repeatedly argued that this inquiry is challenging.”); *id.* at 227 n.281 (citing fifteen scholars who have expressed this definitional criticism).

³²⁹ *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

³³⁰ See, e.g., *Gundy v. United States*, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting) (“The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens.”).

³³¹ See, e.g., *United States v. Comstock*, 560 U.S. 126, 137 (2010) (“Neither Congress’ power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of ‘carrying into Execution’ the enumerated powers ‘vested by’ the ‘Constitution in the Government of the United States’” (quoting U.S. CONST. art. I, § 8, cl. 18)); see also Paulina Arnold, *How Immigration Detention Became Exceptional*, 75 STAN. L. REV. 261, 265 (2023) (“As civil confinement’s rationales shifted from paternalism to public safety, its constitutional requirements levelled up. Immigration detention has been isolated from that change, not because of some enduring difference between immigration detention and other forms of confinement, but largely because of historical accident.”).

³³² See, e.g., *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) (“[U]nsurprisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress’s power, it also risks intruding on powers reserved to the States.”).

³³³ See, e.g., Ofra Bloch & Andrea Scoseria Katz, *Taking Legality Seriously: What the Major Questions Doctrine Is—And Isn’t*, 94 GEO. WASH. L. REV. 121, 127 (2026) (arguing the major

a legislature to decide.³³⁴ Although I do not agree with all of the particulars, Professors Andrea Katz and Ofra Bloch make an important and helpful distinction in terms of the level of majoriness between “actions that pose a risk to fundamental rights or the political process” and those less major “actions that are exceptionally large in scale or significance but do not carry such risks.”³³⁵

Perhaps more importantly, who decides majoriness will differ based on the administrative law doctrine or regulatory practice under examination. When it comes to defining majoriness as a constitutional matter, I am confident in the courts’ ability to flesh out the contours case by case, just as they have done when it comes to determining whether a search or seizure is reasonable, whether a punishment or fine is excessive, or how much process is due before a governmental deprivation of life, liberty, or property—just to name a few.³³⁶ The same is true of doctrinal developments.³³⁷ On the doctrinal front, however, Congress has the authority to intervene to, for instance, define what counts as majoriness for major questions doctrine purposes, or when to require heightened agency reason-giving under APA arbitrary and capricious review if, for instance, an agency policy would upset settled expectations or reliance interests. Congress, of course, can also decide majoriness when it comes to agency procedure by legislating heightened procedures—like formal rulemaking—for specific agency actions or for general categories of agency actions.³³⁸ The President and federal agencies themselves also have discretion to recognize majoriness and adopt internal administrative law that proceduralizes above the constitutional and statutory floor.³³⁹

The most important takeaway is that the vision of majoriness for proportionality purposes is not limited to economic impact; it focuses on the importance of a *value* judgment. That will vary across administrative law contexts and based on which actors (courts, Congress, the President, or federal agencies) are charged with determining majoriness in that context. This answer is not intended to provide an operationalized

questions doctrine applies in full force to “actions that pose a risk to fundamental rights or the political process”).

³³⁴ See, e.g., *West Virginia*, 597 U.S. at 743 (Gorsuch, J., concurring) (noting that the major questions “doctrine applies when an agency claims the power to resolve a matter of great ‘political significance’” (quoting *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022))).

³³⁵ Bloch & Katz, *supra* note 333, at 127.

³³⁶ See *supra* Part I, Section II.D (providing examples of other constitutional contexts where courts have embraced a proportional approach).

³³⁷ See *supra* Sections II.A–C (providing examples of administrative law doctrines where courts have embraced a proportional approach).

³³⁸ See *infra* Part V (exploring legislative options in greater detail).

³³⁹ See *supra* Part III (exploring internal administrative law options in greater detail).

method for determining majoriness in all contexts but, instead, to clarify the concept to be fleshed out in particular applications.

