2019 Update

Federal Administrative Law Cases and Materials (Second Edition)

by

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Administrative law is a dynamic field, and there are always interesting new cases being decided and new debates unfolding. Still, the past couple of years have been more consequential than most. In chronological order, the passing of Justice Antonin Scalia, the election of Donald Trump to the presidency, the appointment of Justice Neil Gorsuch, the retirement of Justice Anthony Kennedy, and the appointment of Justice Brett Kavanaugh have already yielded several important administrative law decisions touching on a broad array of topics including the nondelegation doctrine, *Chevron* and *Auer* deference, evidentiary requirements, *State Farm* arbitrary and capricious review, and justiciability decisions. Even when those decisions did not yield immediate doctrinal changes, they often signaled the possibility of substantial changes to come.

Although we do not believe in publishing new casebook editions without good reason, the time has come for us to do so. Thus, we announce that the Third Edition of this book will be released later this year, in time for the Spring 2020 semester. In the meantime, we offer the following highlights and changes from that manuscript, some of which were in the 2017 Update to the casebook but are included here also for convenience. For a more comprehensive and detailed summary of recent cases and events as they relate to administrative law, we recommend Kristin E. Hickman & Richard J. Pierce, Jr., *Administrative Law Treatise* (6th ed. 2018) and twice-annual supplements thereto.

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A. *GUNDY* AND THE NONDELEGATION DOCTRINE

CHAPTER 2, SECTION A: NONDELEGATION

In the 2018 term, the Supreme Court narrowly retained the intelligible principles standard, but the Justices' opinions signaled that the standard's days may be numbered given turnover in the Court's personnel.

Gundy v. United States
139 S. Ct. 2116 (2019).

■ Justice KAGAN announced the judgment of the Court and delivered an opinion, in which Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join.

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether 34 U.S.C. § 20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates that doctrine. We hold it does not. Under § 20913(d), the Attorney General must apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment. That delegation easily passes constitutional muster.

I

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. In * * * 2006, * * * Congress enacted SORNA. See 120 Stat. 590, 34 U.S.C. § 20901 *et seq.*

SORNA makes "more uniform and effective" the prior "patchwork" of sex-offender registration systems. *Reynolds v. United States*, 565 U.S. 432, 435 (2012). The Act's express "purpose" is "to protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for [their] registration." § 20901. To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, than most States had before. The Act also backs up those requirements with new criminal penalties. Any person required to register under SORNA who knowingly fails to do so (and who travels in interstate commerce) may be imprisoned for up to ten years. See 18 U.S.C. § 2250(a).

The basic registration scheme works as follows. A "sex offender" is defined as "an individual who was convicted of" specified criminal offenses: all offenses "involving a sexual act or sexual contact" and additional offenses "against a minor." 34 U.S.C. §§ 20911(1), (5)(A), (7). Such an individual must register—provide his name, address, and certain other information—in every State where he resides, works, or studies. See §§ 20913(a), 20914. And he must keep the registration current, and periodically report in person to a law enforcement office, for a period of between fifteen years and life (depending on the severity of his crime and his history of recidivism). See §§ 20915, 20918.

Section 20913—the disputed provision here—elaborates the "[i]nitial registration" requirements for sex offenders. §§ 20913(b), (d). Subsection (b) sets out the general rule: An offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (or, if the offender is not sentenced to prison, "not later than [three] business days after being sentenced"). Two provisions down, subsection (d) addresses (in its title's words) the "[i]nitial registration of sex offenders unable to comply with subsection (b)." The provision states:

> he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter ... and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

Subsection (d), in other words, focuses on individuals convicted of a sex offense before SORNA's enactment—a group we will call pre-Act offenders. Many of these individuals were unregistered at the time of SORNA's enactment, either because pre-existing law did not cover them or because they had successfully evaded that law (so were "lost" to the system). And of those potential new registrants, many or most could not comply with subsection (b)'s registration rule because they had already completed their prison sentences. For the entire group of pre-Act offenders, once again, the Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration."

Under that delegated authority, the Attorney General issued an interim rule in February 2007, specifying that SORNA's registration requirements apply in full to "sex offenders convicted of the offense for which registration is required prior to the enactment

of that Act." 72 Fed. Reg. 8897. The final rule, issued in December 2010, reiterated that SORNA applies to all pre-Act offenders. 75 Fed. Reg. 81850. That rule has remained the same to this day.

Petitioner Herman Gundy is a pre-Act offender. The year before SORNA's enactment, he pleaded guilty under Maryland law for sexually assaulting a minor. After his release from prison in 2012, Gundy came to live in New York. But he never registered there as a sex offender. A few years later, he was convicted for failing to register, in violation of § 2250. He argued below (among other things) that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders. § 20913(d). * * *

II

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825). But the Constitution does not "deny[ ] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." *Yakus v. United States*, 321 U.S. 414, 425 (1944) (internal quotation marks omitted). Congress may "obtain[ ] the assistance of its coordinate Branches"—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). "[I]n our increasingly complex society, replete with ever changing and more technical problems," this Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Ibid.* So we have held, time and again, that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Ibid.* (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); brackets in original).

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. See, *e.g., Whitman v. American Trucking Assns, Inc.*, 531 U.S. 457, 473 (2001) (construing the text of a delegation to place constitutionally adequate "limits on the EPA's discretion"); *American Power & Light Co. v. SEC*, 329 U.S. 90, 104–105 (1946) (interpreting a statutory delegation, in light of its "purpose[,] factual background[, and] context," to provide sufficiently "definite" standards). Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I. And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself.

That is the case here, because § 20913(d) does not give the Attorney General anything like the "unguided" and "unchecked" authority that Gundy says. * * * The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues.

Given that statutory meanin-g, Gundy's constitutional claim must fail. Section 20913(d)'s dele-gation falls well within permissible bounds.

A

This is not the first time this Court has had to interpret § 20913(d). In *Reynolds*, the Court considered whether SORNA's registration requirements applied of their own force to pre-Act offenders or instead applied only once the Attorney General said they did. We read the statute as adopting the latter approach. But even as we did so, we made clear how far

SORNA limited the Attorney General's authority. And in that way, we effectively resolved the case now before us.

Everything in *Reynolds* started from the premise that Congress meant for SORNA's registration requirements to apply to pre-Act offenders. The majority recounted SORNA's "basic statutory purpose," found in its text, as follows: "the 'establish[ment of] a comprehensive national system for the registration of [sex] offenders' that *includes* offenders who committed their offenses before the Act became law." 565 U.S. at 442 (quoting § 20901; emphasis and alterations in original; citation omitted). * * *

But if that was so, why had Congress (as the majority held) conditioned the pre-Act offenders' duty to register on a prior "ruling from the Attorney General"? *Id.,* at 441. The majority had a simple answer: "*[I]nstantaneous* registration" of pre-Act offenders "might not prove feasible," or "[a]t least Congress might well have so thought." *Id.,* at 440–441, 443. Here, the majority explained that SORNA's requirements diverged from prior state law. See *id.*, at 440. Some pre-Act offenders (as defined by SORNA) had never needed to register before; others had once had to register, but had fulfilled their old obligations. And still others (the "lost" or "missing" offenders) should have registered, but had escaped the system. As a result, SORNA created a "practical problem[ ]": It would require "newly registering or reregistering a large number of pre-Act offenders." *Reynolds*, 565 U.S. at 440 (internal quotation marks omitted). And attached to that broad feasibility concern was a more technical one. * * *

On that understanding, the Attorney General's role under § 20913(d) was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so. That statutory delegation, the Court explained, would "involve[ ] implementation delay." *Id.,* at 443. But no more than that. * * * Reasonably read, SORNA enabled the Attorney General only to address (as appropriate) the "practical problems" involving pre-Act offenders before requiring them to register. *Id.,* at 440. The delegation was a stopgap, and nothing more.

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[Ed. In deleted paragraphs, Justice Kagan explains why SORNA's statutory declaration of purpose and legislative history demonstrate congressional intent that SORNA's requirements apply to pre-Act offenders, requiring the Attorney General "to order their registration as soon as feasible" with latitude only to delay as needed to resolve associated "transitional difficulties."]

And no Attorney General has used (or, apparently, thought to use) § 20913(d) in any more expansive way. To the contrary. Within a year of SORNA's enactment (217 days, to be precise), the Attorney General determined that SORNA would apply immediately to pre-Act offenders. See Interim Rule, 72 Fed. Reg. 8897. That rule has remained in force ever since (save for a technical change to one of the rule's illustrative examples). See Final Rule, 75 Fed. Reg. 81850.[1] And at oral argument here, the Solicitor General's office—rarely in a hurry to agree to limits on the Government's authority—acknowledged that § 20913(d) does not allow the Attorney General to excuse a pre-Act offender from registering, except for reasons of "feasibility." Tr. of Oral Arg. 41–42. We thus end up, on close inspection of the

[1] Gundy tries to dispute that simple fact, but fails. He points to changes that Attorneys General have made in guidelines to States about how to satisfy SORNA's funding conditions. See Brief for Petitioner 32–33. But those state-directed rules are independent of the only thing at issue here: the application of registration requirements to pre-Act offenders. Those requirements have been constant since the Attorney General's initial rule, as the guidelines themselves affirm. See 73 Fed. Reg. 38046 (2008); 76 Fed. Reg. 1639 (2011). Indeed, the guidelines to States are issued not under § 20913(d) at all, but under a separate delegation in § 20912(b). See 73 Fed. Reg. 38030; 76 Fed. Reg. 1631.

statutory scheme, exactly where *Reynolds* left us. The Attorney General's authority goes to transition-period implementation issues, and no further.

C

Now that we have determined what § 20913(d) means, we can consider whether it violates the Constitution. The question becomes: Did Congress make an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible? Under this Court's long-established law, that question is easy. Its answer is no.

As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the delegee's exercise of authority. *J. W. Hampton, Jr., & Co.*, 276 U.S. at 409. Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee "the general policy" he must pursue and the "boundaries of [his] authority." *American Power & Light*, 329 U.S. at 105. Those standards, the Court has made clear, are not demanding. "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.' " *Whitman*, 531 U.S. at 474–475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). Only twice in this country's history (and that in a single year) have we found a delegation excessive—in each case because "Congress had failed to articulate *any* policy or standard" to confine discretion. *Mistretta*, 488 U.S. at 373, n. 7 (emphasis added); see *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). By contrast, we have over and over upheld even very broad delegations. Here is a sample: We have approved delegations to various agencies to regulate in the "public interest." See, *e.g., National Broadcasting Co.*, 319 U.S. at 216; *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932). We have sustained authorizations for agencies to set "fair and equitable" prices and "just and reasonable" rates. *Yakus*, 321 U.S. at 422, 427; *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). We more recently affirmed a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health." *Whitman*, 531 U.S. at 472, (quoting 42 U.S.C. § 7409(b)(1)). And so forth.

In that context, the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found). The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature. * * * That statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore. It falls well within constitutional bounds.[2]

Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitu-tional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.

* * *

■ Justice KAVANAUGH took no part in the consideration or decision of this case.

■ Justice ALITO, concurring in the judgment.

The Constitution confers on Congress certain "legislative [p]owers," Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government. See *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 472 (2001). Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that

[2] Even Gundy conceded at oral argument that if the statute means what we have said, it "likely would be constitutional." Tr. of Oral Arg. 25. That is why all of his argument is devoted to showing that it means something else.

authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. See *ibid.*

If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.

■ Justice GORSUCH, with whom THE CHIEF JUSTICE and Justice THOMAS join, 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. * * *

Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But Justice ALITO supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.

I

For individuals convicted of sex offenses *after* Congress adopted the Sex Offender Registration and Notification Act (SORNA) in 2006, the statute offers detailed instructions. It requires them "to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries."[1] The law divides offenders into three tiers based on the seriousness of their crimes: Some must register for 15 years, others for 25 years, and still others for life.[2] The statute proceeds to set registration deadlines: Offenders sentenced to prison must register before they're released, while others must register within three business days after sentencing.[3] The statute explains when and how offenders must update their registrations.[4] And the statute specifies particular penalties for failing to comply with its commands.[5] On and on the statute goes for more than 20 pages of the U.S. Code.

But what about those convicted of sex offenses *before* the Act's adoption? At the time of SORNA's enactment, the nation's population of sex offenders exceeded 500,000, and Congress concluded that something had to be done about these "pre-Act" offenders too. But it seems Congress couldn't agree what that should be. The treatment of pre-Act offenders proved a "controversial issue with major policy significance and practical ramifications for states."[6] Among other things, applying SORNA immediately to this group threatened to impose unpopular and costly burdens on States and localities by forcing them to adopt or overhaul their own sex offender registration schemes.[7] So Congress simply passed the

[1] *Reynolds v. United States*, 565 U.S. 432, 434 (2012).

[2] 34 U.S.C. §§ 20911, 20915(a).

[3] § 20913(b).

[4] § 20913(c).

[5] § 20913(e).

[6] Logan, The Adam Walsh Act and the Failed Promise of Administrative Federalism, 78 Geo. Wash. L. Rev. 993, 999–1000 (2010).

[7] *Id.*, at 1003–1004.

problem to the Attorney General. For all half-million pre-Act offenders, the law says only this, in 34 U.S.C. § 20913(d):

"The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter ... and to prescribe rules for the registration of any such sex offender."

Yes, that's it. The breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast. As the Department of Justice itself has acknowledged, SORNA "does not require the Attorney General" to impose registration requirements on pre-Act offenders "within a certain time frame or by a date certain; it does not require him to act at all."[8] If the Attorney General does choose to act, he can require all pre-Act offenders to register, or he can "require some but not all to register."[9] For those he requires to register, the Attorney General may impose "some but not all of [SORNA's] registration requirements," as he pleases.[10] And he is free to change his mind on any of these matters "at any given time or over the course of different [political] administrations."[11] Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country—a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration obligations and post-Act offenders came to predominate.

Unsurprisingly, different Attorneys General have exercised their discretion in different ways.[12] For six months after SORNA's enactment, Attorney General Gonzales left past offenders alone. Then the pendulum swung the other direction when the Department of Justice issued an interim rule requiring pre-Act offenders to follow all the same rules as post-Act offenders.[13] A year later, Attorney General Mukasey issued more new guidelines, this time directing the States to register some but not all past offenders.[14] Three years after that, Attorney General Holder required the States to register only those pre-Act offenders convicted of a new felony after SORNA's enactment.[15] Various Attorneys General have also taken different positions on whether pre-Act offenders might be entitled to credit for time spent in the community before SORNA was enacted.[16]

These unbounded policy choices have profound consequences for the people they affect. Take our case. Before SORNA's enactment, Herman Gundy pleaded guilty in 2005 to a sexual offense. After his release from prison five years later, he was arrested again, this time for failing to register as a sex offender according to the rules the Attorney General had then prescribed for pre-Act offenders. As a result, Mr. Gundy faced an additional 10-year prison term—10 years more than if the Attorney General had, in his discretion, chosen to write the rules differently.

II

A

Our founding document begins by declaring that "We the People ... ordain and establish this Constitution." At the time, that was a radical claim, an assertion that sovereignty

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[8] Brief for United States in *Reynolds v. United States*, O. T. 2011, No. 106549, p. 23.

[9] *Id.*, at 24.

[10] Ibid.

[11] Ibid.

[12] See, *e.g.*, 72 Fed. Reg. 8894 (2007); 73 Fed. Reg. 38030 (2008); 76 Fed. Reg. 1639 (2011).

[13] 28 CFR § 72.3 (2007); 72 Fed. Reg. 8894.

[14] See 73 Fed. Reg. 38030.

[15] See 76 Fed. Reg. 1639.

[16] Compare 73 Fed. Reg. 38036 (no credit given) with 75 Fed. Reg. 81851 (full credit given).

belongs not to a person or institution or class but to the whole of the people. From that premise, the Constitution proceeded to vest the authority to exercise different aspects of the people's sovereign power in distinct entities. In Article I, the Constitution entrusted all of the federal government's legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.

To the framers, each of these vested powers had a distinct content. When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,"[17] or the power to "prescribe general rules for the government of society."[18]

The framers understood, too, that it would frustrate "the system of government ordained by the Constitution" if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.[19] Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement. As Chief Justice Marshall explained, Congress may not "delegate ... powers which are strictly and exclusively legislative."[20] Or as John Locke, one of the thinkers who most influenced the framers' understanding of the separation of powers, described it:

"The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them."[21]

Why did the framers insist on this particular arrangement? They believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty.[22] An "excess of law-making" was, in their words, one of "the diseases to which our governments are most liable."[23] To address that tendency, the framers went to great lengths to make lawmaking difficult. In Article I, by far the longest part of the Constitution, the framers insisted that any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto. Some occasionally complain about Article I's detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty.

Nor was the point only to limit the government's capacity to restrict the people's freedoms. Article I's detailed processes for new laws were also designed to promote deliberation. "The oftener the measure is brought under examination," Hamilton explained,

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[17] The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton).

[18] *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); see also J. Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration § 22, p. 13 (1947) (Locke, Second Treatise); 1 W. Blackstone, Commentaries on the Laws of England 44 (1765).

[19] *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

[20] *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43, 6 L.Ed. 253 (1825).

[21] Locke, Second Treatise § 141, at 71.

[22] The Federalist No. 48, at 309–312 (J. Madison).

[23] *Id.*, No. 62, at 378. See also *id.*, No. 73, at 441–442 (Hamilton); Locke, Second Treatise § 143.

"the greater the diversity in the situations of those who are to examine it," and "the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest."[24]

* * *

If Congress could pass off its legislative power to the executive branch, the "[v]esting [c]lauses, and indeed the entire structure of the Constitution would "make no sense."[29] Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice.[30] Accountability would suffer too. Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to " 'disguise ... responsibility for ... the decisions.' "[31]

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B

Accepting, then, that we have an obligation to decide whether Congress has unconstitution-ally divested itself of its legislative responsibilities, the question follows: What's the test? * * *

First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to "fill up the details." 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." Writing for the Court, Chief Justice Marshall distinguished between those "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act ... to fill up the details."[36] The Court upheld the statute before it because Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and the residual authority to make "alterations and additions" did no more than permit courts to fill up the details.

Later cases built on Chief Justice Marshall's understanding. * * * 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.[39]

Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. Here, too, the power extended to the executive may prove highly consequential. During the Napoleonic Wars, for example, Britain and France each tried to block the United States from trading with the other.

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[24] The Federalist No. 73, at 443.

[29] Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 340 (2002).

[30] The Federalist No. 47, at 303 (Madison); *id.*, No. 62, at 378 (same).

[31] Rao, Administrative Collusion: How Delegation Diminishes the Collective Congress, 90 N. Y. U. L. Rev. 1463, 1478 (2015). See also B. Iancu, Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism 87 (2012).

[36] *Id.*, at 31, 43.

[39] *Yakus v. United States*, 321 U.S. 414, 426 (1944).

Congress responded with a statute instructing that, if the President found that either Great Britain or France stopped interfering with American trade, a trade embargo would be imposed against the other country. In *Cargo of Brig Aurora* v. *United States*, this Court explained that it could "see no sufficient reason, why the legislature should not exercise its discretion [to impose an embargo] either expressly or *conditionally*, as their judgment should direct."[40] Half a century later, Congress likewise made the construction of the Brooklyn Bridge depend on a finding by the Secretary of War that the bridge wouldn't interfere with navigation of the East River. The Court held that Congress "did not abdicate any of its authority" but "simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact."[41]

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.[42] So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if "the discretion is to be exercised over matters already within the scope of executive power."[43] Though the case was decided on different grounds, the foreign-affairs-related statute in *Cargo of the Brig Aurora* may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II. *Wayman* itself might be explained by the same principle as applied to the judiciary: Even in the absence of any statute, courts have the power under Article III "to regulate their practice."[44]

C

Before the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld. But then the federal government began to grow explosively. And with the proliferation of new executive programs came new questions about the scope of congressional delegations.

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[Ed. In deleted paragraphs, Justice Gorsuch summarizes numerous Supreme Court cases in arguing that the intelligible principles standard originally "was just another way to describe the traditional rule that Congress may leave the executive the responsibility to find facts and fill up details" but then "eventually began to take on a life of its own."]

This mutated version of the "intelligible principle" remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked. Judges and scholars representing a wide and diverse range of views have condemned it as resting on "misunderst[ood] historical foundations."[61] They have explained, too, that it has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional. Indeed, where some have claimed to see

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[40] 11 U.S. (7 Cranch) 382, 388 (1813) (emphasis added).

[41] *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883).

[42] See *Loving v. United States*, 517 U.S. 748, 768, 116 S.Ct. 1737 (1996); *id.*, at 776 (Scalia, J., concurring in part and concurring in judgment); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[43] Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance? 83 Mich. L. Rev. 1223, 1260 (1985).

[44] 10 Wheat. at 43.

[61] *Association of American Railroads*, 135 S.Ct., at 1249 (THOMAS, J., concurring in judgment).

"intelligible principles" many "less discerning readers [have been able only to] find gibberish."[62] Even Justice Douglas, one of the fathers of the administrative state, came to criticize excessive congressional delegations in the period when the intelligible principle "test" began to take hold.[63]

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III

A

Returning to SORNA with this understanding of our charge in hand, problems quickly emerge. Start with this one: It's hard to see how SORNA leaves the Attorney General with only details to fill up. Of course, what qualifies as a detail can sometimes be difficult to discern and, as we've seen, this Court has upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct. But it's hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch. As the government itself admitted in *Reynolds*, SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them. The Attorney General may choose which pre-Act offenders to subject to the Act. And he is free to change his mind at any point or over the course of different political administrations. In the end, there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak, and not a single other case where we have upheld executive authority over matters like these on the ground they constitute mere "details." This much appears to have been deliberate, too. Because members of Congress could not reach consensus on the treatment of pre-Act offenders, it seems this was one of those situations where they found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge.

Nor can SORNA be described as an example of conditional legislation subject to executive fact-finding. To be sure, Congress could have easily written this law in that way. It might have required all pre-Act offenders to register, but then given the Attorney

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[62] Lawson, 88 Va. L. Rev., at 329. See also *Mistretta v. United States*, 488 U.S. 361, 415–417 (1989) (Scalia, J., dissenting); Ely, *supra*, at 132 ("[B]y refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic"); Wright, Beyond Discretionary Justice, 81 Yale L. J. 575, 583 (1972) ("[T]he delegation doctrine retains an important potential as a check on the exercise of unbounded, standardless discretion by administrative agencies"); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 34 (CADC 2008) (Brown, J., dissenting) ("[The majority] conjures standards and limits from thin air to construct a supposed intelligible principle") (collecting cases); Schoenbrod, 83 Mich. L. Rev., at 1231 ("[T]he [intelligible principle] test has become so ephemeral and elastic as to lose its meaning"); Schwartz, Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power, 72 Nw. U. L. Rev. 443, 446 (1977) ("[T]he requirement of defined standards has ... become all but a vestigial euphemism"); P. Hamburger, Is Administrative Law Unlawful? 378 (2014) ("[T]he notion of an 'intelligible principle' sets a ludicrously low standard for what Congress must supply"); M. Redish, The Constitution as Political Structure 138–139 (1995); Gewirtz, The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines, 40 Law & Contemp. Prob., pt. 2, pp. 46, 50–51 (Summer 1976); McGowan, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119, 1127–1128, and n. 33 (1977).

[63] "Washington, D. C., is filled with lobbyists for every special interest that is trying to make a fast buck out of some piece of the public domain.... In the thirties and forties I had viewed the creation of an agency as the solution of a problem. I learned that agencies soon became spokesmen for the status quo, that few had the guts to carry through the reforms assigned to them. I also realized that Congress defaulted when it left it up to an agency to do what the 'public interest' indicated should be done. 'Public interest' is too vague a standard to be left to free-wheeling administrators. They should be more closely confined to specific ends or goals." W. Douglas, Go East, Young Man 216–217 (1974).

General the authority to make case-by-case exceptions for offenders who do not present an " 'imminent hazard to the public safety' " comparable to that posed by newly released post-Act offenders.[82] It could have set criteria to inform that determination, too, asking the executive to investigate, say, whether an offender's risk of recidivism correlates with the time since his last offense, or whether multiple lesser offenses indicate higher or lower risks than a single greater offense.

But SORNA did none of this. Instead, it gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders. The Attorney General's own edicts acknowledge the considerable policy-making powers he enjoys, describing his rules governing pre-Act offenders as " 'of fundamental importance to the initial operation of SORNA, and to its practical scope ... since [they] determin[e] the applicability of SORNA's requirements to virtually the entire existing sex offender population.' "[83] These edicts tout, too, the Attorney General's "discretion to apply SORNA's requirements to sex offenders with pre-SORNA convictions if he determines (as he has) that the public benefits of doing so outweigh any adverse effects."[84] Far from deciding the factual predicates to a rule set forth by statute, the Attorney General himself acknowledges that the law entitles him to make his own policy decisions.

Finally, SORNA does not involve an area of overlapping authority with the executive. Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers. But SORNA stands far afield from any of that. It gives the Attorney General the authority to "prescrib[e] the rules by which the duties and rights" of citizens are determined, a quintessentially legislative power.[85]

* * *

To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to " 'unit[e]' " the " 'legislative and executive powers ... in the same person' "—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.[88]

Nor would enforcing the Constitution's demands spell doom for what some call the "administrative state." The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by SORNA. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language. Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.

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[82] Cf. *Touby*, 500 U.S. at 166.

[83] 75 Fed. Reg. 81850 (quoting 72 Fed. Reg. 8896).

[84] 75 Fed. Reg. 81850.

[85] The Federalist No. 78, at 465 (Hamilton.

[88] The Federalist No. 47, at 302

* * * [T]he government insists, the statute supplies a clear statement of legislative policy, with only details for the Attorney General to clean up.

But even this new dream of a statute wouldn't be free from doubt. A statute directing an agency to regulate private conduct to the extent "feasible" can have many possible meanings: It might refer to "technological" feasibility, "economic" feasibility, "administrative" feasibility, or even "political" feasibility. Such an "evasive standard" could threaten the separation of powers if it effectively allowed the agency to make the "important policy choices" that belong to Congress while frustrating "meaningful judicial review."[89] And that seems exactly the case here, where the Attorney General is left free to make all the important policy decisions and it is difficult to see what standard a court might later use to judge whether he exceeded the bounds of the authority given to him.

But don't worry over that; return to the real world. The bigger problem is that the feasibility standard is a figment of the government's (very recent) imagination. The only provision addressing pre-Act offenders, § 20913(d), says *nothing* about feasibility. And the omission can hardly be excused as some oversight: No one doubts that Congress knows exactly how to write a feasibility standard into law when it wishes.[90]

* * *

In *Reynolds*, the government told this Court that SORNA supplies no standards regulating the Attorney General's treatment of pre-Act offenders. This Court agreed, and everyone proceeded with eyes open about the potential constitutional consequences; in fact, the dissent expressly warned that adopting such a broad construction of the statute would yield the separation-of-powers challenge we face today.[106] Now, when the statute faces the chopping block, the government asks us to ignore its earlier arguments and reimagine (really, rewrite) the statute in a new and narrower way to avoid its long-predicted fate. No wonder some of us are not inclined to play along.

The only real surprise is that the Court fails to make good on the consequences the government invited, resolving nothing and deferring everything. In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That "is delegation running riot."[107]

NOTES AND QUESTIONS

1. In applying the intelligible principles standard to uphold SORNA, Justice Kagan's opinion for the Court in *Gundy* echoes the *Benzene* case discussed earlier in this Chapter 2 by relying on a combination of statutory text, history, and purpose to infer a feasibility requirement to limit the Attorney General's discretion. The Benzene case was decided in an era of statutory interpretation when Justices and judges tended to be less explicitly textualist in evaluating statutory meaning, arguably giving them more latitude to infer statutory requirements as Justice Kagan did here. Does textualism as an interpretive methodology make upholding statutes under the intelligible principles standard more difficult?

2. Justice Gorsuch advocated that the Court repudiate the intelligible principles

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[89] *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 676, 685–686 (1980) (Rehnquist, J., concurring in judgment).

[90] See, *e.g.*, 42 U.S.C. §§ 1310(b)(2)(C), 1383b(e)(2)(B); 20 U.S.C. § 3509; 49 U.S.C. § 24201(a)(1).

[106] See *id.*, at 450 (Scalia, J., dissenting).

[107] *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring).

standard, yet he did not suggest eliminating agency rulemaking altogether, and instead suggested the Court adopt an alternative standard for evaluating congressional delegations of discretionary power focusing on whether Congress has "[made] the policy decisions" and "prescribe[d] the rule governing private conduct" and merely left to the agency the responsibility "to fill up the details." Does distinguishing between rules governing private conduct and mere details seem more precise than the intelligible principles standard? Why or why not?

B. ARE SEC ADMINISTRATIVE LAW JUDGES CONSTITUTIONAL?

CHAPTER 3, SECTION A: THE POWER TO APPOINT

Lucia v. Securities & Exchange Commission
138 S. Ct. 2044 (2018)

■ Justice KAGAN delivered the opinion of the Court.

The Appointments Clause of the Constitution lays out the permissible methods of appointing "Officers of the United States," a class of government officials distinct from mere employees. Art. II, § 2, cl. 2. This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such "Officers." In keeping with *Freytag v. Commissioner,* 501 U.S. 868 (1991), we hold that they do.

I

The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. See 17 C.F.R. § 201.110 (2017). But the Commission also may, and typically does, delegate that task to an ALJ. See *ibid*; 15 U.S.C. § 78d–1(a). The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all.

An ALJ assigned to hear an SEC enforcement action has extensive powers—the "authority to do all things necessary and appropriate to discharge his or her duties" and ensure a "fair and orderly" adversarial proceeding. §§ 201.111, 200.14(a). Those powers "include, but are not limited to," supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally "[r]egulating the course of" the proceeding and the "conduct of the parties and their counsel"; and imposing sanctions for "[c]ontemptuous conduct" or violations of procedural requirements. §§ 201.111, 201.180; see §§ 200.14(a), 201.230. As that list suggests, an SEC ALJ exercises authority "comparable to" that of a federal district judge conducting a bench trial. *Butz v. Economou,* 438 U.S. 478, 513 (1978).

After a hearing ends, the ALJ issues an "initial decision." § 201.360(a)(1). That decision must set out "findings and conclusions" about all "material issues of fact [and] law"; it also must include the "appropriate order, sanction, relief, or denial thereof." § 201.360(b). The Commission can then review the ALJ's decision, either upon request or *sua sponte*. See § 201.360(d)(1). But if it opts against review, the Commission "issue[s] an order that the [ALJ's] decision has become final." § 201.360(d)(2). At that point, the initial decision is "deemed the action of the Commission." § 78d–1(c).

This case began when the SEC instituted an administrative proceeding against petitioner Raymond Lucia and his investment company. * * * The SEC charged Lucia under

the Investment Advisers Act, § 80b–1 *et seq.,* and assigned ALJ Cameron Elliot to adjudicate the case. After nine days of testimony and argument, Judge Elliot issued an initial decision concluding that Lucia had violated the Act and imposing sanctions, including civil penalties of $300,000 and a lifetime bar from the investment industry. * * *

On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. * * *

The Commission rejected Lucia's argument.

* * *

II

The sole question here is whether the Commission's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so. See Art. II, § 2, cl. 2.[3] And as all parties agree, none of those actors appointed Judge Elliot before he heard Lucia's case; instead, SEC staff members gave him an ALJ slot. So if the Commission's ALJs are constitutional officers, Lucia raises a valid Appointments Clause claim. The only way to defeat his position is to show that those ALJs are not officers at all, but instead non-officer employees—part of the broad swath of "lesser functionaries" in the Government's workforce. *Buckley v. Valeo,* 424 U.S. 1, 126, n. 162 (1976) (*per curiam*). For if that is true, the Appointments Clause cares not a whit about who named them. See *United States v. Germaine,* 99 U.S. 508, 510 (1879).

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *Germaine* held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." *Id.,* at 511–512. Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Id.,* at 511. *Buckley* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States." 424 U.S., at 126. The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the *amicus* and the Government urge us to elaborate on *Buckley*'s "significant authority" test, but another of our precedents makes that project unnecessary. The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments. And maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one, because in *Freytag v. Commissioner,* 501 U.S. 868 (1991), we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. As we now explain, our analysis there (sans any more detailed legal criteria) necessarily decides this case.

The officials at issue in *Freytag* were the "special trial judges" (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In "comparatively narrow and minor matters," they could both hear and definitively resolve a case for the Tax Court. *Id.*, at 873. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to

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[3] That statement elides a distinction, not at issue here, between "principal" and "inferior" officers. See *Edmond v. United States,* 520 U.S. 651, 659–660 (1997). Only the President, with the advice and consent of the Senate, can appoint a principal officer; but Congress (instead of relying on that method) may authorize the President alone, a court, or a department head to appoint an inferior officer. See *ibid.* Both the Government and Lucia view the SEC's ALJs as inferior officers and acknowledge that the Commission, as a head of department, can constitutionally appoint them.

"prepare proposed findings and an opinion" for a regular Tax Court judge to consider. *Ibid.* The proceeding challenged in *Freytag* was a major one, involving $1.5 billion in alleged tax deficiencies. *See id.*, at 871, n. 1. After conducting a 14–week trial, the STJ drafted a proposed decision in favor of the Government. A regular judge then adopted the STJ's work as the opinion of the Tax Court. See *id.,* at 872. The losing parties argued on appeal that the STJ was not constitutionally appointed.

This Court held that the Tax Court's STJs are officers, not mere employees. Citing *Germaine*, the Court first found that STJs hold a continuing office established by law. See 501 U.S., at 881. They serve on an ongoing, rather than a "temporary [or] episodic[,] basis"; and their "duties, salary, and means of appointment" are all specified in the Tax Code. *Ibid.* The Court then considered, as *Buckley* demands, the "significance" of the "authority" STJs wield. 501 U.S., at 881. In addressing that issue, the Government had argued that STJs are employees, rather than officers, in all cases (like the one at issue) in which they could not "enter a final decision." *Ibid.* But the Court, thought the Government's focus on finality "ignore[d] the significance of the duties and discretion that [STJs] possess." *Ibid.* Describing the responsibilities involved in presiding over adversarial hearings, the Court said: STJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.,* at 881–882. And the Court observed that "[i]n the course of carrying out these important functions, the [STJs] exercise significant discretion." *Id.,* at 882. That fact meant they were officers, even when their decisions were not final.[4]

Freytag says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. See *id.*, at 881. Indeed, everyone here—Lucia, the Government, and the *amicus*—agrees on that point. Far from serving temporarily or episodically, SEC ALJs "receive[] a career appointment." 5 C.F.R. § 930.204(a) (2018). And that appointment is to a position created by statute, down to its "duties, salary, and means of appointment." *Freytag,* 501 U.S., at 878, see 5 U.S.C. §§ 556–557, 5372, 3105.