2. *What Does Proportionality Require?*

Similarly, this Foreword does not mean to suggest that there is some universal metric for what proportionality requires in administrative law. As the examples in Parts II, III, and IV illustrate, proportionality can involve the nature and extent of procedures an agency is required to engage when regulating. It can also involve the amount of reason-giving, deliberation, and analysis an agency must engage in or disclose to the public—or the amount of participation by the President or the public in the agency decision-making process. As Part I and Section II.A suggest, proportionality can also concern the standard and scope of judicial review as well as the specificity and detail Congress must include in statutory delegations and directives. As detailed in Section II.D, it can involve the procedures required to appoint, or remove, an agency official. As detailed in Section III.C, it can involve whether a court can decide a case without remanding to the agency or issue relief from government action that extends beyond the parties to the dispute.

The nature and extent of what proportionality requires is necessarily context specific. It may just involve one of the types of requirements discussed above or a combination of many. Moreover, the categories and types of proportionality requirements articulated in this Foreword are not exhaustive, but merely illustrative. Finally, just like with majoriness, the requirements may well differ and depend on which actors are charged with establishing them—i.e., the courts, Congress, the President, or the agencies themselves.

B. Rules Versus Standards and Administrability

Many judicial conservatives and other formalists will be concerned that embracing proportionality shifts administrative law away from bright-line rules and toward less workable standards.³⁴⁰ This is not an unjustified concern. Indeed, Professor Andrew Hammond and I published an article not long before this Foreword based on our review of

³⁴⁰ This debate between rules and standards is, of course, not new. See, e.g., Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 72–76 (1983) (arguing that the optimal degree of precision for any agency rulemaking “depends on a series of variables peculiar to the rule’s author, enforcer, and addressee”); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 257–58 (1974) (discussing the relative efficiency of and effects associated with implementing rules and standards); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 565 (1992) (“[T]he problem of choosing between rules and standards can be viewed as one concerning how the government should acquire and disseminate information about the appropriate content of the law.”).

hundreds of judicial decisions that explored the administrability downsides of replacing bright-line rules with less determinate standards and criticized the Supreme Court for not considering the administrability of a proposed new doctrine when reversing prior administrative law precedents.³⁴¹ We argued that the doctrine of stare decisis should “involve assessing whether the proposed new doctrine will be workable in the lower courts and in the public more generally.”³⁴²

For those of us, myself included, who are more formalist than functionalist, these are serious concerns which merit several responses that should alleviate some of them.

First, a proportionality principle does not necessarily have to be a standard. Congress, courts, the President, and federal agencies can adopt bright-line rules in terms of tiers, categories, and thresholds that trigger different requirements. As detailed in Parts III and IV, Congress and the executive branch can and regularly do adopt bright-line rules that incorporate proportionality. As detailed in Section I.B and Part II, courts too have adopted tiers, categories, and other bright-line rules.

Second, as the U.S. Chamber argued in its amicus brief in *Consumers’ Research*, discussed in Section I.B, “[t]his proportional approach to nondelegation will change little about how the Court treats cases at both extremes Where a revitalized nondelegation doctrine will have the most impact is in the middle, for questions that are significant but not so significant that it is implausible that Congress granted the agency the authority to answer them.”³⁴³ This is true in other administrative law contexts as well. Especially when bright-line rules control the extremes, the hard cases will be rarer than in a totality-of-the-circumstances or balancing test that applies to the full spectrum of actions.

Third, especially when it comes to developing judicial doctrines, this would not be courts’ first attempt at developing a proportionality-based doctrine. As detailed in Part I—based on the U.S. Chamber’s amicus brief in *Consumers’ Research*—the Supreme Court routinely applies comparable tests when it comes to determining officer status under the Appointments Clause,³⁴⁴ the reasonableness of searches and seizures under the Fourth Amendment,³⁴⁵ the process required under the Due Process Clauses,³⁴⁶ the level of scrutiny under the First and Fourteenth

³⁴¹ Andrew Hammond & Christopher J. Walker, *Stare Decisis and the Missing Administrability Inquiry*, 100 N.Y.U. L. REV. 1883, 1919–23 (2025).

³⁴² *Id.* at 1888.

³⁴³ U.S. Chamber Amicus Br., *supra* note 75, at 4.

³⁴⁴ See, e.g., *United States v. Arthrex, Inc.*, 594 U.S. 1, 13–14 (2021).

³⁴⁵ See, e.g., *Lange v. California*, 594 U.S. 295, 301 (2021).

³⁴⁶ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Amendments,³⁴⁷ and excessiveness under the Eighth Amendment.³⁴⁸ As the U.S. Chamber acknowledged, “There will no doubt be some hard cases in determining whether Congress has provided enough instruction to satisfy nondelegation concerns, just as there are hard cases under all of the doctrines above. But experience has proved that courts are comfortable applying such tests in the vast majority of cases.”³⁴⁹

Finally, sometimes the Constitution and our laws require formalists to live with a bit of functionalism in judicial doctrine. Not every legal right or obligation can be enforced with a bright-line rule. Pragmatic formalists must turn to developing standards that are as workable as possible. As Justice Gorsuch concluded in his *Consumers’ Research* dissent regarding the nondelegation doctrine, “When it comes to other aspects of the separation of powers, we have found manageable ways to honor the Constitution’s design. This one requires no less of us.”³⁵⁰ This pragmatic formalism arguably applies to embracing proportionality in administrative law more generally.

Some conservatives may be disappointed that administrability is the right-of-center concern confronted here. They might say that the real concern is not that my reform proposal threatens formalism, but that it threatens anti-administrativism. In other words, the vision for the future of administrative law should be that the vast majority of the federal administrative state is unconstitutional and whatever remains is highly constrained by courts and the President.³⁵¹ They want little to no law at the federal level, pushing down regulation to the state and local levels and, ultimately, freedom to the markets and liberty to the people. I am sympathetic to a vision of small government, states’ rights, free markets, and ordered liberty. But I also believe in a separation of powers that empowers Congress to make the major value judgments in federal law and the Executive to execute those legislative judgments. Focusing on proportionality in administrative law best advances that constitutional vision.

C. *The Need for Symmetry and Neutral Principles*

Many liberals and other proregulatory advocates, by contrast, will be concerned that this proportional approach will be developed asymmetrically in a deregulatory fashion, only making it harder to regulate.

³⁴⁷ See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (First Amendment); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985) (Equal Protection).

³⁴⁸ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

³⁴⁹ U.S. Chamber Amicus Br., *supra* note 75, at 25.

³⁵⁰ *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 747 (2025) (Gorsuch, J., dissenting).

³⁵¹ See generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (arguing that administrative law in the United States is largely illegal in its current form).

That is a major criticism of the major questions doctrine—that it does not operate as a neutral principle between regulation and deregulation and is necessarily and asymmetrically deregulatory in nature.³⁵² As Professor Dan Walters has argued in a variety of administrative law contexts, such “asymmetry imports a libertarian default rule into administrative law, preventing judges from holding agencies to Congress’s expectation of policy implementation while simultaneously empowering courts to stop agencies whenever the latter’s activities move beyond what Congress has mandated.”³⁵³ Especially in light of the new major questions doctrine,³⁵⁴ concerns about deregulatory asymmetry in this proportionality project are not unreasonable.

To be abundantly clear, that asymmetry is not my call for proportionality in administrative law. When it comes to proportionality, it is critical that judicial doctrine and agency procedure be symmetrically calibrated. When it comes to filling up the details, agencies should not be expected to use extensive procedures or risk exacting judicial review, and Congress likewise should not be required to legislate with specificity. Much of the work that remains to foreground proportionality involves calibrating how we approach federal agencies implementing their statutory mandates by filling up the details. It also involves de-escalating agency procedure and judicial review when it comes to matters of intermediate importance. This reform project would be considered a failure if embracing proportionality did not involve lessening the burdens on agencies’ fill-up-the-details implementation authority and on the work Congress and agencies (and courts) must do in the intermediate category between minor and major.

Similarly, a proportional approach to administrative law should apply to agency action and inaction, to regulation and deregulation, to enforcement and nonenforcement.³⁵⁵ The more important the agency inaction, deregulation, or nonenforcement, the more should be expected from both agencies and courts. To be sure, the extent of agency procedures and the scope of judicial review need not be identical for agency action and inaction. One may reasonably still expect it to usually be harder for an agency to act, regulate, or enforce—than not. But the more important the inaction, deregulation, or nonenforcement—compared

³⁵² See Deacon & Litman, *supra* note 6, at 1070 (“The truth is that the Court’s focus on regulatory novelty turns the major questions doctrine into a potent de-regulatory tool that will do much of the work—if a more selective and ideologically targeted form of the work—that a revived nondelegation doctrine would do.”).