Still more, the Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. *Freytag,* 501 U.S., at 878. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. See *Butz,* 438 U.S., at 513. Consider in order the four specific (if overlapping) powers *Freytag* mentioned. First, the Commission's ALJs (like the Tax Court's STJs) "take testimony." 501 U.S., at 881. More precisely, they "[r]eceiv[e] evidence" and "[e]xamine witnesses" at hearings, and may also take pre-hearing depositions. 17 C.F.R. §§ 201.111(c), 200.14(a)(4); see 5 U.S.C. § 556(c)(4). Second, the ALJs (like STJs) "conduct trials." 501 U.S., at 882. As detailed earlier, they administer oaths, rule on motions, and generally "regulat[e] the course of" a hearing, as well as the conduct of parties and counsel. § 201.111; see §§ 200.14(a)(1), (a)(7). Third, the ALJs (like STJs) "rule on the admissibility of evidence." 501 U.S., at 882; see § 201.111(c). They thus critically shape the administrative record (as they also do when issuing

[4] The Court also provided an alternative basis for viewing the STJs as officers. "Even if the duties of [STJs in major cases] were not as significant as we ... have found them," we stated, "our conclusion would be unchanged." *Freytag,* 501 U.S., at 878. That was because the Government had conceded that in minor matters, where STJs could enter final decisions, they had enough "independent authority" to count as officers. *Ibid.* And we thought it made no sense to classify the STJs as officers for some cases and employees for others. See *ibid.* Justice SOTOMAYOR relies on that back-up rationale in trying to reconcile *Freytag* with her view that "a prerequisite to officer status is the authority" to issue at least some "final decisions." But *Freytag* has two parts, and its primary analysis explicitly rejects Justice SOTOMAYOR's theory that final decisionmaking authority is a *sine qua non* of officer status. See 501 U.S., at 881–882. As she acknowledges, she must expunge that reasoning to make her reading work.

document subpoenas). See § 201.111(b). And fourth, the ALJs (like STJs) "have the power to enforce compliance with discovery orders." 501 U.S., at 882. In particular, they may punish all "[c]ontemptuous conduct," including violations of those orders, by means as severe as excluding the offender from the hearing. See § 201.180(a)(1). So point for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. As the *Freytag* Court recounted, STJs "prepare proposed findings and an opinion" adjudicating charges and assessing tax liabilities. 501 U.S., at 873. Similarly, the Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. See § 201.360(b). And what happens next reveals that the ALJ can play the more autonomous role. In a major case like *Freytag,* a regular Tax Court judge must always review an STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. See 501 U.S., at 873. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself "becomes final" and is "deemed the action of the Commission." § 201.360(d)(2); 15 U.S.C. § 78d–1(c). That last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too.

* * *

■ Justice THOMAS, with whom Justice GORSUCH joins, concurring.

I agree with the Court that this case is indistinguishable from *Freytag v. Commissioner,* 501 U.S. 868 (1991). If the special trial judges in *Freytag* were "Officers of the United States," Art. II, § 2, cl. 2, then so are the administrative law judges of the Securities and Exchange Commission. Moving forward, however, this Court will not be able to decide every Appointments Clause case by comparing it to *Freytag*. And, as the Court acknowledges, our precedents in this area do not provide much guidance. While precedents like *Freytag* discuss what is *sufficient* to make someone an officer of the United States, our precedents have never clearly defined what is *necessary*. I would resolve that question based on the original public meaning of "Officers of the United States." To the Founders, this term encompassed all federal civil officials "'with responsibility for an ongoing statutory duty.' " *NLRB v. SW General, Inc.,* 137 S. Ct. 929, 946 (2017) (THOMAS, J., concurring); Mascott, Who Are "Officers of the United States"? 70 Stan. L. Rev. 443, 564 (2018) (Mascott).[1]

The Appointments Clause provides the exclusive process for appointing "Officers of the United States." See *SW General*, 137 S. Ct., at 945 (opinion of THOMAS, J.). While principal officers must be nominated by the President and confirmed by the Senate, Congress can authorize the appointment of "inferior Officers" by "the President alone," "the Courts of Law," or "the Heads of Departments." Art. II, § 2, cl. 2.

This alternative process for appointing inferior officers strikes a balance between efficiency and accountability. Given the sheer number of inferior officers, it would be too burdensome to require each of them to run the gauntlet of Senate confirmation. See *United States v. Germaine,* 99 U.S. 508, 509–510 (1879); 2 Records of the Federal Convention of 1787, pp. 627–628 (M. Farrand ed. 1911). But, by specifying only a limited number of actors who can appoint inferior officers without Senate confirmation, the Appointments Clause maintains clear lines of accountability—encouraging good appointments and giving the

[1] I address only the dividing line between "Officers of the United States," who are subject to the Appointments Clause, and nonofficer employees, who are not. I express no view on the meaning of "Office" or "Officer" in any other provision of the Constitution, or the difference between principal officers and inferior officers under the Appointments Clause.

public someone to blame for bad ones. See The Federalist No. 76, p. 455 (C. Rossiter ed. 1961) (A. Hamilton); Wilson, Lectures on Law: Government, in 1 The Works of James Wilson 343, 359–361 (J. Andrews ed., 1896).

The Founders likely understood the term "Officers of the United States" to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty. See Mascott 454. "Officers of the United States" was probably not a term of art that the Constitution used to signify some special type of official. Based on how the Founders used it and similar terms, the phrase "of the United States" was merely a synonym for "federal," and the word "Office[r]" carried its ordinary meaning. See *id.,* at 471–479. The ordinary meaning of "officer" was anyone who performed a continuous public duty. See *id.,* at 484–507; *e.g., United States v. Maurice,* 26 F. Cas. 1211, 1214 (No. 15,747) (C.C.D.Va.1823) (defining officer as someone in "'a public charge or employment' " who performed a "continuing" duty); 8 Annals of Cong. 2304–2305 (1799) (statement of Rep. Harper) (explaining that the word officer "is derived from the Latin word *officium*" and "includes all persons holding posts which require the performance of some public duty"). For federal officers, that duty is "established by Law"—that is, by statute. Art. II, § 2, cl. 2. The Founders considered individuals to be officers even if they performed only ministerial statutory duties—including recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse). See Mascott 484–507. Early congressional practice reflected this understanding. With exceptions not relevant here, Congress required all federal officials with ongoing statutory duties to be appointed in compliance with the Appointments Clause. See *id.,* at 507–545.

Applying the original meaning here, the administrative law judges of the Securities and Exchange Commission easily qualify as "Officers of the United States." These judges exercise many of the agency's statutory duties, including issuing initial decisions in adversarial proceedings. See 15 U.S.C. § 78d–1(a); 17 C.F.R. §§ 200.14, 200.30–9 (2017). As explained, the importance or significance of these statutory duties is irrelevant. All that matters is that the judges are continuously responsible for performing them.

In short, the administrative law judges of the Securities Exchange Commission are "Officers of the United States" under the original meaning of the Appointments Clause. They have "'responsibility for an ongoing statutory duty,'" which is sufficient to resolve this case. *SW General,* 137 S. Ct., at 946 (opinion of THOMAS, J.). Because the Court reaches the same conclusion by correctly applying *Freytag,* I join its opinion.

■ [The opinion of Justice BREYER concurring in the judgment in part and dissenting in part, joined in part by Justices GINSBURG and SOTOMAYOR, is omitted. Justice BREYER agreed with the Court that the SEC ALJs were improperly appointed but wrote separately (1) to address "a different, embedded constitutional question" regarding "the constitutionality of statutory 'for cause' removal protections," and (2) to disagree with the Court's remedy. Ed.]

■ Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

The Court today and scholars acknowledge that this Court's Appointments Clause jurisprudence offers little guidance on who qualifies as an "Officer of the United States." See, *e.g., ante,* at 2051 ("The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments"); Plecnik, Officers Under the Appointments Clause, 11 Pitt. Tax Rev. 201, 204 (2014). The lack of guidance is not without consequence. "[Q]uestions about the Clause continue to arise regularly both in the operation of the Executive Branch and in proposed legislation." 31 Opinion of Office of Legal Counsel 73, 76 (2007) (Op. OLC). This confusion can undermine the reliability and finality of proceedings and result in wasted resources.

As the majority notes, this Court's decisions currently set forth at least two prerequisites to officer status: (1) an individual must hold a "continuing" office established

by law, *United States v. Germaine,* 99 U.S. 508, 511–512 (1879), and (2) an individual must wield "significant authority," *Buckley v. Valeo,* 424 U.S. 1, 126 (1976) (*per curiam*). The first requirement is relatively easy to grasp; the second, less so. To be sure, to exercise "significant authority," the person must wield considerable powers in comparison to the average person who works for the Federal Government. As this Court has noted, the vast majority of those who work for the Federal Government are not "Officers of the United States." See *Free Enterprise Fund v. Public Company Accounting Oversight Bd.,* 561 U.S. 477, 506, n. 9 (2010) (indicating that well over 90% of those who render services to the Federal Government and are paid by it are not constitutional officers). But this Court's decisions have yet to articulate the types of powers that will be deemed significant enough to constitute "significant authority."

To provide guidance to Congress and the Executive Branch, I would hold that one requisite component of "significant authority" is the ability to make final, binding decisions on behalf of the Government. Accordingly, a person who merely advises and provides recommendations to an officer would not herself qualify as an officer.

There is some historical support for such a requirement. For example, in 1822, the Supreme Judicial Court of Maine opined in the "fullest early explication" of the meaning of an " 'office,' " that " 'the term "office" implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office,' " that " 'in its effects[,] ... will bind the rights of others.' " 31 Op. OLC 83 (quoting 3 Greenl. (Me.) 481, 482). In 1899, a Report of the Judiciary Committee of the House of Representatives noted that "the creation and conferring of an office involves a delegation to the individual of ... sovereign functions," *i.e.,* "the power to ... legislate, ... execute law, or ... hear and determine judicially questions submitted." 1 A. Hinds, Precedents of the House of Representatives of the United States 607 (1907). Those who merely assist others in exercising sovereign functions but who do not have the authority to exercise sovereign powers themselves do not wield significant authority. *Id.,* at 607–608. Consequently, a person who possesses the "mere power to investigate some particular subject and report thereon" or to engage in negotiations "without [the] power to make binding" commitments on behalf of the Government is not an officer. *Ibid.*

Confirming that final decisionmaking authority is a prerequisite to officer status would go a long way to aiding Congress and the Executive Branch in sorting out who is an officer and who is a mere employee. At the threshold, Congress and the Executive Branch could rule out as an officer any person who investigates, advises, or recommends, but who has no power to issue binding policies, execute the laws, or finally resolve adjudicatory questions.

Turning to the question presented here, it is true that the administrative law judges (ALJs) of the Securities and Exchange Commission wield "extensive powers." They preside over adversarial proceedings that can lead to the imposition of significant penalties on private parties. In the hearings over which they preside, Commission ALJs also exercise discretion with respect to important matters.

Nevertheless, I would hold that Commission ALJs are not officers because they lack final decisionmaking authority. As the Commission explained below, the Commission retains "'plenary authority over the course of [its] administrative proceedings and the rulings of [its] law judges.' " *In re Raymond J. Lucia Companies, Inc. & Raymond J. Lucia, Sr.,* SEC Release No. 75837 (Sept. 3, 2015). Commission ALJs can issue only "initial" decisions. 5 U.S.C. § 557(b). The Commission can review any initial decision upon petition or on its own initiative. 15 U.S.C. § 78d–1(b). The Commission's review of an ALJ's initial decision is *de novo*. 5 U.S.C. § 557(c). It can "make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. § 201.411(a) (2017). The Commission is also in no way confined by the record initially developed by an ALJ. The Commission can accept evidence itself or refer a matter to an ALJ to take additional evidence that the Commission deems relevant or necessary. See *ibid.*; § 201.452. In recent

years, the Commission has accepted review in every case in which it was sought. See R. Jackson, Fact and Fiction: The SEC's Oversight of Administrative Law Judges (Mar. 9, 2018), http://clsbluesky.law.columbia.edu/2018/03/09/fact-and-fiction-the-secs-oversight-of-administrative-law-judges/ (as last visited June 19, 2018). Even where the Commission does not review an ALJ's initial decision, as in cases in which no party petitions for review and the Commission does not act *sua sponte,* the initial decision still only becomes final when the Commission enters a finality order. 17 C.F.R. § 201.360(d)(2). And by operation of law, every action taken by an ALJ "shall, for all purposes, ... be deemed the action of the *Commission*." 15 U.S.C. § 78d–1(c) (emphasis added). In other words, Commission ALJs do not exercise significant authority because they do not, and cannot, enter final, binding decisions against the Government or third parties.

The majority concludes that this case is controlled by *Freytag v. Commissioner,* 501 U.S. 868 (1991). In *Freytag,* the Court suggested that the Tax Court's special trial judges (STJs) acted as constitutional officers even in cases where they could not enter final, binding decisions. In such cases, the Court noted, the STJs presided over adversarial proceedings in which they exercised "significant discretion" with respect to "important functions," such as ruling on the admissibility of evidence and hearing and examining witnesses. 501 U.S., at 881–882. That part of the opinion, however, was unnecessary to the result. The Court went on to conclude that even if the STJs' duties in such cases were "not as significant as [the Court] found them to be," its conclusion "would be unchanged." *Id.,* at 882. The Court noted that STJs could enter final decisions in certain types of cases, and that the Government had conceded that the STJs acted as officers with respect to those proceedings. *Ibid.* Because STJs could not be "officers for purposes of some of their duties ..., but mere employees with respect to other[s]," the Court held they were officers in all respects. *Ibid. Freytag* is, therefore, consistent with a rule that a prerequisite to officer status is the authority, in at least some instances, to issue final decisions that bind the Government or third parties.

NOTES AND QUESTIONS

1. While *Lucia* was pending before the Supreme Court, the SEC issued an Order in which it "ratified" the prior appointment of all of its ALJs, thereby rendering their appointments as inferior officers valid. SEC Order (Nov. 30, 2017), available at https://www.sec.gov/ litigation/opinions/2017/33-10440.pdf (last visited Aug. 1, 2019). Also, the Order remanded several dozen pending matters in which ALJs had reached initial decisions back to the ALJs who decided them, with instructions to reconsider them. In remanding Lucia's case, however, Justice Kagan for the Court ordered that his case be reconsidered by a different, properly appointed ALJ, because the original ALJ had already heard and decided the case. According to Justice Kagan, "[t]o cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled." Dissenting, Justices Breyer, Sotomayor, and Ginsburg disagreed,

> After all, when a judge is reversed on appeal and a new trial ordered, typically the judge who rehears the case is the same judge who heard it the first time. The reversal here is based on a technical constitutional question, and the reversal implies no criticism at all of the original judge or his ability to conduct the new proceedings.

Why do you think Justice Kagan ordered reconsideration of Lucia's case by a different ALJ? Should the remedy be unique to Lucia's case, or should the same remedy apply in every instance in which a court remands an ALJ's decision to an agency for reconsideration? What do you think the benefits and burdens of such a remedy are?

2. Justice Kagan's majority opinion in Lucia relied on the "exercises significant authority" standard from *Buckley v. Valeo*, *supra*. Jennifer Mascott has argued that courts

have struggled to apply the *Buckley* standard and that the original public meaning of "officer is much broader, "encompass[ing] any individual who had ongoing responsibility for a government duty," including "even individuals with more ministerial duties like recordkeeping." In their concurring opinion in *Lucia*, Justices Thomas and Gorsuch did not call for replacing the *Buckley* standard, but they cited Mascott's article favorably and agreed with the majority that the SEC ALJs were Officers of the United States because they had "responsibility for an ongoing statutory duty." What are the implications, if any, of this concurrence? What would be the consequences if every government official who has responsibility for an ongoing statutory duty is declared an Officer of the United States?

C. PRESIDENT TRUMP'S BORDER WALL EMERGENCY DECLARATION

CHAPTER 3, SECTION C: OTHER PRESIDENTIAL ATTEMPTS TO CONTROL AGENCIES

On February 15, 2019, President Trump issued a declaration of emergency that has started a new battle in the courts with respect to the President's power to take unilateral actions based on a declaration of emergency. During his presidential campaign, President Trump promised to build a wall across the border between the U.S. and Mexico and made that promise the centerpiece of his campaign. Before he became president there were walls or fences of various types along parts of the border, but construction of a wall that covers the entire border would cost many billions of dollars.