³⁵³ Walters, *supra* note 54, at 461.

³⁵⁴ Accord Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL’Y 773, 777 (2022) (agreeing that “[t]he new major questions doctrine seems to operate in only one direction: deregulatory”).

³⁵⁵ See Walters, *supra* note 54, at 490–95 (detailing the lack of symmetry when it comes to judicial review of agency inaction, delay, and enforcement discretion).

with less impactful inaction, deregulation, or nonenforcement—the more proportionally exacting administrative law should be.

Some progressives may be disappointed that deregulatory asymmetry is the left-of-center concern confronted here. They might say that the real concern should be about allowing the federal government to address the most pressing policy issues of our time. With a Congress that has lost its ambition, they argue, federal agencies must be empowered to make these major value judgments themselves and to use old statutes to address new problems. Legislative gridlock, political polarization, and Congress's inability to make major value judgments are legitimate concerns that I have recognized in prior work.³⁵⁶ But, as discussed above, my vision of a separation of powers is that it empowers Congress, not federal agencies or the President alone, to make the major value judgments in federal law. In that sense, I concede that foregrounding proportionality in administrative law is antithetical to the call for federal agencies to go it alone. As discussed in Part V, I also concede that agencies and courts should more fully adopt a proportional approach to administrative law, even if Congress does not also do so.

V. CONGRESS'S CENTRAL ROLE IN THE PATH FORWARD

Up to this point, the Foreword has focused on how the Supreme Court and the executive branch have embraced—and can and should further embrace—proportionality in administrative law. But to fully implement this vision, Congress must also get involved to recalibrate administrative law and regulatory practice based on proportionality. This Part focuses on two categories of legislative reform: modernizing the APA, and reclaiming authority to make the major value judgments in federal law and patrol the intermediate statutory delegations.

A. *Modernize the Administrative Procedure Act*

The APA is the quasi-constitution of the modern administrative state. When he was a law professor, Justice Scalia remarked “that the Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished.”³⁵⁷ Congress only amended

³⁵⁶ Cf. Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1120 (2018) (“To restore Congress's proper role in the modern administrative state, however, Congress must also return to its core constitutional function of regularly passing laws.”).

³⁵⁷ Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363 (1978); see also Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209 (2015) (drawing on WILLIAM N. ESKRIDGE JR. & JOHN

the APA around sixteen times in the statute's first seven decades.³⁵⁸ To be sure, that does not mean the APA has not otherwise evolved since its enactment in 1946. As I have chronicled elsewhere, “the Supreme Court and the lower courts—with the D.C. Circuit playing a prominent role—have developed a number of administrative common law doctrines that have reshaped the APA's default rules for agency action and judicial review thereof.”³⁵⁹

It is time to modernize the APA to restore and further ingrain proportionality as an organizing principle in administrative law. This effort could include codifying the judicial innovations discussed in Part II, such as adopting the major questions doctrine, setting the standard of review for legal questions to independent judgment with *Skidmore* respect, and clarifying which statutory features constitute a delegation of policymaking discretion to a federal agency.³⁶⁰ Congress could similarly codify the agency change-in-position doctrine and expressly calibrate APA arbitrary and capricious review more generally to require more (or less) reason-giving, depending on the nature and extent of the proposed regulatory action as well as the existing reliance interests and settled expectations.³⁶¹ And Congress could further elaborate the role of harmless error review and other exceptions to the ordinary remand rule, including when remand without vacatur is permissible.³⁶² Finally, Congress could codify a proportional approach to universal injunctive relief, including preliminary and permanent universal vacatur under the APA.³⁶³ These are just a few of no doubt many potential reforms to foreground proportionality in the APA.³⁶⁴

FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010), to argue that the APA is a “superstatute” in the Eskridge–Ferejohn sense).