After President Trump's first two years in office, Congress had appropriated only a small fraction of the amount of funding needed to construct the wall that he had promised. At that point, President Trump asked Congress to appropriate $5.7 billion to begin the process of constructing a wall. He told Congress that he would not sign an appropriations bill to fund the government unless the bill included the $5.7 billion he requested. When Congress refused to enact such a bill before appropriations for most of the government expired, the government shut down for lack of funds. President Trump made it clear that he would not reopen the government by signing any appropriations bill until Congress presented him with an appropriations bill that included the $5.7 billion he had requested for the wall.

After a 35-day shutdown, President Trump reopened the government by signing an appropriations bill that included only $1.375 billion that could be used to build the wall. At the same time that he signed that bill, President Trump declared a national emergency and announced that he was directing the Department of Defense (DOD), the Department of Homeland Security and the Department of Interior to reallocate $5.7 billion from other purposes to fund the wall.

President Trump announced his intention to spend a total of $8 billion to begin to build the wall. At least arguably, some of that funding is available through reallocation of funds that can be implemented independent of the declaration of an emergency. In *Lincoln v. Vigil*, 508 U.S. 182 (1993), excerpted and discussed in Chapter 7, the Supreme Court held that agencies have unreviewable discretion to reallocate funds among agency programs and functions unless Congress has expressly appropriated funds for a particular purpose. The Trump Administration claims that some of the funds that it has directed agencies to reallocate to construction of the wall are not the subject of statutory provisions requiring that appropriated funds be spent for a particular purpose.

On the other hand, a substantial portion of the funds that President Trump directed agencies to reallocate are the subject of statutory provisions that expressly require that the

funds be spent for particular purposes. Thus, for instance, $3.5 billion would come from DOD's military construction budget. That budget identifies many specific construction projects and directs DOD to spend a specific amount on each such projects. Reallocation of funds from the DOD construction budget to fund the wall is lawful if, but only if, President Trump's declaration of a national emergency is lawful.

President Trump relied on the National Emergencies Act of 1976 (NEA) as the basis for his declaration of emergency and his order to reallocate appropriated funds to build the wall. The NEA authorizes the President to declare a national emergency and to exercise extraordinary power, including the expenditure of funds, during such an emergency. It contains no definition of national emergency and states no criteria applicable to declaring such an emergency.

The NEA is one of over one hundred statutes that authorize the president to take extraordinary actions during a national emergency. Most of those statutes are similar to the NEA in their lack of any definition of national emergency or any criteria for declaring such an emergency. Presidents have declared national emergencies sixty times since 1976. Thirty-two of those declarations are still in effect. Congress has never terminated an emergency that was declared under the NEA, and no one has ever challenged the validity of a declaration of emergency issued under the NEA in court.

The NEA contains a provision that authorizes Congress to terminate a national emergency by enacting a concurrent resolution. It also requires Congress to convene to consider whether to terminate a national emergency every six months after the emergency is declared. When Congress enacted the NEA, it believed that it could enact a concurrent resolution that would terminate a national emergency by majority vote of both Houses of Congress.

The Supreme Court's opinion in *INS v. Chadha*, 462 U.S. 919 (1983), excerpted and discussed in Chapter 2, corrected that erroneous belief. The *Chadha* Court held that Congress can enact a concurrent resolution that binds the president only by following the procedures for enactment of a statute provided in Article I of the Constitution, including presentment of the resolution to the president subject to a potential presidential veto.

After President Trump issued his declaration of emergency, both Houses of Congress voted to enact a resolution of disapproval of the declaration. President Trump vetoed the resolution. Both Houses voted to override the veto, but neither House could muster the two-thirds majority required to override a veto.

Numerous petitions to review the declaration of emergency have been filed with the courts. The government will argue that none of the petitioners has standing, but at least some petitioners are likely to be able to establish standing—e.g., states in which DOD construction projects would have taken place but for the declaration.

NOTES AND QUESTIONS

1. Some petitioners are likely to argue that Congress never would have enacted the NEA had it known that it could not terminate an emergency by enacting a concurrent resolution without having to present the resolution to the president subject to potential veto. They likely will contend then that the power conferred on the president by the NEA is not severable from the power of Congress to terminate an emergency included in the NEA. And they likely will maintain that, since the power to terminate an emergency by enacting a concurrent resolution is unconstitutional, it follows that the entire statute, including the provision that authorizes the president to declare an emergency is unconstitutional.

How should the Supreme Court resolve that issue? Do you believe that Congress would have conferred on the president any power to declare an emergency if it had known

that it would not unilaterally be able to terminate any emergency the president declared? Should a court to hold unconstitutional the NEA's grant of emergency power to the president, thereby requiring the president to ask Congress to authorize any extraordinary action the president wants to take in an emergency?

2. Responding to challenges to President Trump's emergency declaration, the government is likely to argue that presidential declarations of emergencies are unreviewable exercises of discretion because the NEA does not provide any standards that a court can use to review such an action. Can such a holding be reconciled with the Supreme Court's decision in *Youngstown* to review President Truman's emergency order requiring the military to seize and operate the steel mills when a strike closed them during the Korean War? Does it matter that the petitioner in *Youngstown* argued that President Truman's action violated its constitutional rights under the Takings Clause of the Constitution, whereas the funds at stake in the present scenario are statutory allocations to government programs? Can Congress argue that President Trump's action violates *its* constitutional rights because Article I confers on Congress the exclusive power to appropriate funds? Does Congress have standing to obtain review of the emergency order and to make that argument?

3. Assuming that President Trump's action is reviewable, into which of Justice Jackson's three categories does it fall? Was the president's power "at its maximum" because the president was acting pursuant to an express authorization from Congress? Or was the president's power "at its lowest ebb" because Congress twice expressly rejected the action President Trump took—once when the president asked Congress to appropriate funds for the wall, and again when Congress voted in favor of the concurrent resolution (albeit short of a two-thirds majority) to terminate the emergency?

4. Assuming that the action is reviewable, how should a court approach the process of review? The Administrative Procedure Act (APA) sets forth the standards that courts should apply when they review an agency action. The Courts have held, however, that the President is not an agency for APA purposes. *See Franklin v. Massachusetts*, 505 U.S. 788 (1992), excerpted and discussed in Chapter 7.

5. Opponents of President Trump's emergency order argue that it is invalid because no emergency exists. When he issued the order, President Trump explained his action as follows:

> The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate. In response to the directive in my April 4, 2018, memorandum and subsequent requests for support by the Secretary of Homeland Security, the Department of Defense has provided support and resources to the Department of Homeland Security at the

southern border. Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.

Opponents point to evidence that seems to contradict many of the president's statements of fact. Should a court conduct an evidentiary hearing to decide whether an emergency exists that justifies the action the president has taken? If so, should all presidential declarations of emergency be subject to challenge through use of an evidentiary hearing? Opponents also point to a statement President Trump made when he issued the order: "I could do the wall over a longer period of time. *I didn't need to do this*, but I'd rather do it much faster." Does that statement contradict his claim that he is responding to an emergency? Should a court consider the statement? If so, what significance should it attach to the statement?

6. Opponents of President Trump's emergency order argue that the order is not a legitimate exercise of presidential emergency power because it differs from prior presidential emergency declarations. That argument is problematic because presidents have exercised emergency powers on hundreds of occasions in widely varying circumstances and with widely varying results. In many cases, presidents have imposed sanctions, including asset freezes and trade restrictions, on nations and foreign nationals who are believed to be acting in ways that are detrimental to the country. Other past uses include President Lincoln's suspension of habeas corpus during the Civil War, President Roosevelt's closure of banks to avoid a run on banks during the depression, President Wilson's restrictions on shipping to enable adequate shipments of food and raw materials to the U.S. during World War I, and President Nixon's use of extraordinary measures to allow continued mail delivery during a postal workers' strike. Does President Trump's use of emergency power to begin to fund construction of a border wall differ from these historic uses? If so, how does it differ?

7. Some opponents of the wall emergency funding order are likely to argue that the NEA is unconstitutional as a violation of the nondelegation doctrine. Should the Court take such an argument seriously? If so, which of the different ways of enforcing the nondelegation doctrine described in Chapter 2 should the Court use? What would be the consequences of a judicial decision that the NEA violates the nondelegation doctrine? What would it mean for the dozens of other statutes in which Congress has given the president emergency powers?

8. Democrats have led the opposition to President Trump's emergency order to fund the border wall, but many Republicans are concerned that order could be used as a precedent by a future Democrat president to take actions that Republicans would find particularly distasteful and inappropriate. Thus, for instance, some Republicans have expressed concern that a Democrat might declare a climate change emergency and order major reductions in use of fossil fuels or declare a public health emergency and order the Center for Medicaid and Medicare Services to enroll all Americans who lack health insurance in Medicare. Are those concerns realistic? Could you distinguish those scenarios from President Trump's border wall funding emergency order? In which of Justice Jackson's three categories of presidential power would those other scenarios fit?

9. Bipartisan concern about potential abuses of presidential emergency powers has reached the point at which many legislators of both parties are searching for ways of amending the NEA to limit the power of presidents to take unilateral actions based on a declaration of emergency. Can you think of any substantive statutory limit that would avoid, or reduce, the potential for abuse while leaving the president with enough discretion

to respond quickly and appropriately to bona fide emergencies? Are temporal limits—e.g., an amendment that limits the duration of any emergency to six months unless Congress authorizes an extension—more promising than substantive limits? How confident are you that Congress would be able to agree upon a proposed extension in time to avoid the potentially catastrophic effects of an expiration of an emergency order that is critical to the health or safety of the country?

D. *KERRY V. DIN*

CHAPTER 4: THE ROLE OF THE DUE PROCESS CLAUSE

The Supreme Court's resolution of *Kerry v. Din* included opinions that, at least in theory, could foreshadow a significant reduction in both the scope of when the Due Process Clause applies and the procedures required by the Due Process Clause. The sweeping rhetoric of Justice Scalia's plurality opinion suggests such a shift. Nevertheless, his opinion merely represented a plurality of three justices. Moreover, the passing of Justice Scalia and the appointment of Justice Gorsuch, whose views on the Due Process Clause have not been comprehensively analyzed or reported and may be different, may make this case anomalous. Also, the case implicated national security concerns. As the materials accompanying *Hamdi v. Rumsfeld* in the Second Edition attest, the courts' application of the Due Process Clause in cases with national security implications is sometimes a little different than in the more typical case concerning the availability of government benefits. Regardless, the opinions in *Kerry v. Din* are well-written and interesting. Also, as most of the due process cases in the Second Edition are older, *Kerry v. Din* offers a nice opportunity to contemplate procedural due process in a more contemporary context. It pairs particularly nicely with a discussion problem offered after the following case excerpt.

Kerry v. Din
135 S. Ct. 2128 (2015)

■ Justice SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice THOMAS join.

Fauzia Din is a citizen and resident of the United States. Her husband, Kanishka Berashk, is an Afghan citizen and former civil servant in the Taliban regime who resides in that country. When the Government declined to issue an immigrant visa to Berashk, Din sued.

The state action of which Din complains is the denial of *Berashk's* visa application. Naturally, one would expect him—not Din—to bring this suit. But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission. See *Kleindienst v. Mandel,* 408 U.S. 753, 762 (1972). So, Din attempts to bring suit on his behalf, alleging that the Government's denial of her *husband's* visa application violated *her* constitutional rights. In particular, she claims that the Government denied her due process of law when, without adequate explanation of the reason for the visa denial, it deprived her of her constitutional right to live in the United States with her spouse. There is no such constitutional right. What Justice BREYER's dissent strangely describes as a "deprivation of her freedom to live together with her spouse in America" is, in any world other than the artificial world of ever-expanding constitutional rights, nothing more than a deprivation of her spouse's freedom to immigrate into America.

* * *

I

A

Under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.,* an alien may not enter and permanently reside in the United States without a visa. § 1181(a). The INA creates a special visa-application process for aliens sponsored by "immediate relatives" in the United States. §§ 1151(b), 1153(a). Under this process, the citizen-relative first files a petition on behalf of the alien living abroad, asking to have the alien classified as an immediate relative. See §§ 1153(f), 1154(a)(1). If and when a petition is approved, the alien may apply for a visa by submitting the required documents and appearing at a United States Embassy or consulate for an interview with a consular officer. See §§ 1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA. § 1361.

One ground for inadmissibility, § 1182(a)(3)(B), covers "[t]errorist activities." In addition to the violent and destructive acts the term immediately brings to mind, the INA defines "terrorist activity" to include providing material support to a terrorist organization and serving as a terrorist organization's representative. § 1182(a)(3)(B)(i), (iii)-(vi).

B

Fauzia Din came to the United States as a refugee in 2000, and became a naturalized citizen in 2007. She filed a petition to have Kanishka Berashk, whom she married in 2006, classified as her immediate relative. The petition was granted, and Berashk filed a visa application. The U.S. Embassy in Islamabad, Pakistan, interviewed Berashk and denied his application. A consular officer informed Berashk that he was inadmissible under § 1182(a)(3)(B) but provided no further explanation.

* * *

II

The Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." Although the amount and quality of process that our precedents have recognized as "due" under the Clause has changed considerably since the founding, see *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 28–36 (1991) (SCALIA, J., concurring in judgment), it remains the case that *no* process is due if one is not deprived of "life, liberty, or property," *Swarthout v. Cooke,* 562 U.S. 216, 219 (2011) (*per curiam*). The first question that we must ask, then, is whether the denial of Berashk's visa application deprived Din of any of these interests. Only if we answer in the affirmative must we proceed to consider whether the Government's explanation afforded sufficient process.

A

The Due Process Clause has its origin in Magna Carta. * * * The Court has recognized that at the time of the Fifth Amendment's ratification, the words "due process of law" were understood "to convey the same meaning as the words 'by the law of the land' " in Magna Carta. *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272, 276, 15 L.Ed. 372 (1856). Although the terminology associated with the guarantee of due process changed dramatically between 1215 and 1791, the general scope of the underlying rights protected stayed roughly constant.

Edward Coke, whose Institutes "were read in the American Colonies by virtually every student of law," *Klopfer v. North Carolina,* 386 U.S. 213, 225 (1967), thoroughly described the scope of the interests that could be deprived only pursuant to "the law of the land." Magna Carta, he wrote, ensured that, without due process, "no man [may] be taken or imprisoned"; "disseised of his lands, or tenements, or dispossessed of his goods, or chattels"; "put from his livelihood without answer"; "barred to have the benefit of the law"; denied "the franchises, and priviledges, which the subjects have of the gift of the king"; "exiled"; or

"forejudged of life, or limbe, disherited, or put to torture, or death." 1 Coke, *supra,* at 46–48. Blackstone's description of the rights protected by Magna Carta is similar, although he discusses them in terms much closer to the "life, liberty, or property" terminology used in the Fifth Amendment. He described first an interest in "personal security," "consist[ing] in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." 1 W. Blackstone, Commentaries on the Laws of England 125 (1769). Second, the "personal liberty of individuals" "consist[ed] in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint." *Id.,* at 130. And finally, a person's right to property included "the free use, enjoyment, and disposal of all his acquisitions." *Id.,* at 134.

Din, of course, could not conceivably claim that the denial of Berashk's visa application deprived her—or for that matter even Berashk—of life or property; and under the above described historical understanding, a claim that it deprived her of liberty is equally absurd. The Government has not "taken or imprisoned" Din, nor has it "confine[d]" her, either by "keeping [her] against h[er] will in a private house, putting h[er] in the stocks, arresting or forcibly detaining h[er] in the street." *Id.,* at 132. Indeed, not even Berashk has suffered a deprivation of liberty so understood.

B

Despite this historical evidence, this Court has seen fit on several occasions to expand the meaning of "liberty" under the Due Process Clause to include certain implied "fundamental rights." (The reasoning presumably goes like this: If you have a right to do something, you are free to do it, and deprivation of freedom is a deprivation of "liberty"—never mind the original meaning of that word in the Due Process Clause.) These implied rights have been given *more* protection than "life, liberty, or property" properly understood. While one may be dispossessed of property, thrown in jail, or even executed so long as proper procedures are followed, the enjoyment of implied constitutional rights cannot be limited at all, except by provisions that are "narrowly tailored to serve a compelling state interest." *Reno v. Flores,* 507 U.S. 292, 301–302 (1993). Din does not explicitly argue that the Government has violated this absolute prohibition of the substantive component of the Due Process Clause, likely because it is obvious that a law barring aliens engaged in terrorist activities from entering this country is narrowly tailored to serve a compelling state interest. She nevertheless insists that, because enforcement of the law affects her enjoyment of an implied fundamental liberty, the Government must first provide her a full battery of procedural-due-process protections.

* * *

Din describes the denial of Berashk's visa application as implicating, alternately, a "liberty interest in her marriage," a "right of association with one's spouse," "a liberty interest in being reunited with certain blood relatives," and "the liberty interest of a U.S. citizen under the Due Process Clause to be free from arbitrary restrictions on his right to live with his spouse." To be sure, this Court has at times indulged a propensity for grandiloquence when reviewing the sweep of implied rights, describing them so broadly that they would include not only the interests Din asserts but many others as well. For example: "Without doubt, [the liberty guaranteed by the Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience" *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). But this Court is not bound by dicta, especially dicta that have been repudiated by the holdings of our subsequent cases. And the actual holdings of the cases Din relies upon hardly establish the capacious right she now asserts.

Unlike the States in *Loving v. Virginia,* 388 U.S. 1 (1967), *Zablocki v. Redhail,* 434 U.S. 374 (1978), and *Turner v. Safley,* 482 U.S. 78 (1987), the Federal Government here has not

attempted to forbid a marriage. Although Din and the dissent borrow language from those cases invoking a fundamental right to marriage, they both implicitly concede that no such right has been infringed in this case. Din relies on the "associational interests in marriage that necessarily are protected by the right to marry," and that are "presuppose[d]" by later cases establishing a right to marital privacy. The dissent supplements the fundamental right to marriage with a fundamental right to live in the United States in order to find an affected liberty interest.

Attempting to abstract from these cases some liberty interest that might be implicated by Berashk's visa denial, Din draws on even more inapposite cases. *Meyer,* for example, invalidated a state statute proscribing the teaching of foreign language to children who had not yet passed the eighth grade, reasoning that it violated the teacher's "right thus to teach and the right of parents to engage him so to instruct their children." 262 U.S., at 400. *Pierce v. Society of Sisters,* 268 U.S. 510, 534–535 (1925), extended *Meyer,* finding that a law requiring children to attend public schools "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Moore v. East Cleveland,* 431 U.S. 494, 505–506 (1977), extended this interest in raising children to caretakers in a child's extended family, striking down an ordinance that limited occupancy of a single-family house to members of a nuclear family on the ground that "[d]ecisions concerning child rearing ... long have been shared with grandparents or other relatives." And *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965), concluded that a law criminalizing the use of contraceptives by married couples violated "penumbral rights of 'privacy and repose' " protecting "the sacred precincts of the marital bedroom"—rights which do not plausibly extend into the offices of our consulates abroad.

Nothing in the cases Din cites establishes a free-floating and categorical liberty interest in marriage (or any other formulation Din offers) sufficient to trigger constitutional protection whenever a regulation in any way touches upon an aspect of the marital relationship. Even if our cases could be construed so broadly, the relevant question is not whether the asserted interest "is consistent with this Court's substantive-due-process line of cases," but whether it is supported by "this Nation's history and practice." *Glucksberg,* 521 U.S., at 723–724 (emphasis deleted). Even if we might "imply" a liberty interest in marriage generally speaking, that must give way when there is a tradition denying the specific application of that general interest. Thus, *Glucksberg* rejected a claimed liberty interest in "self-sovereignty" and "personal autonomy" that extended to assisted suicide when there was a longstanding tradition of outlawing the practice of suicide. *Id.,* at 724, 727–728 (internal quotation marks omitted).

Here, a long practice of regulating spousal immigration precludes Din's claim that the denial of Berashk's visa application has deprived her of a fundamental liberty interest. Although immigration was effectively unregulated prior to 1875, as soon as Congress began legislating in this area it enacted a complicated web of regulations that erected serious impediments to a person's ability to bring a spouse into the United States. See Abrams, What Makes the Family Special? 80 U. Chi. L. Rev. 7, 10–16 (2013).

Most strikingly, perhaps, the Expatriation Act of 1907 provided that "any American woman who marries a foreigner shall take the nationality of her husband." Ch. 2534, 34 Stat. 1228. Thus, a woman in Din's position not only lacked a liberty interest that might be affected by the Government's disposition of her husband's visa application, she lost her *own* rights as a citizen upon marriage. When Congress began to impose quotas on immigration by country of origin less than 15 years later, with the Immigration Act of 1921, it omitted fiances and husbands from the family relations eligible for preferred status in the allocation of quota spots. § 2(d), 42 Stat. 6. Such relations were similarly excluded from the relations eligible for nonquota status, when that status was expanded three years later. Immigration Act of 1924, § 4(a), 43 Stat. 155.

To be sure, these early regulations were premised on the derivative citizenship of women, a legacy of the law of coverture that was already in decline at the time. C. Bredbenner, A Nationality of Her Own 5 (1998). Modern equal-protection doctrine casts substantial doubt on the permissibility of such asymmetric treatment of women citizens in the immigration context, and modern moral judgment rejects the premises of such a legal order. Nevertheless, this all-too-recent practice repudiates any contention that Din's asserted liberty interest is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Glucksberg, supra,* at 720 (citations and internal quotations marks omitted).

Indeed, the law showed little more solicitude for the marital relationship when it was a male resident or citizen seeking admission for his fiancee or wife. The Immigration Act of 1921 granted nonquota status only to unmarried, minor children of citizens, § 2(a), while granting fiancees and wives preferred status *within* the allocation of quota spots, § 2(d). In other words, a citizen could move his spouse forward in the line, but once all the quota spots were filled for the year, the spouse was barred without exception. This was not just a theoretical possibility: As one commentator has observed, "[f]or many immigrants, the family categories did little to help, because the quotas were so small that the number of family members seeking slots far outstripped the number available." Abrams, *supra,* at 13.

Although Congress has tended to show "a continuing and kindly concern ... for the unity and the happiness of the immigrant family," E. Hutchinson, Legislative History of American Immigration Policy 1798–1965, p. 518 (1981), this has been a matter of legislative grace rather than fundamental right. Even where Congress has provided special privileges to promote family immigration, it has also "written in careful checks and qualifications." *Ibid.* This Court has consistently recognized that these various distinctions are "policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress." *Fiallo v. Bell,* 430 U.S. 787, 798 (1977). Only by diluting the meaning of a fundamental liberty interest and jettisoning our established jurisprudence could we conclude that the denial of Berashk's visa application implicates any of Din's fundamental liberty interests.

C

Justice BREYER suggests that procedural due process rights attach to liberty interests that either are (1) created by nonconstitutional law, such as a statute, or (2) "sufficiently important" so as to "flow 'implicit[ly]' from the design, object, and nature of the Due Process Clause."

The first point is unobjectionable, at least given this Court's case law. See, *e.g., Goldberg v. Kelly,* 397 U.S. 254, 262, and n. 8 (1970); *Collins,* 503 U.S., at 129. But it is unhelpful to Din, who does not argue that a statute confers on her a liberty interest protected by the Due Process Clause. * * *

Justice BREYER's second point—that procedural due process rights attach even to some nonfundamental liberty interests that have *not* been created by statute—is much more troubling. He relies on the implied-fundamental-rights cases discussed above to divine a "right of spouses to live together and to raise a family," along with "a citizen's right to live within this country." But perhaps recognizing that our established methodology for identifying fundamental rights cuts against his conclusion, he argues that the term "liberty" in the Due Process Clause includes implied rights that, although not so fundamental as to deserve substantive-due-process protection, are important enough to deserve procedural-due-process protection. In other words, there are two categories of implied rights protected by the Due Process Clause: really fundamental rights, which cannot be taken away at all absent a compelling state interest; and not-so-fundamental rights, which can be taken away so long as procedural due process is observed.

The dissent fails to cite a single case supporting its novel theory of implied nonfundamental rights. It is certainly true that *Vitek v. Jones,* 445 U.S. 480 (1980), and *Washington v. Harper,* 494 U.S. 210 (1990), do not entail implied *fundamental* rights, but this is because they do not entail *implied* rights at all. *Vitek* concerned the involuntary commitment of a prisoner, deprivation of the expressly protected right of liberty under the original understanding of the term. " 'Among the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.' " *Vitek, supra,* at 492. The same is true of *Harper,* which concerned forced administration of psychotropic drugs to an inmate. 494 U.S., at 214. Arguably, *Paul v. Davis,* 424 U.S. 693 (1976), also addressed an interest expressly contemplated within the meaning of "liberty." See 1 W. Blackstone, Commentaries on the Laws of England 125 ("The right of personal security consists in a person's ... reputation"). But that case is of no help to the dissent anyway, since it found no liberty interest entitled to the Due Process Clause's protection. *Paul, supra,* at 713–714. Finally, the dissent points to *Goss v. Lopez,* 419 U.S. 565, 574 (1975), a case that "recognize[d] ... as a property interest" a student's right to a public education conferred by Ohio's express statutory creation of a public school system; and further concluded that the student's 10–day suspension implicated the constitutionally grounded liberty interest in " 'a person's good name, reputation, honor, or integrity.' "

Ultimately, the dissent identifies no case holding that there is an implied nonfundamental right protected by procedural due process, and only one case even *suggesting* that there is. That suggestion, in *Smith v. Organization of Foster Families For Equality & Reform,* 431 U.S. 816 (1977), is contained in dictum in a footnote, *id.,* at 842, n. 48. The holding of the case was that "the procedures provided by New York State ... and by New York Cit[y] ... are adequate to protect *whatever* liberty interests appellees *may* have." *Id.,* at 856 (emphasis added).

* * * The Government has not refused to recognize Din's marriage to Berashk, and Din remains free to live with her husband anywhere in the world that both individuals are permitted to reside. And the Government has not expelled Din from the country. It has simply determined that Kanishka Berashk engaged in terrorist activities within the meaning of the Immigration and Nationality Act, and has therefore denied him admission into the country. This might, indeed, deprive Din of something "important," but if that is the criterion for Justice BREYER's new pairing of substantive and procedural due process, we are in for quite a ride.

* * *

Because Fauzia Din was not deprived of "life, liberty, or property" when the Government denied Kanishka Berashk admission to the United States, there is no process due to her under the Constitution. To the extent that she received any explanation for the Government's decision, this was more than the Due Process Clause required. The judgment of the Ninth Circuit is vacated, and the case is remanded for further proceedings.

■ Justice KENNEDY, with whom Justice ALITO joins, concurring in the judgment.

* * * [R]ather than deciding, as the plurality does, whether Din has a protected liberty interest, my view is that, even assuming she does, the notice she received regarding her husband's visa denial satisfied due process.

Today's disposition should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her alien spouse. The Court need not decide that issue, for this Court's precedents instruct that, even assuming she has such an interest, the Government satisfied due process when it notified Din's husband that his visa was denied under the immigration statute's terrorism bar, § 1182(a)(3)(B).

I

The conclusion that Din received all the process to which she was entitled finds its most substantial instruction in the Court's decision in *Kleindienst v. Mandel,* 408 U.S. 753 (1972). There, college professors—all of them citizens—had invited Dr. Ernest Mandel, a self-described " 'revolutionary Marxist,' " to speak at a conference at Stanford University. *Id.,* at 756. Yet when Mandel applied for a temporary nonimmigrant visa to enter the country, he was denied. At the time, the immigration laws deemed aliens "who advocate[d] the economic, international, and governmental doctrines of World communism" ineligible for visas. § 1182(a)(28)(D) (1964 ed.). Aliens ineligible under this provision did have one opportunity for recourse: The Attorney General was given discretion to waive the prohibition and grant individual exceptions, allowing the alien to obtain a temporary visa. § 1182(d)(3). For Mandel, however, the Attorney General, acting through the Immigration and Naturalization Service (INS), declined to grant a waiver. In a letter regarding this decision, the INS explained Mandel had exceeded the scope and terms of temporary visas on past trips to the United States, which the agency deemed a " 'flagrant abuse of the opportunities afforded him to express his views in this country.' " 408 U.S., at 759.

The professors who had invited Mandel to speak challenged the INS' decision, asserting a First Amendment right to " 'hear his views and engage him in a free and open academic exchange.' " *Id.,* at 760. They claimed the Attorney General infringed this right when he refused to grant Mandel relief. See *ibid.*

* * *

The reasoning and the holding in *Mandel* control here. * * * *Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made "on the basis of a facially legitimate and bona fide reason." *Id.,* at 770. Once this standard is met, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against" the constitutional interests of citizens the visa denial might implicate. *Ibid.* This reasoning has particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by noncitizens who seek entry to this country.

II

Like the professors who sought an audience with Dr. Mandel, Din claims her constitutional rights were burdened by the denial of a visa to a noncitizen, namely her husband. And as in *Mandel,* the Government provided a reason for the visa denial: It concluded Din's husband was inadmissible under § 1182(a)(3)(B)'s terrorism bar. Even assuming Din's rights were burdened directly by the visa denial, the remaining question is whether the reasons given by the Government satisfy *Mandel* 's "facially legitimate and bona fide" standard. I conclude that they do.

Here, the consular officer's determination that Din's husband was ineligible for a visa was controlled by specific statutory factors. The provisions of § 1182(a)(3)(B) establish specific criteria for determining terrorism-related inadmissibility. The consular officer's citation of that provision suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements. Given Congress' plenary power to "suppl[y] the conditions of the privilege of entry into the United States," *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 543 (1950), it follows that the Government's decision to exclude an alien it determines does not satisfy one or more of those conditions is facially legitimate under *Mandel*.

The Government's citation of § 1182(a)(3)(B) also indicates it relied upon a bona fide factual basis for denying a visa to Berashk. Cf. *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14–15 (1926). Din claims due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis. It is true the Attorney General there disclosed the facts motivating his decision to deny Dr. Mandel a waiver, and that the Court cited those facts as demonstrating "the Attorney General validly

exercised the plenary power that Congress delegated to the Executive." 408 U.S., at 769. But unlike the waiver provision at issue in *Mandel,* which granted the Attorney General nearly unbridled discretion, § 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa. Din, moreover, admits in her Complaint that Berashk worked for the Taliban government, which, even if itself insufficient to support exclusion, provides at least a facial connection to terrorist activity. Absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk a visa—which Din has not plausibly alleged with sufficient particularity—*Mandel* instructs us not to "look behind" the Government's exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed. See 408 U.S., at 770.

The Government, furthermore, was not required, as Din claims, to point to a more specific provision within § 1182(a)(3)(B). To be sure, the statutory provision the consular officer cited covers a broad range of conduct. And Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on which the consular officer relied. Congress understood this problem, however. The statute generally requires the Government to provide an alien denied a visa with the "specific provision or provisions of law under which the alien is inadmissible," § 1182(b)(1); but this notice requirement does not apply when, as in this case, a visa application is denied due to terrorism or national security concerns. § 1182(b)(3). Notably, the Government is not prohibited from offering more details when it sees fit, but the statute expressly refrains from requiring it to do so.

* * *

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

* * *

In my view, Ms. Din should prevail on this constitutional claim. She possesses the kind of "liberty" interest to which the Due Process Clause grants procedural protection. And the Government has failed to provide her with the procedure that is constitutionally "due." See *Swarthout v. Cooke,* 562 U.S. 216, 219 (2011) (*per curiam*) (setting forth the Court's two-step inquiry for procedural due process claims). * * *

I

* * *

The liberty interest that Ms. Din seeks to protect consists of her freedom to live together with her husband in the United States. She seeks *procedural,* not *substantive,* protection for this freedom. Compare *Wilkinson v. Austin,* 545 U.S. 209, 221 (2005) (Due Process Clause requires compliance with fair *procedures* when the government deprives an individual of certain "liberty" or "property" interests), with *Reno v. Flores,* 507 U.S. 292, 302 (1993) (Due Process Clause limits the extent to which government can *substantively* regulate certain "fundamental" rights, "no matter what process is provided"). Cf. *Smith v. Organization of Foster Families For Equality & Reform,* 431 U.S. 816, 842, n. 48 (1977) (liberty interests arising under the Constitution for procedural due process purposes are not the same as fundamental rights requiring substantive due process protection).

Our cases make clear that the Due Process Clause entitles her to such procedural rights as long as (1) she seeks protection for a liberty interest sufficiently important for procedural protection to flow "implicit[ly]" from the design, object, and nature of the Due Process Clause, or (2) nonconstitutional law (a statute, for example) creates "an expectation" that a person will not be deprived of that kind of liberty without fair procedures. *Wilkinson, supra,* at 221.

The liberty for which Ms. Din seeks protection easily satisfies both standards. As this Court has long recognized, the institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys community support, and plays a central role in most individuals' "orderly pursuit of happiness," *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). Similarly, the Court has long recognized that a citizen's right to live within this country, being fundamental, enjoys basic procedural due process protection. See *Ng Fung Ho v. White,* 259 U.S. 276, 284–285 (1922); *Baumgartner v. United States,* 322 U.S. 665, 670 (1944).

At the same time, the law, including visa law, surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure. Cf. *Turner v. Safley,* 482 U.S. 78, 95–96 (1987) (noting various legal benefits of marriage); 8 U.S.C. § 1151(b)(2)(A)(i) (special visa preference for spouse of an American citizen). Justice SCALIA's response—that nonconstitutional law creates an "expectation" that merits procedural protection under the Due Process Clause only if there is an unequivocal statutory right—is sorely mistaken. His argument rests on the rights/privilege distinction that this Court rejected almost five decades ago, in the seminal case of *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970). See generally *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights"); *id.,* at 572 ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed").

Justice SCALIA's more general response—claiming that I have created a new category of constitutional rights—misses the mark. I break no new ground here. Rather, this Court has *already* recognized that the Due Process Clause guarantees that the government will not, without fair procedure, deprive individuals of a host of rights, freedoms, and liberties that are no more important, and for which the state has created no greater expectation of continued benefit, than the liberty interest at issue here. See, *e.g., Wolff v. McDonnell,* 418 U.S. 539, 556–557 (1974) (prisoner's right to maintain "goodtime" credits shortening term of imprisonment; procedurally protected liberty interest based on nonconstitutional law); *Paul v. Davis,* 424 U.S. 693, 701 (1976) (right to certain aspects of reputation; procedurally protected liberty interest arising under the Constitution); *Goss v. Lopez,* 419 U.S. 565, 574–575 (1975) (student's right not to be suspended from school class; procedurally protected liberty interest arising under the Constitution); *Vitek v. Jones,* 445 U.S. 480, 491–495 (1980) (prisoner's right against involuntary commitment; procedurally protected liberty interest arising under the Constitution); *Washington v. Harper,* 494 U.S. 210, 221–222 (1990) (mentally ill prisoner's right not to take psychotropic drugs; procedurally protected liberty interest arising under the Constitution); see generally *Goldberg, supra,* at 262–263 (right to welfare benefits; procedurally protected property interest based on nonconstitutional law). How could a Constitution that protects individuals against the arbitrary deprivation of so diverse a set of interests not also offer some form of procedural protection to a citizen threatened with governmental deprivation of her freedom to live together with her spouse in America? As compared to reputational harm, for example, how is Ms. Din's liberty interest any less worthy of due process protections?