³⁵⁸ Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 630 (2017) (based on Westlaw reports). For comparison, the Affordable Care Act was amended thirty-one times between its passage in 2010 and 2018. KATE M. COSTIN & ALISON MITCHELL, CONG. RSCH. SERV., R45244, LEGISLATIVE ACTIONS TO MODIFY THE AFFORDABLE CARE ACT IN THE 111TH–115TH CONGRESSES (2018).

³⁵⁹ Walker, *supra* note 358, at 631; *see id.* at 633–38 (chronicling statutory amendments to the APA); Walker, *supra* note 290, at 738–61 (chronicling the judicial evolution of the APA); Christopher J. Walker & Scott T. MacGuidwin, *Interpreting the Administrative Procedure Act: A Literature Review*, 98 NOTRE DAME L. REV. 1963, 1966–89 (2023) (arguing that different theories of APA interpretation have led to different judicial developments regarding the APA).

³⁶⁰ *See supra* Section II.A.

³⁶¹ *See supra* Section II.B.

³⁶² *See supra* Section II.C.1.

³⁶³ *See supra* Section II.C.2.

³⁶⁴ *See* Walker, *supra* note 358, at 638–70 (discussing numerous other APA modernization proposals suggested by the American Bar Association Section of Administrative Law and Regulatory Practice, the Administrative Conference of the United States, and various members of Congress).

Congress could also restore—and further calibrate—the proportionality it had in mind when it enacted the APA in 1946. As discussed in Section III.A, the APA had originally calibrated rulemaking requirements with formal, trial-like procedures for the most impactful rules, a lightly proceduralized general notice-and-public-comment approach to less-impactful rules, and no required process for interpretive guidance, policy statements, or procedural rules.³⁶⁵ Over the decades, courts have reformed rulemaking to essentially eliminate formal rulemaking and to highly proceduralize informal rulemaking.³⁶⁶ In other words, instead of having formal rulemaking, informal rulemaking, and agency guidance—three distinct levels of procedural requirements that could apply proportionally to the impact of the regulatory actions—there is now just an on-off switch: notice-and-comment rulemaking that falls between the procedural requirements of APA formal and informal rulemaking, and agency guidance that requires no procedures at all.

One obvious way to embrace proportionality in the APA is to return to, and improve on, the APA's original proportional approach to rulemaking. For the high-impact and major rules (think \$1 billion and \$100 million rules), Congress should set a default requirement of more agency procedures for rulemaking. For the former, Congress should restore the APA's original formal, trial-like procedures. For the latter, the procedures should be somewhere in between original APA formal rulemaking and modern-day notice-and-comment rulemaking. More procedures would also be required for major agency guidance. If these reforms sound familiar, that is because they were in the 2017 bipartisan Senate version of the Regulatory Accountability Act,³⁶⁷ which I detail elsewhere.³⁶⁸ To be sure, these would be APA defaults; Congress should depart from them in an agency's organic statute when Congress determines that the economic impact alone does make the regulatory action “major,” such that less procedure and judicial review are appropriate—and vice versa.

But Congress should not stop there. It should also calibrate procedures for rules that are less impactful.³⁶⁹ In the middle, Congress should preserve the modern-day notice-and-comment rulemaking process, with its procedures of detailed public notice and comment. For the

³⁶⁵ See *supra* Section III.A.

³⁶⁶ See *supra* Section III.A.

³⁶⁷ S. 951, 115th Cong. (2017).

³⁶⁸ See Walker, *supra* note 358, at 656–64; see also Will Yeatman, *Who Opposes the (Revised) Regulatory Accountability Act?*, YALE J. ON REGUL.: NOTICE & COMMENT (Jan. 15, 2026), <https://www.yalejreg.com/nc/who-opposes-the-revised-regulatory-accountability-act/> [<https://perma.cc/HBW7-DQWP>] (observing that the revised version of the Regulatory Accountability Act is “rooted in the proportionality principle, meaning that administrative scrutiny increases if the cost of the regulation exceeds a certain threshold (\$100,000,000/year)”).