II

A

The more difficult question is the nature of the procedural protection required by the Constitution. After all, sometimes, as with the military draft, the law separates spouses with little individualized procedure. And sometimes, as with criminal convictions, the law provides procedure to one spouse but not to the other. Unlike criminal convictions, however, neither spouse here has received any procedural protection. And, unlike the draft

(justified by a classic military threat), the deprivation does not apply similarly to hundreds of thousands of American families.

Rather, here, the Government makes individualized visa determinations through the application of a legal rule to particular facts. Individualized adjudication normally calls for the ordinary application of Due Process Clause procedures. *Londoner v. City and County of Denver,* 210 U.S. 373, 385–386 (1908). And those procedures normally include notice of an adverse action, an opportunity to present relevant proofs and arguments, before a neutral decisionmaker, and reasoned decisionmaking. See *Hamdi v. Rumsfeld,* 542 U.S. 507, 533 (2004) (plurality opinion); see also Friendly, Some Kind of a Hearing, 123 U. Pa. L. Rev. 1267, 1278–1281 (1975). These procedural protections help to guarantee that government will not make a decision directly affecting an individual arbitrarily but will do so through the reasoned application of a rule of law. It is that rule of law, stretching back at least 800 years to Magna Carta, which in major part the Due Process Clause seeks to protect. *Hurtado v. California,* 110 U.S. 516, 527 (1884).

Here, we need not consider all possible procedural due process elements. Rather we consider only the minimum procedure that Ms. Din has requested—namely, a statement of reasons, some kind of explanation, as to why the State Department denied her husband a visa.

We have often held that this kind of statement, permitting an individual to understand *why* the government acted as it did, is a fundamental element of due process. See, *e.g., Goldberg,* 397 U.S., at 267–268; *Perry v. Sindermann,* 408 U.S. 593, 603 (1972); *Morrissey v. Brewer,* 408 U.S. 471, 485, 489 (1972); *Wolff, supra,* at 563–564; *Goss, supra,* at 581; *Mathews v. Eldridge,* 424 U.S. 319, 345–346 (1976); *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 546 (1985); *Wilkinson,* 545 U.S., at 224; *Hamdi, supra,* at 533 (plurality opinion).

That is so in part because a statement of reasons, even one provided after a visa denial, serves much the same function as a "notice" of a proposed action. It allows Ms. Din, who suffered a "serious loss," a fair "opportunity to meet" "the case" that has produced separation from her husband. See *Joint Anti–Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 171–172 (1951) (Frankfurter, J., concurring); see also *Hamdi, supra,* at 533 (plurality opinion); *Wolff, supra,* at 563; Friendly, *supra,* at 1280 ("notice" must provide "the grounds for" the relevant action). Properly apprised of the grounds for the Government's action, Ms. Din can then take appropriate action—whether this amounts to an appeal, internal agency review, or (as is likely here) an opportunity to submit additional evidence and obtain reconsideration, 22 CFR 42.81(e) (2014).

I recognize that our due process cases often determine the constitutional insistence upon a particular procedure by balancing, with respect to that procedure, the "private interest" at stake, "the risk of an erroneous deprivation" absent the sought-after protection, and the Government's interest in not providing additional procedure. *Eldridge, supra,* at 335. Here "balancing" would not change the result. The "private interest" is important, the risk of an "erroneous deprivation" is significant, and the Government's interest in not providing a reason is normally small, at least administratively speaking. Indeed, Congress requires the State Department to provide a reason for a visa denial in most contexts. 8 U.S.C. § 1182(b)(1). Accordingly, in the absence of some highly unusual circumstance (not shown to be present here), the Constitution requires the Government to provide an adequate reason why it refused to grant Ms. Din's husband a visa. That reason, in my view, could be either the factual basis for the Government's decision or a sufficiently specific statutory subsection that conveys effectively the same information.

B

1

Justice KENNEDY, without denying that Ms. Din was entitled to a reason, believes that she received an adequate reason here. According to the complaint, however, the State

Department's denial letter stated only that the visa "had been denied under ... 8 U.S.C. § 1182(a)." In response to requests for further explanation, the State Department sent an e-mail stating that the visa "had been denied under ... 8 U.S.C. § 1182(a)(3)(B)—the terrorism and national security bars to admissibility." *Id.,* at 31. I do not see how either statement could count as adequate.

For one thing, the statutory provision to which it refers, § 1182(a)(3)(B), sets forth, not one reason, but dozens. It is a complex provision with 10 different subsections, many of which cross-reference other provisions of law. Some parts cover criminal conduct that is particularly serious, such as hijacking aircraft and assassination. §§ 1182(a)(3)(B)(iii)(I), (IV). Other parts cover activity that, depending on the factual circumstances, cannot easily be labeled "terrorist." * * * Taken together the subsections, directly or through cross-reference, cover a vast waterfront of human activity potentially benefitting, sometimes in major ways, sometimes hardly at all, sometimes directly, sometimes indirectly, sometimes a few people, sometimes many, sometimes those with strong links, sometimes those with hardly a link, to a loosely or strongly connected group of individuals, which, through many different kinds of actions, might fall within the broad statutorily defined term "terrorist."

For another thing, the State Department's reason did not set forth any factual basis for the Government's decision. Perhaps the Department denied the visa because Ms. Din's husband at one point was a payroll clerk for the Afghan Government when that government was controlled by the Taliban. But there is no way to know if that is so.

The generality of the statutory provision cited and the lack of factual support mean that here, the reason given is analogous to telling a criminal defendant only that he is accused of "breaking the law"; telling a property owner only that he cannot build because environmental rules forbid it; or telling a driver only that police pulled him over because he violated traffic laws. As such, the reason given cannot serve its procedural purpose. It does not permit Ms. Din to assess the correctness of the State Department's conclusion; it does not permit her to determine what kinds of facts she might provide in response; and it does not permit her to learn whether, or what kind of, defenses might be available. In short, any "reason" that Ms. Din received is not constitutionally adequate.

* * *

DISCUSSION PROBLEM

In its efforts to protect national security, the Transportation Security Administration (TSA), an agency within the Department of Homeland Security, has established a transportation watch list system, known colloquially as the "no fly list," that prohibits listed persons from boarding and traveling on airplanes. In December 2004, Congress included language in the Intelligence Reform and Terrorism Prevention Act requiring the TSA to "establish a procedure to enable airline passengers who are delayed or prohibited from boarding a flight" due to their placement on the no fly list that would allow those passengers to "appeal such determination and correct information contained in the system." Does placement on the no fly list implicate procedural due process concerns? Should the Department of Homeland Security be required to provide a pre-termination hearing before placing someone on the no fly list? Why or why not?

The following sources offer more comprehensive analysis of this issue:

- Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 Emory L.J. 1313 (2016) (offering interesting examples as well as extensive analysis of the issue).

- *Green v. TSA*, 351 F.Supp.2d 1119 (W.D. Wash. 2005) (holding that the no fly list does not implicate a protected due process interest, evaluating "stigma plus" argument based on *Wisconsin v. Constantineau* and like cases).

- *Latif v. Holder*, 28 F.Supp.3d 1134 (D. Ore. 2014) (recognizing a protected liberty interest in flying internationally, and also a reputational interest under the "stigma plus" rationale of *Wisconsin v. Constantineau* and like cases).

E. *STATE FARM*, PRETEXT, AND THE CENSUS BUREAU CASE

CHAPTER 5, SECTION C: ARBITRARY AND CAPRICIOUS ("HARD LOOK") REVIEW

We have chosen not to include an excerpt from the Supreme Court's recent decision concerning the proposed citizenship question for the 2020 census in the upcoming Third Edition. We question whether the case is a harbinger of cases to come or will prove to be an outlier. Nevertheless, the following summary may prove useful as a basis for classroom discussion of the materials on *State Farm* and hard look review.

Hard Look Review and Pretextual Reasoning

As described in the above materials, the *State Farm*, hard look approach to arbitrary and capricious review under APA § 706(2)(A) requires agencies to provide contemporaneous explanations for their regulatory choices. How much credence should courts give to the explanations the agency formally provides in the administrative record, as opposed to unexpressed motives suggested by extraneous sources?

The Supreme Court debated this question in *Department of Commerce v. New York*, 139 S. Ct. 2551 91991). The case concerned a challenge to a decision by the Secretary of Commerce to include a citizenship question on the 2020 census questionnaire, contrary to the census Bureau's recommendation that the government instead rely on administrative records alone or, alternatively, develop a data model based on an alternative survey tool to estimate citizenship across the U.S. population. As the Court noted, censuses prior to 2010 asked at least some households about citizenship. Although the 2010 census did not, the Secretary published a memo explaining his decision to reinstate the citizenship question on the 2020 census. In the memo, he analyzed the strengths and weaknesses of the different alternative approaches to measuring citizenship across the population, and he also stated that he was acting in response to a Department of Justice (DOJ) request for assistance in obtaining better citizenship data to aid in Voting Rights Act enforcement. The advministrative record included DOJ's memorandum to that effect, but also included additional documentation reflecting that the Secretary had considered including the question prior to receiving DOJ's request, and had inquired of DOJ whether it would support the question's inclusion in the census. Parties challenging the Secretary's decision as arbitrary and capricious under the APA and *State Farm* argued that the Voting Rights Act justification was pretext for the Secretary's desire to manipulate the census for political purposes.

The Court rejected the Secretary's decision to include the citizenship question on the ground that the expressed justification of responding to the DOJ's request for assistance was "incongruent with what the record reveals about the agency's priorities and decisionmaking process." Considering an expansive administrative record that included not only the above-mentioned documentation but also more than 12,000 pages of internal deliberative materials, the Court concluded that the record "reveal[ed] a significant mismatch between the decision the Secretary made and the rationale he provided" and

"tells a story that does not match the explanation the Secretary gave for his decision." Accordingly, the Court said that the Secretary's decision violated State Farm by failing to adequately explain the reasons for his action.

Dissenting in part, Justices Thomas, Gorsuch, and Kavanaugh expressed grave concern about the majority's rejection fo the Secretary's decision on grounds of pretext. They noted the Court's own conclusion that the administrative record did not support a finding of bad faith or improper behavior. They contended as well that the Court has never previously "invalidated an agency action as 'pretextual.'" More ominously, they asserted that, "if taken seriously as a rule of decision, this holding would transform administrative law."

> It is not difficult for political opponents of executive action to generate controversy with accusations of pretext, deceit, and illicit motives. Significant policy decisions are regularly criticized as products of partisan influence, interest group pressure, corruption, and animus. Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the [APA].

Id. at 2576 (Thomas, J., dissenting in part). They predicted as well that, "[n]ow that the Court has opened up this avenue of attack, opponents of executive actions have strong incentives to craft narratives that would derail them" and that partisans will "use the courts to harangue executive officers through depositions, discovery, delay, and distraction." How persuasive do you find the dissenters concerns?

Recall from the *State Farm* decision itself Justice Rehnquist's opinion concurring in part and dissenting in part, representing four Justices, in which he suggested that agency action in that case "seemed to be related to the election of" President Reagan, and that the election of a new president of a different political party with different policy goals should be considered "a perfectly reasonable basis" for agency decisionmaking. Are the political considerations endorsed by Justice Rehnquist in *State Farm* the same or different from those of the *Department of Commerce* case?

F. *ENCINO MOTORCARS, LLC V. NAVARRO* AND THE CONTINUED DEBATE OVER THE RELATIONSHIP BETWEEN *CHEVRON* DEFERENCE AND HARD LOOK REVIEW

CHAPTER 5, SECTION C: ARBITRARY AND CAPRICIOUS ("HARD LOOK") REVIEW
CHAPTER 6, SECTION B: THE *CHEVRON* "REVOLUTION"

On page 590 of the Second Edition, the fourth note after the excerpt from *FCC v. Fox Television Stations, Inc.* discusses a footnote in *Judulang v. Holder*, 132 S. Ct. 476 (2011), that seems to equate *Chevron* step two and hard look review. A short discussion on pages 708-709 in Chapter 6 further addresses the relationship between those doctrines. Subsequent opinions of the Supreme Court have continued to hint at a relationship between *Chevron* and hard look review, as exemplified by the following.

Encino Motorcars, LLC v. Navarro
136 S. Ct. 2117 (2016).

■ Justice KENNEDY delivered the opinion of the Court.

This case addresses whether a federal statute requires payment of increased compensation to certain automobile dealership employees for overtime work. The federal statute in question is the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.,*enacted

in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas–Best Freight System, Inc.,* 450 U.S. 728, 739 (1981). Among its other provisions, the FLSA requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. The rate of overtime pay must be "not less than one and one-half times the regular rate" of the employee's pay. § 207(a).

Five current and former service advisors brought this suit alleging that the automobile dealership where they were employed was required by the FLSA to pay them overtime wages. The dealership contends that the position and duties of a service advisor bring these employees within § 213(b)(10)(A), which establishes an exemption from the FLSA overtime provisions for certain employees engaged in selling or servicing automobiles. The case turns on the interpretation of this exemption.

I

Automobile dealerships in many communities not only sell vehicles but also sell repair and maintenance services. Among the employees involved in providing repair and maintenance services are service advisors, partsmen, and mechanics. Service advisors interact with customers and sell them services for their vehicles. A service advisor's duties may include meeting customers; listening to their concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; recording service orders; following up with customers as the services are performed (for instance, if new problems are discovered); and explaining the repair and maintenance work when customers return for their vehicles. See also *Brennan v. Deel Motors, Inc.,* 475 F.2d 1095, 1096 (C.A.5 1973); 29 CFR § 779.372(c)(4) (1971). Partsmen obtain the vehicle parts needed to perform repair and maintenance and provide those parts to the mechanics. See § 779.372(c)(2). Mechanics perform the actual repair and maintenance work. See § 779.372(c)(3).

In 1961, Congress enacted a blanket exemption from the FLSA's minimum wage and overtime provisions for all automobile dealership employees. Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. In 1966, Congress repealed that broad exemption and replaced it with a narrower one. The revised statute did not exempt dealership employees from the minimum wage requirement. It also limited the exemption from the overtime compensation requirement to cover only certain employees—in particular, "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft" at a covered dealership. Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. Congress authorized the Department of Labor to "promulgate necessary rules, regulations, or orders" with respect to this new provision. § 602, *id.,* at 844.

* * *

In [1974], Congress amended the statutory provision by enacting its present text, which now sets out the exemption in two subsections. Fair Labor Standards Amendments of 1974, § 14, 88 Stat. 65. The first subsection is at issue in this case. It exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" at a covered dealership. 29 U.S.C. § 213(b)(10)(A). The second subsection exempts "any salesman primarily engaged in selling trailers, boats, or aircraft" at a covered dealership. § 213(b)(10)(B). The statute thus exempts certain employees engaged in servicing automobiles, trucks, or farm implements, but not similar employees engaged in servicing trailers, boats, or aircraft.

In 1978, the Department issued an opinion letter departing from its previous position. Taking a position consistent with the cases decided by the courts, the opinion letter stated that service advisors could be exempt under § 213(b)(10)(A). Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH–467) (1978), [1978–1981 Transfer Binder] CCH Wages–

Hours Administrative Rulings ¶ 31,207. The letter acknowledged that the Department's new policy "represent [ed] a change from the position set forth in section 779.372(c)(4)" of its 1970 regulation. In 1987, the Department confirmed its 1978 interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under § 213(b)(10)(A). It observed that some courts had interpreted the statutory exemption to cover service advisors; and it stated that, as a result of those decisions, it would "no longer deny the [overtime] exemption for such employees." Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04–4(k) (Oct. 20, 1987), online at https://perma.cc/5GHD–KCJJ (all Internet materials as last visited June 16, 2016). The Department again acknowledged that its new position represented a change from its 1970 regulation and stated that the regulation would "be revised as soon as is practicable." *Ibid.*

Twenty-one years later, in 2008, the Department at last issued a notice of proposed rulemaking. 73 Fed. Reg. 43654. The notice observed that every court that had considered the question had held service advisors to be exempt under § 213(b)(10)(A), and that the Department itself had treated service advisors as exempt since 1987. *Id.,* at 43658–43659. The Department proposed to revise its regulations to accord with existing practice by interpreting the exemption in § 213(b)(10)(A) to cover service advisors.

In 2011, however, the Department changed course yet again. It announced that it was "not proceeding with the proposed rule." 76 Fed. Reg. 18833. Instead, the Department completed its 2008 notice-and-comment rulemaking by issuing a final rule that took the opposite position from the proposed rule. The new final rule followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells automobiles, trucks, or farm implements. *Id.,* at 18859 (codified at 29 CFR § 779.372(c)(1)).

The Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under § 213(b)(10)(A).

* * *

II

A

The full text of the statutory subsection at issue states that the overtime provisions of the FLSA shall not apply to:

> "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b)(10)(A).

The question presented is whether this exemption should be interpreted to include service advisors. To resolve that question, it is necessary to determine what deference, if any, the courts must give to the Department's 2011 interpretation.

In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*. At the first step, a court must determine whether Congress has "directly spoken to the precise question at issue." 467 U.S., at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.,* at 842–843. If not, then at the second step the court must defer to the agency's interpretation if it is "reasonable." *Id.,* at 844.

A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency

will use that authority to resolve ambiguities in the statutory scheme. See *id.,* at 843–844; *United States v. Mead Corp.,* 533 U.S. 218, 229–230 (2001). When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that "relatively formal administrative procedure" is a "very good indicator" that Congress intended the regulation to carry the force of law, so *Chevron* should apply. *Mead Corp., supra,* at 229–230. But *Chevron* deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. 533 U.S., at 227. Of course, a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule. Cf., *e.g., JEM Broadcasting Co. v. FCC,* 22 F.3d 320, 324–326 (C.A.D.C.1994); cf. also *Auer v. Robbins,* 519 U.S. 452, 458–459 (1997) (party cannot challenge agency's failure to amend its rule in light of changed circumstances without first seeking relief from the agency). But where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation. Respondents do not contest the manner in which petitioner has challenged the agency procedures here, and so this opinion assumes without deciding that the challenge was proper.

One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983) (internal quotation marks omitted). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.,* 419 U.S. 281, 286 (1974). But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. See 5 U.S.C. § 706(2)(A); *State Farm, supra,* at 42–43.

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. See, *e.g., National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 981–982 (2005); *Chevron,* 467 U.S., at 863–864. When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009). But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Ibid.* (emphasis deleted). In explaining its changed position, an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Ibid.*; see also *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 742 (1996). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations, supra,* at 515–516. It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X, supra,* at 981. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. See *Mead Corp., supra,* at 227.

B

Applying those principles here, the unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. In promulgating the 2011 regulation, the Department offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry

reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.

The retail automobile and truck dealership industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements. See National Automobile Dealers Association, Comment Letter on Proposed Rule Updating Regulations Issued Under the Fair Labor Standards Act (Sept. 26, 2008), online at https://www.regulations.gov/#!documentDetail;D=WHD–2008–0003–0038. Dealerships and service advisors negotiated and structured their compensation plans against this background understanding. Requiring dealerships to adapt to the Department's new position could necessitate systemic, significant changes to the dealerships' compensation arrangements. Dealerships whose service advisors are not compensated in accordance with the Department's new views could also face substantial FLSA liability, see 29 U.S.C. § 216(b), even if this risk of liability may be diminished in some cases by the existence of a separate FLSA exemption for certain employees paid on a commission basis, see § 207(i), and even if a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position, see § 259(a). In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy.

* * *

It is not the role of the courts to speculate on reasons that might have supported an agency's decision. "[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm,* 463 U.S., at 43 (citing *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947)). Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision. See *Fox Television Stations,* 556 U.S., at 515–516. This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law. See 5 U.S.C. § 706(2)(A); *State Farm, supra,* at 42–43. It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute.

* * *

For the reasons above, § 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Because the decision below relied on *Chevron* deference to this regulation, it is appropriate to remand for the Court of Appeals to interpret the statute in the first instance. Cf. *Mead,* 533 U.S., at 238–239. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

■ Justice GINSBURG, with whom Justice SOTOMAYOR joins, concurring.

I agree in full that, in issuing its 2011 rule, the Department of Labor did not satisfy its basic obligation to explain "that there are good reasons for [a] new policy." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). The Department may have adequate reasons to construe the Fair Labor Standards Act automobile-dealership exemption as it did. The 2011 rulemaking tells us precious little, however, about what those reasons are.

I write separately to stress that nothing in today's opinion disturbs well-established law. In particular, where an agency has departed from a prior position, there is no "heightened standard" of arbitrary-and-capricious review. *Id.,* at 514. An agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Fox,* 556 U.S., at 515 (emphasis deleted). "But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good

reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Ibid.*

* * *

■ Justice THOMAS, with whom Justice ALITO joins, dissenting.

The Court granted this case to decide whether an exemption under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.,* "requires payment of increased compensation to certain automobile dealership employees"—known as service advisors—"for overtime work." The majority declines to resolve that question. Instead, after explaining why the Court owes no deference to the Department of Labor's regulation purporting to interpret this provision, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984), the majority leaves it "for the Court of Appeals to interpret the statute in the first instance."

I agree with the majority's conclusion that we owe no *Chevron* deference to the Department's position because "deference is not warranted where [a] regulation is 'procedurally defective.' " But I disagree with its ultimate decision to punt on the issue before it. We have an "obligation ... to decide the merits of the question presented." *CBOCS West, Inc. v. Humphries,* 553 U.S. 442, 472 (2008) (THOMAS, J., dissenting). We need not wade into the murky waters of *Chevron* deference to decide whether the Ninth Circuit's reading of the statute was correct. We must instead examine the statutory text. That text reveals that service advisors are salesmen primarily engaged in the selling of services for automobiles. Accordingly, I would reverse the Ninth Circuit's judgment.

* * *

NOTES AND QUESTIONS

1. Not everyone is convinced either that the Supreme Court has merged *Chevron* step two and hard look review, or that it should. In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 496 (2d Cir. 2017), in evaluating an EPA regulation interpreting the Clean Water Act, the Second Circuit expressly rejected the blending of *Chevron* step two and *State Farm* analysis. "An agency's initial interpretation of a statutory provision should be evaluated only under the *Chevron* framework, which does not incorporate the *State Farm* standard," for example, because an agency need not provide "factual materials or cost-benefit analysis" in order to justify its decision to adopt a particular interpretation of a statute. The court went on to suggest that courts should evaluate *State Farm* challenges before *Chevron* ones. Citing *Encino Motorcars*, the court said that, "where a litigant brings both a *State Farm* challenge and a *Chevron* challenge to a rule, and the *State Farm* challenge is successful, there is no need for the reviewing court to engage in *Chevron* analysis."

2. What might be the implications of blending *Chevron* step two and hard look review for other aspects of judicial review of administrative action? In *Perez-Guzman v. Lynch*, 835 F.3d 1066 (9th Cir. 2016), the Ninth Circuit recognized the six-year limitations period on APA procedural challenges imposed by 28 U.S.C. § 2401(a) as potentially limiting consideration of *State Farm*-type arguments at *Chevron* step two. The case concerned an interpretation of the Immigration Reform and Immigrant Responsibility Act of 1996 as expressed in a regulation adopted by the Attorney General in 1999. Finding the statute ambiguous, the court proceeded to *Chevron*'s second step and the argument that the court should not defer "because the agency failed to adequately explain its reasoning when it promulgated the regulation in 1999." Notwithstanding *Encino Motorcars*, the court declined to consider that particular argument regarding the inapplicability of *Chevron*

deference because the six-year limitations period for raising APA procedural claims had expired.

G. THE RETENTION OF *AUER* DEFERENCE

CHAPTER 6: STATUTORY INTERPRETATION IN ADMINISTRATIVE LAW

We will be replacing Section F of Chapter 6 of the casebook in its entirety to reflect the evolution of the Seminole Rock/Auer controlling weight standard through the debate over its validity and the Supreme Court's decision to retain the doctrine, albeit with limitations and qualifications, in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). These materials are as follows.

AGENCY INTERPRETATIONS OF AGENCY REGULATIONS

Just as congressionally-enacted statutes are often ambiguous, so too agency regulations that attempt to resolve those statutory ambiguities may themselves prove to be unclear. And, just as agencies promulgate regulations to resolve ambiguous statutory language and fill statutory gaps, agencies often issue rulings, orders, or other guidance that interpret those regulations. Given the deference that reviewing courts give to agency interpretations of the statutes that they administer, should judges also defer to an agency's interpretations of its own regulations?

The Supreme Court in 1945 articulated the standard by which reviewing courts should evaluate those interpretations. In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the Court considered the substantive validity of an Office of Price Administration bulletin that interpreted an earlier Office regulation promulgated in the course of administering the Emergency Price Control Act of 1942. In evaluating the bulletin, the Court offered the following:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. * * * In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

Id. at 413–14.

As Sanne Knudsen and Amy Wildermuth have documented, for many years after the Supreme Court issued its decision in *Seminole Rock*, courts did not pay its controlling weight standard much mind. Starting in the 1960s, the courts embraced the standard as a rebuttable presumption in favor of judicial deference to agency interpretations of their own regulations. *See* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47 (2015); Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of* Seminole Rock, 22 Geo. Mason L. Rev. 647 (2015). And, if the Supreme Court's decision *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), initially raised doubts regarding the ongoing vitality of *Seminole Rock*'s controlling weight standard, the Court put such questions to rest with the following decision.

Auer v. Robbins
519 U.S. 452 (1997)

■ Justice SCALIA delivered the opinion of the Court.

The Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 *et seq.,* exempts "bona fide executive, administrative, or professional" employees from overtime pay requirements. This case presents the question whether the Secretary of Labor's "salary-basis" test for determining an employee's exempt status reflects a permissible reading of the statute as it applies to public-sector employees. We also consider whether the Secretary has reasonably interpreted the salary-basis test to deny an employee salaried status (and thus grant him overtime pay) when his compensation may "as a practical matter" be adjusted in ways inconsistent with the test.

I

Petitioners are sergeants and a lieutenant employed by the St. Louis Police Department. They brought suit in 1988 against respondents, members of the St. Louis Board of Police Commissioners, seeking payment of overtime pay that they claimed was owed under § 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1). Respondents argued that petitioners were not entitled to such pay because they came within the exemption provided by § 213(a)(1) for "bona fide executive, administrative, or professional" employees.

Under regulations promulgated by the Secretary, one requirement for exempt status under § 213(a)(1) is that the employee earn a specified minimum amount on a "salary basis." 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996). According to the regulations, "[a]n employee will be considered to be paid 'on a salary basis' ... if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." § 541.118(a). Petitioners contended that the salary-basis test was not met in their case because, under the terms of the St. Louis Metropolitan Police Department Manual, their compensation could be reduced for a variety of disciplinary infractions related to the "quality or quantity" of work performed. Petitioners also claimed that they did not meet the other requirement for exempt status under § 213(a)(1): that their duties be of an executive, administrative, or professional nature. See §§ 541.1(a)-(e), 541.2(a)-(d), 541.3(a)-(d).

* * *

II

The FLSA grants the Secretary broad authority to "defin[e] and delimi[t]" the scope of the exemption for executive, administrative, and professional employees. § 213(a)(1). Under the Secretary's chosen approach, exempt status requires that the employee be paid on a salary basis, which in turn requires that his compensation not be subject to reduction because of variations in the "quality or quantity of the work performed," 29 C.F.R. § 541.118(a) (1996). Because the regulation goes on to carve out an exception from this rule for "[p]enalties imposed ... for infractions of safety rules of major significance," § 541.118(a)(5), it is clear that the rule embraces reductions in pay for disciplinary violations. The Secretary is of the view that employees whose pay is adjusted for disciplinary reasons do not deserve exempt status because as a general matter true "executive, administrative, or professional" employees are not "disciplined" by piecemeal deductions from their pay, but are terminated, demoted, or given restricted assignments.

A

The FLSA did not apply to state and local employees when the salary-basis test was adopted in 1940. See 29 U.S.C. § 203(d) (1940 ed.); 5 Fed. Reg. 4077 (1940) (salary-basis test). In 1974 Congress extended FLSA coverage to virtually all public-sector employees, Pub. L. 93–259, § 6, 88 Stat. 58–62, and in 1985 we held that this exercise of

power was consistent with the Tenth Amendment, *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery,* 426 U.S. 833 (1976)). The salary-basis test has existed largely in its present form since 1954, see 19 Fed. Reg. 4405 (1954), and is expressly applicable to public-sector employees, see 29 C.F.R. §§ 553.2(b), 553.32(c) (1996).

Respondents concede that the FLSA may validly be applied to the public sector, and they also do not raise any general challenge to the Secretary's reliance on the salary-basis test. They contend, however, that the "no disciplinary deductions" element of the salary-basis test is invalid for public-sector employees because as applied to them it reflects an unreasonable interpretation of the statutory exemption. That is so, they say, because the ability to adjust public-sector employees' pay—even executive, administrative or professional employees' pay—as a means of enforcing compliance with work rules is a necessary component of effective government. In the public-sector context, they contend, fewer disciplinary alternatives to deductions in pay are available.

Because Congress has not "directly spoken to the precise question at issue," we must sustain the Secretary's approach so long as it is "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–843 (1984). While respondents' objections would perhaps support a different application of the salary-basis test for public employees, we cannot conclude that they compel it. The Secretary's view that public employers are not *so* differently situated with regard to disciplining their employees as to require wholesale revision of his time-tested rule simply cannot be said to be unreasonable.

* * *

III

A primary issue in the litigation unleashed by application of the salary-basis test to public-sector employees has been whether, under that test, an employee's pay is "subject to" disciplinary or other deductions whenever there exists a theoretical possibility of such deductions, or rather only when there is something more to suggest that the employee is actually vulnerable to having his pay reduced. Petitioners in effect argue for something close to the former view; they contend that because the police manual nominally subjects all department employees to a range of disciplinary sanctions that includes disciplinary deductions in pay, and because a single sergeant was actually subjected to a disciplinary deduction, they are "subject to" such deductions and hence nonexempt under the FLSA.

* * *

The Secretary of Labor, in an *amicus* brief filed at the request of the Court, interprets the salary-basis test to deny exempt status when employees are covered by a policy that permits disciplinary or other deductions in pay "as a practical matter." That standard is met, the Secretary says, if there is either an actual practice of making such deductions or an employment policy that creates a "significant likelihood" of such deductions. The Secretary's approach rejects a wooden requirement of actual deductions, but in their absence it requires a clear and particularized policy—one which "effectively communicates" that deductions will be made in specified circumstances. This avoids the imposition of massive and unanticipated overtime liability (including the possibility of substantial liquidated damages, see, *e.g., Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993) in situations in which a vague or broadly worded policy is nominally applicable to a whole range of personnel but is not "significantly likely" to be invoked against salaried employees.

Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless " 'plainly erroneous or inconsistent with the regulation.' " *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945)). That deferential standard is easily met here. The critical phrase "subject to" comfortably

bears the meaning the Secretary assigns. See American Heritage Dictionary 1788 (3d ed.1992) (def. 2: defining "subject to" to mean "prone; disposed"; giving as an example "a child who is subject to colds"); Webster's New International Dictionary 2509 (2d ed.1950) (def. 3: defining "subject to" to mean "[e]xposed; liable; prone; disposed"; giving as an example "a country subject to extreme heat").

The Secretary's approach is usefully illustrated by reference to this case. The policy on which petitioners rely is contained in a section of the police manual that lists a total of 58 possible rule violations and specifies the range of penalties associated with each. All department employees are nominally covered by the manual, and some of the specified penalties involve disciplinary deductions in pay. Under the Secretary's view, that is not enough to render petitioners' pay "subject to" disciplinary deductions within the meaning of the salary-basis test. This is so because the manual does not "effectively communicate" that pay deductions are an anticipated form of punishment for employees *in petitioners' category,* since it is perfectly possible to give full effect to every aspect of the manual without drawing any inference of that sort. If the statement of available penalties applied solely to petitioners, matters would be different; but since it applies both to petitioners and to employees who are unquestionably not paid on a salary basis, the expressed availability of disciplinary deductions may have reference only to the latter. No clear inference can be drawn as to the likelihood of a sanction's being applied to employees such as petitioners. Nor, under the Secretary's approach, is such a likelihood established by the one-time deduction in a sergeant's pay, under unusual circumstances.

Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a "*post hoc* rationalizatio[n]" advanced by an agency seeking to defend past agency action against attack, *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 212 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question. Petitioners also suggest that the Secretary's approach contravenes the rule that FLSA exemptions are to be "narrowly construed against ... employers" and are to be withheld except as to persons "plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 392 (1960). But that is a rule governing judicial interpretation of statutes and regulations, not a limitation on the Secretary's power to resolve ambiguities in his own regulations. A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.

* * *

While the *Chevron* review standard and *Mead*'s refinement of its scope both have been subjected to near-constant judicial and scholarly debate, for most of its existence, the *Seminole Rock* standard of judicial deference was not particularly controversial. Post-*Mead*, the Supreme Court likewise continued uncritically to apply the *Seminole Rock* standard, now often alternatively labeled as *Auer* deference. For example,

- In *Christensen v. Harris County*, 529 U.S. 576 (2000), discussed at length elsewhere in this Chapter, the Court acknowledged that "an agency's interpretation of its own regulation is entitled to deference" under *Auer* and *Seminole Rock* but declined to defer to the agency's opinion letter on the ground that, contrary to the agency's argument, the regulation was unambiguous.
- In *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), the Court observed that an interpretation of agency regulations asserted by regulated parties had been "disclaimed" by "a formal letter" issued by each of three agencies

with administrative responsibility over the Endangered Species Act and deferred to the agencies' views as "plainly" satisfying the "deferential standard" of *Auer v. Robbins*.