³⁶⁹ See *supra* Section III.A (detailing these various levels of rulemaking under the APA).

even less impactful rules, however, Congress should revive the original informal rulemaking process, which would just require general notice and an opportunity for public comment. Reintroducing the original APA informal rulemaking process could be transformative for regulatory governance, allowing agencies to more effectively fill up the details in their statutory schemes. And, of course, Congress should preserve the status quo of no process for nonmajor subregulatory guidance, policy statements, and procedural rules. For those rules, federal agencies would be left with discretion to tailor procedures based on context-specific considerations and the agencies' expert judgment for filling up the details. Similar proportional reforms could be made to agency adjudication, including to restore the informal and formal stages of adjudication that Professor Emily Bremer has rediscovered in her historical work on the APA.³⁷⁰

B. Reclaim Authority to Make Major Value Judgments

The judicial developments discussed in Section II.A—the elimination of *Chevron* deference in *Loper Bright* and the emergence of the major questions doctrine—have reduced the authority of the President and federal agencies to make the major value judgments and intermediate decisions that exceed filling up the details. As I have argued elsewhere, however,

these judicial reforms, without more, will not restore Congress to the vibrant actor that the Court seems to think is necessary. As a result, these judicial reforms will not shift the power balance from the President and the administrative state back to Congress. Instead, at least in the interim, much of that power balance will shift to the federal judiciary or lead to a deregulatory power void.³⁷¹

That article recommended two legislative reforms to respond to these judicial developments. Each will be summarized in turn.³⁷²

1. Legislative Fast-Track for Major Questions

When it comes to major questions, Congress should codify the major questions doctrine and a legislative mechanism to easily answer those major questions itself. Drawing on several historical precedents

³⁷⁰ See Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 413, 447 (2021); see also Christopher J. Walker, *A Reform Agenda for Administrative Adjudication*, REGUL., Spring 2021, at 30, 32–33 (suggesting other reforms to agency adjudication).

³⁷¹ Walker, *supra* note 9, at 191.

³⁷² The following discussion draws substantially from *id.* at 206–10.

in other areas,³⁷³ my work has proposed creating a fast-track legislative procedure for the major questions doctrine modeled on the Congressional Review Act (“CRA”).³⁷⁴ When a court declares something a major question, it says the agency cannot regulate. In those circumstances, Congress should fast-track an up-or-down vote on whether the current Congress thinks the agency should have that authority.³⁷⁵ Once the regulation is judicially invalidated, Congress could have a window of time during which it could introduce a joint resolution. When it comes to the legislative process, Congress could require fast-track procedures similar to those in the CRA. These could “include a committee discharge mechanism, a limitation on amendments and delay motions, and a simple majority up-down vote in the Senate after a set period for debate.”³⁷⁶

If the resolution makes it through the House, the Senate, and the President, the substantive effect would be to amend the relevant statute in two limited ways. First, this amended statute would provide clear authorization for the regulatory power the agency had claimed in the invalidated rule. Second, it would authorize additional regulatory power that is “substantially the same” as the authority the reviewing court had precluded on major questions doctrine grounds.³⁷⁷ Accordingly, this enacted resolution would provide the “clear statement” the major questions doctrine requires from Congress, with some “substantially the same” flexibility for the agency to update its approach to changed circumstances.³⁷⁸

These procedures would kick in whenever a federal court finds that an agency’s claim to authority under a statute is textually plausible but lacks clear support sufficient to answer the major question at issue.³⁷⁹ Under the current doctrine, finding that an issue is a major question functionally walls off political resolution because the reviewing court denies the agency authority to regulate, and Congress is rarely capable of taking prompt action on controversial issues. This fast-track procedure would promote Congress’s ability to make the major value judgments as intended under our separation of powers, and therefore advance political accountability and democratic legitimacy.³⁸⁰ It would

³⁷³ Walker, *supra* note 354, at 778–79 (discussing the budget reconciliation bypass of Senate filibuster rules created by the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 601–688)).

³⁷⁴ *Id.* at 781.

³⁷⁵ *Id.* at 791–92.

³⁷⁶ *Id.* at 780–81.

³⁷⁷ *Id.* at 791.

³⁷⁸ *Id.* at 781–82.

³⁷⁹ *Id.* at 789.

³⁸⁰ Others have argued that this fast-track legislative provision should apply more broadly to whenever the Supreme Court interprets a statute. *See* Supreme Court Review Act of 2022, S. 4681, 117th Cong. § 2 (creating a fast-track legislative process for Congress to pass substantive

also soften the impact of courts making the major value judgment that the major questions doctrine applied in the first place.

2. Regular Reauthorization

Reviving Congress's use of regular reauthorization is another way to encourage the legislature to make the major value judgments and patrol the intermediate ones on a more regular basis.³⁸¹ As Jonathan Adler and I have argued, "Legislation that 'sunset,' expires, or otherwise requires regular reauthorization could induce Congress to revisit, reassess, and recalibrate existing programs" in light of changes in the world, including those imposed by the courts.³⁸² This idea is not new. "Temporary legislation," Professor Jacob Gersen has observed, "is a staple of legislatures, both old and modern."³⁸³ Although Congress rarely takes steps to incentivize—let alone require—reauthorization of major regulatory statutes, it does utilize temporary legislation to induce periodic reengagement or reauthorization of potentially controversial or problematic programs across a range of policy areas. Some examples include the Farm Bill,³⁸⁴ the Federal Aviation Administration reauthorization,³⁸⁵ and the Food and Drug Administration's user-fee programs.³⁸⁶

In terms of implementation, at one extreme, Congress could consider enacting a universal sunset statute that would require the reauthorization of any federal agency or program within a certain number of years. The failure to reauthorize would lead the sun to set on an entire agency or program, thus barring any subsequent appropriation. This one-size-fits-all approach would be bold, yet foolish. Statutes vary, and action-forcing reforms may not be appropriate for all regulatory contexts. For some federal programs and perhaps some entire federal agencies, it might make sense to incorporate express sunset provisions.

legislation to respond to any Supreme Court decision that interprets a federal statute in any way or "interprets or reinterprets the Constitution of the United States in a manner that diminishes an individual right or privilege that is or was previously protected by the Constitution of the United States"); see also Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, ATLANTIC (Nov. 16, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/> [<https://perma.cc/DR3H-MRMD>] ("Congress could pass a Congressional Review Act for the Supreme Court, which would enable it to overturn Court decisions on legislative matters with greater speed and ease."). Elsewhere, I argue why my narrower proposal is better, in part because it is more politically feasible. See Walker, *supra* note 354, at 789–93.

³⁸¹ See Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1937–38 (2020).

³⁸² *Id.* at 1960.

³⁸³ Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 298 (2007).

³⁸⁴ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for Fiscal Year 2017, H.R. 5054, 114th Cong. (2016).

³⁸⁵ FAA Reauthorization Act of 2024, Pub. L. No. 118-63, 138 Stat. 1175 (codified at 49 U.S.C. § 44903 note).

³⁸⁶ See Adler & Walker, *supra* note 381, at 1964–74 (detailing federal reauthorization efforts).

Such a blanket sunseting threat would force Congress to take a fresh look at the agency's regulatory activities and consider whether the program or agency continues to effectively fulfill the purpose for which Congress created it.

But Congress does not face a binary choice between a complete sunset of an agency or program and permanent legislation. It may choose to incorporate statutory defaults to which the agency or program resets if not reauthorized within a set time period. Likewise, in some regulatory contexts, it might be advantageous to set the sunset default as something that would politically force Congress to revisit and reauthorize the agency or program. In the case of regulatory agencies, the lack of authorization could mean that an agency lacks the ability to act with the force of law. In effect, without a valid authorization, it could not be said that the agency has been delegated such authority.

Consider, for instance, the Clean Air Act. Under this hypothetical proposal, the EPA would now lack the ability to promulgate new regulations, issue new permits to regulated facilities, and perhaps even initiate new enforcement actions unless and until the act was reauthorized.³⁸⁷ The expired authorization would not affect the validity of regulations already promulgated, nor would it prevent state-level enforcement under approved state implementation plans or the filing of citizen suits against facilities for violating existing permits, regulations, or statutory provisions. Nonetheless, the consequences of allowing the authorization to expire would provide ample incentive for environmental groups and regulated industries to come to the table, as each would find the default baseline undesirable. That, in turn, would provide Congress with the opportunity and need to revisit and reconsider particularly obsolete or ineffective provisions in the law. One could imagine a similar sunset default in the immigration context: no federal enforcement, but also no authority to grant or renew immigration benefits.

In sum, regular reauthorization of statutes governing federal agencies would force Congress to come to the table to update statutes to deal with new problems. This proposal would address the issue of the executive branch discovering new powers in old, broad statutes to address novel problems that the major questions doctrine and nondelégation seek to remedy. It would also provide Congress with the ability to regularly review judicial decisions where the court has exercised its independent judgment to limit agencies' ability to regulate. In so doing, the current Congress can decide for itself whether it wishes to authorize the challenged agency action.

* * *

It is critical that Congress gets involved to fully implement this vision of proportionality throughout administrative law and regulatory

³⁸⁷ See *id.* at 1942–43.

practice. But Congress's paralysis does not excuse agencies, courts, and the President from acting now. Indeed, as discussed in Part II, the Supreme Court has already embraced proportionality in various administrative law doctrines.³⁸⁸ But it has largely done so asymmetrically, ratcheting up the requirements for the most important regulatory actions.³⁸⁹ The Court should now turn its attention to adopting proportionality when it comes to the intermediate and least important regulatory actions, as it has started to do with administrative remedies.

This symmetrical vision of proportionality better reflects separation-of-powers values. Congress should make the major value judgments via legislation. The President and federal agencies should faithfully execute or implement those statutory value judgments through regulatory activities. And courts should say what the law is and ensure that the President and agencies regulate within constitutional and statutory boundaries. De-escalating on the judicial front for minor and intermediate matters helps the judiciary stay within its lane of judging—and not drift into the interstitial policymaking lane that Congress and the Constitution have allocated to the executive branch for law execution. Or as Professor Jeff Pojanowski puts it in advancing a neoclassical theory of administrative law, “deference on policy questions is the corollary of nondeference on legal questions.”³⁹⁰

CONCLUSION

With the anti-administrativist revolution taking place at the Supreme Court and the White House, there is an opportunity to rethink administrative law from the ground up. This Foreword has argued that all three branches should seek to embrace proportionality as an organizing principle in administrative law and regulatory practice. For those outside of these debates, this recommendation no doubt seems commonsensical—if not banal. Yet proportionality is missing in the current debates in the field. On the other hand, those engaged in the debates may conclude that I have overread the Supreme Court's recent administrative law decisions to find strong hints of proportionality when proportionality is on the periphery at best. That may be true, at least to some extent. My goal has been to demonstrate that it would not be unrealistic or unprecedented for the Court to engage in a more ambitious proportionalist reform project.

Indeed, as noted in the Introduction, the current era is not the first anti-administrativist turn at the Supreme Court. Nor would this be the first time the Court embraced proportionality in administrative

³⁸⁸ See *supra* Part II.

³⁸⁹ See, e.g., Deacon & Litman, *supra* note 6, at 1022–34.

³⁹⁰ Pojanowski, *supra* note 36, at 893.

law. During the due process revolution of the 1960s and 1970s, when the Court increasingly recognized the right to a predeprivation hearing even for public benefits,³⁹¹ Judge Friendly urged the Court to abandon requiring a robust predeprivation hearing in every context—to require only “some kind of hearing” proportional to the interests at stake.³⁹² One year later, the Supreme Court accepted Judge Friendly’s call and introduced a proportional approach to procedural due process in *Mathews v. Eldridge*.³⁹³

Perhaps this Foreword will help prompt another critical course correction in administrative law. We currently face another anti-administrativist revolution. It is time once again to embrace proportionality in administrative law—to require more of agencies, courts, and Congress when it comes to the most important regulatory actions and to require far less when it comes to agencies’ minor fill-up-the-details regulatory activities. This time, however, it is not enough for the courts to embrace proportionality. The political branches need to do the same. Without Congress, it will be difficult to create any lasting change in administrative law and regulatory practice.

³⁹¹ See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

³⁹² See Friendly, *supra* note 57, at 1267.

³⁹³ See *Mathews v. Eldridge*, 424 U.S. 319, 343, 348 (1976) (citing Friendly, *supra* note 57, at 1281, 1303).