- In *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), after describing EEOC regulations interpreting the Age Discrimination in Employment Act as "less than clear," the Court deferred to a position taken in the government's amicus brief and various internal EEOC directives as "a reasonable extrapolation of the agency's regulations and . . . as a result . . . dispositive under *Auer*."
- In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009), the Court concluded that EPA regulations interpreting the Clean Water Act were ambiguous and, applying *Auer* deference, found an interpretation of those regulations contained in an internal EPA memorandum to be "not 'plainly erroneous or inconsistent with the regulation[s],' " and thus "correct."

And, particularly in the post-*Chevron* era, *Seminole Rock* review arguably was highly deferential—speaking in terms of "controlling weight" absent plain error or inconsistency with regulatory language. One study of Supreme Court cases found a 91% deference rate in cases applying the *Seminole Rock*/*Auer* standard, *see* William Eskridge & Lauren Baer, *The Continuum of Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1142 (2008), although studies of the *Seminole Rock* standard in federal circuit and district courts found lower and even declining deference rates in more recent years. *See* Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 Ohio St. L.J. 813 (2015); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515 (2011).

The Supreme Court's continued commitment to *Seminole Rock* and *Auer* has been particularly interesting when one considers that *Mead* denies *Chevron* deference to agency interpretations of statutes expressed in the very guidance formats that agencies typically utilize to articulate their interpretations of their own regulations. Indeed, in *Martin v. Occupational Safety & Health Review Commission*, the Supreme Court suggested in dicta that *Skidmore* rather than *Seminole Rock* provided the appropriate review standard for "less formal means of interpreting regulations" embodied in such forms as "interpretive rules" and "enforcement guidelines" because they did not derive from the exercise of the Secretary's delegated lawmaking powers." 499 U.S. 144, 157 (1991).

Nevertheless, another characteristic of the Supreme Court's more recent applications of *Seminole Rock* and *Auer* has been its occasional identification of the circumstances in which it would not evaluate an agency's interpretations of its regulations under that standard. For example, in *Gonzales v. Oregon*, 546 U.S. 243 (2006), a majority of the Court declined to apply the *Auer* standard in evaluating an Attorney General interpretation of the Controlled Substances Act on the ground that the regulation in question did "little more than restate the terms of the statute itself." Said the Court,

> Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.

Id. at 258. Having rejected the applicability of Auer, the Court went on to evaluate the agency's interpretation of the statute using the *Skidmore* standard of review. Writing in dissent, Justice Scalia objected to the Court's "antiparroting canon."

> [I]t is doubtful that any such exception to the *Auer* rule exists. The Court cites no authority for it, because there is none. To the contrary, our unanimous decision in

Auer makes clear that broadly drawn regulations are entitled to no less respect than narrow ones.

Id. at 277 (Scalia, J. dissenting).

Subsequently, in *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011), a unanimous Court applied *Auer* to defer to the Federal Reserve Board's interpretation of its Regulation Z, promulgated under the Truth-In-Lending Act (TILA). Writing on behalf of the Court, Justice Sotomayor not only recognized the anti-parroting qualifier in distinguish the case at bar from *Gonzales v. Oregon*, but added a further comparison with its own qualification of the standard:

In *Christensen v. Harris County*, 529 U.S. 576 (2000), we declined to apply *Auer* deference because the regulation in question was unambiguous, and adopting the agency's contrary interpretation would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." 529 U.S., at 588. In light of Regulation Z's ambiguity, there is no such danger here. And our statement in *Christensen* that "deference is warranted only when the language of the regulation is ambiguous," *ibid.*, is perfectly consonant with *Auer* itself; if the text of a regulation is unambiguous, a conflicting agency interpretation advanced in an *amicus* brief will necessarily be "plainly erroneous or inconsistent with the regulation" in question. *Auer*, 519 U.S., at 461 (internal quotation marks omitted).

Chase Bank, 562 U.S. at 211.

Finally, in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Supreme Court offered an extensive synthesis and summary of different limiting principles that govern the applicability of *Seminole Rock* and *Auer*, though the Court's opinion raised as many questions as it answered.

Although *Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, … this general rule does not apply in all cases. Deference is undoubtedly inappropriate, for example, when the agency's interpretation is "plainly erroneous or inconsistent with the regulation." And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." This might occur when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a "convenient litigating position," or a "*post hoc* rationalization" advanced by an agency seeking to defend past agency action against attack.

In this case, there are strong reasons for withholding the deference that Auer generally requires. Petitioners invoke the [Department of Labor's] interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before the interpretation was announced. To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct a regulation prohibits or requires." Indeed, it would result in precisely the kind of "unfair surprise" against which our cases have long warned.

Id. at 155-56 (citations omitted).

In the meantime, scholars continued to question the logic of strong deference to agency interpretations of regulatory language. As John Manning observed, for example,

In a *Chevron* case, the reviewing court asks whether agency action—usually the promulgation of a rule, an agency enforcement action, or an adjudication—is consistent with an authorizing statute. If the reviewing court is effectively bound by the agency's interpretation of the statute, separation remains between the relevant lawmaker (Congress) and at least one entity (the agency) with

> independent authority to interpret the applicable legal text. In contrast, under *Seminole Rock*, the reviewing court asks whether the agency action—typically an enforcement action or adjudication—is consistent with an agency regulation. In those circumstances, if the court is bound by the agency's interpretation of the meaning of its own regulation, there is no independent interpreter; the agency lawmaker has effective control of the exposition of the legal text that is has created. In short, whereas *Chevron* retains one independent interpretive check on lawmaking by Congress, *Seminole Rock* leaves in place no independent interpretive check on lawmaking by an administrative agency."

John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 639 (1996). Manning thus concluded that, unlike *Chevron*, the *Seminole Rock* standard is inconsistent with separation of powers principles, among other flaws. Other scholars questioned *Seminole Rock* and *Auer* as a matter of Administrative Procedure Act interpretation and judicial policy. *See, e.g.*, Jonathan H. Adler, Auer *Evasions*, 16 Geo. J. L. & Pub. Pol'y 1 (2018). Still others questioned the doctrine's growing complexity and, thus, its practicality. *See* Kristin E. Hickman & Mark R. Thomson, *The* Chevron*ization of* Auer, 103 Minn. L. Rev. Headnotes 103 (2019). Other scholars defended the doctrine against these arguments. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297 (2017).

Drawing arguments from Manning and others, in a series of opinions starting in 2010, some Justices began questioning the Supreme Court ought to reconsider the controlling weight standard described in *Seminole Rock* and *Auer*. The following opinion kicked off that conversation among the Justices.

Talk America, Inc. v. Michigan Bell Telephone Co.

131 S. Ct. 2254 (2011).

[In this case between two private parties, the issue was whether the Telecommunications Act of 1996 and Federal Communications Commission (FCC) regulations promulgated thereunder required the respondent to lease certain of its facilities to its competitors at cost-based rates. Although not a party to the case, the FCC filed an amicus briefs before both the Sixth Circuit and the Supreme Court interpreting existing regulations in a manner favorable to the petitioner. Justice Thomas wrote an opinion on behalf of all eight participating Justices deferring to the FCC's interpretation of its own regulations under *Auer v. Robbins*, 519 U.S. 452 (1997), and *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011). Justice Kagan did not participate in the case. Ed.]

■ JUSTICE SCALIA, concurring.

I join the opinion of the Court. I would reach the same result even without benefit of the rule that we will defer to an agency's interpretation of its own regulations, a rule in recent years attributed to our opinion in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), though it first appeared in our jurisprudence more than half a century earlier, see *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In this suit I have no need to rely on *Auer* deference, because I believe the FCC's interpretation is the fairest reading of the orders in question. * * *

It is comforting to know that I would reach the Court's result even without *Auer*. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity. On the surface, it seems to be a natural corollary—indeed, an *a fortiori* application—of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing, see *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The

legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl.1949).

Deferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive. By contrast, deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government. The seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.

There are undoubted advantages to *Auer* deference. It makes the job of a reviewing court much easier, and since it usually produces affirmance of the agency's view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and predictability to the administrative process. The defects of *Auer* deference, and the alternatives to it, are fully explored in Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996). We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so.

In *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013), Justice Scalia expanded upon his *Talk America* opinion. Concurring in part and dissenting in part from the Court's decision in that case to extend *Seminole Rock* deference to an Environmental Protection Agency regulatory interpretation, Justice Scalia expressed frustration that the Court was "giv[ing] effect to a reading of EPA's regulations that is not the most natural one, simply because EPA says that it believes the unnatural reading is right." Declaring that "[e]nough is enough," and maintaining that "the power to write a law and the power to interpret it cannot rest in the same hands," Justice Scalia argued outright and at length that the Court should overrule *Seminole Rock* and *Auer*. Chief Justice Roberts, joined by Justice Alito, concurred separately to express support for reconsidering *Seminole Rock* and *Auer*, while contending that arguments for and against that proposition were not adequately briefed in the case at bar. Subsequently, in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), Justices Alito, Scalia, and Thomas wrote separate concurring opinions urging reconsideration of *Seminole Rock* and *Auer*.

With this background, consider the Supreme Court's recent decision narrowly retaining the controlling weight standard of review for agency interpretations articulated in *Seminole Rock* and in *Auer*, but with a number of limitations and qualifications.

Kisor v. Wilkie

139 S. Ct. 2400 (2019).

■ Justice KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, and an opinion with respect to Parts II–A and III–A, in which Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join.

This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. See *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. We answer that question no. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not.

* * *

II

* * *

Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading.

Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction. But often, ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule "may be so specialized and varying in nature as to be impossible"—or at any rate, impracticable—to capture in its every detail. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Or a "problem[ ] may arise" that the agency, when drafting the rule, "could not [have] reasonably foresee[n]." *Id.,* at 202. Whichever the case, the result is to create real uncertainties about a regulation's meaning.

Consider these examples:

- In a rule issued to implement the Americans with Disabilities Act (ADA), the Department of Justice requires theaters and stadiums to provide people with disabilities "lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, App. A, p. 563 (1996). Must the Washington Wizards construct wheelchair seating to offer lines of sight over spectators when they rise to their feet? Or is it enough that the facility offers comparable views so long as everyone remains seated? See *Paralyzed Veterans of Am. v. D. C. Arena L. P.*, 117 F.3d 579, 581–582 (CADC 1997).
- The Transportation Security Administration (TSA) requires that liquids, gels, and aerosols in carry-on baggage be packed in containers smaller than 3.4 ounces and carried in a clear plastic bag. Does a traveler have to pack his jar of truffle pâté in that way? See *Laba v. Copeland*, 2016 WL 5958241, *1 (WDNC, Oct. 13, 2016).
- The Mine Safety and Health Administration issues a rule requiring employers to report occupational diseases within two weeks after they are "diagnosed." 30 C.F.R. § 50.20(a) (1993). Do chest X-ray results that "scor[e]" above some level of opacity count as a "diagnosis"? What level, exactly? See *American Min. Congress v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1107–1108 (CADC 1993).

* * *

In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call. How should it do so?

In answering that question, we have often thought that a court should defer to the agency's construction of its own regulation. For the last 20 or so years, we have referred to that doctrine as *Auer* deference, and applied it often. * * *

We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. See *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151–153 (1991). Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. See *id.,* at 151. In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151. Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.

In part, that is because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. *Id.,* at 152. Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that "wrote the regulation" will often have direct insight into what that rule was intended to mean. *Mullins Coal Co. of Va. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 159 (1987). The drafters will know what it was supposed to include or exclude or how it was supposed to apply to some problem. To be sure, this justification has its limits. It does not work so well, for example, when the agency failed to anticipate an issue in crafting a rule (*e.g.,* if the agency never thought about whether and when chest X-rays would count as a "diagnosis"). Then, the agency will not be uncovering a specific intention; at most (though this is not nothing), it will be offering insight into the analogous issues the drafters considered and the purposes they designed the regulation to serve. And the defense works yet less well when lots of time has passed between the rule's issuance and its interpretation—especially if the interpretation differs from one that has come before. All that said, the point holds good for a significant category of "contemporaneous" readings. *Lyng v. Payne*, 476 U.S. 926, 939 (1986). Want to know what a rule means? Ask its author.

In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often "entail[s] the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). Return to our TSA example. In most of their applications, terms like "liquids" and "gels" are clear enough. (Traveler checklist: Pretzels OK; water not.) But resolving the uncertain issues—the truffle pâtés or olive tapenades of the world—requires getting in the weeds of the rule's policy: Why does TSA ban liquids and gels in the first instance? What makes them dangerous? Can a potential hijacker use pâté jars in the same way as soda cans? Or take the less specialized-seeming ADA example. It is easy enough to know what "comparable lines of sight" means in a movie theater—but more complicated when, as in sports arenas, spectators sometimes stand up. How costly is it to insist that the stadium owner take that sporadic behavior into account, and is the viewing value received worth the added expense? That cost-benefit calculation, too, sounds more in policy than in law. * * *

And Congress, we have thought, knows just that: It is attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have "unique expertise," often of a scientific or technical nature, relevant to applying a regulation "to complex or changing circumstances." *Martin*, 499 U.S. at 151; see *Thomas Jefferson*, 512 U.S. at 512. Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program.

See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167–168 (2007). And agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public. See *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (discussing as a matter of democratic accountability the "proper roles of the political and judicial branches" in filling regulatory gaps). It is because of those features that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar.

Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. We have noted Congress's frequent "preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980). That preference may be strongest when the interpretive issue arises in the context of a "complex and highly technical regula-tory program." *Thomas Jefferson*, 512 U.S. at 512. After all, judges are most likely to come to divergent conclusions when they are least likely to know what they are doing. * * * But the uniformity justification retains some weight even for more accessible rules, because their language too may give rise to more than one eminently reasonable reading. * * *.

B

But all that said, *Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. * * * We have thus cautioned that *Auer* deference is just a "general rule"; it "does not apply in all cases." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). And although the limits of *Auer* deference are not susceptible to any rigid test, we have noted various circumstances in which such deference is "unwarranted." *Ibid.* * * *

We take the opportunity to restate, and somewhat expand on, those principles here to clear up some mixed messages we have sent. At times, this Court has applied *Auer* deference without significant analysis of the underlying regulation. See, *e.g., United States v. Larionoff*, 431 U.S. 864, 872 (1977) (stating that the Court "need not tarry" over the regulation's language given *Seminole Rock*). At other times, the Court has given *Auer* deference without careful attention to the nature and context of the interpretation. See, *e.g., Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 276, and nn. 22–2 (1969) (deferring to an agency's view as expressed in letters to third parties). And in a vacuum, our most classic formulation of the test—whether an agency's construction is "plainly erroneous or inconsistent with the regulation," *Seminole Rock*, 325 U.S. at 414—may suggest a caricature of the doctrine, in which deference is "reflexive." *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (KENNEDY, J., concurring). So we cannot deny that Kisor has a bit of grist for his claim that *Auer* "bestows on agencies expansive, unreviewable" authority. * * * So before we turn to Kisor's specific grievances, we think it worth reinforcing some of the limits inherent in the *Auer* doctrine.

First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. See *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Seminole Rock*, 325 U.S. at 41 (deferring only "if the meaning of the words used is in doubt"). If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. * * *

And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984) (adopting the same approach for ambiguous statutes). For again, only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is "more [one] of policy than of law." *Pauley*, 501 U.S. at 696. That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved. See *id.,* at 707 (SCALIA, J., dissenting) (A regulation is not ambiguous merely because "discerning the only possible interpretation requires a taxing inquiry"). To make that effort, a court must "carefully consider[ ]" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. *Ibid.* Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.

If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." *Thomas Jefferson*, 512 U.S. at 515. In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. (Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.) * * * Under *Auer*, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." *Arlington v. FCC*, 569 U.S. 290, 296 (2013). And let there be no mistake: That is a requirement an agency can fail.

Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. See *Christopher*, 567 U.S. at 155; see also *Mead*, 533 U.S. at 229–231, 236–237 (requiring an analogous though not identical inquiry for *Chevron* deference). * * * The inquiry on this dimension does not reduce to any exhaustive test. But we have laid out some especially important markers for identifying when *Auer* deference is and is not appropriate.

To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. *Mead*, 533 U.S. at 257–259, and n. 6 (SCALIA, J., dissenting). That constraint follows from the logic of *Auer* deference—because Congress has delegated rulemaking power, and all that typically goes with it, to the agency alone. Of course, the requirement of "authoritative" action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers. So, for example, we have deferred to "official staff memoranda" that were "published in the Federal Register," even though never approved by the agency head. *Ford Motor Credit*, 444 U.S. at 566, n. 9, 567, n. 10 (declining to "draw a radical distinction between" agency heads and staff for *Auer* deference). But there are limits. The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context. See, *e.g., Paralyzed Veterans*, 117 F.3d at 587 (refusing to consider a "speech of a mid-level official" as an "authoritative departmental position"); *N. Y. State Dept. of Social Servs. v. Bowen*, 835 F.2d 360, 365–366 (CADC 1987) (rejecting the idea that an "informal memorandum" recounting a telephone conversation between employees could count as an "authoritative pronouncement"); *Exelon Generation Co. v. Local 15, Int'l Brotherhood of Elec. Workers, AFL–CIO*, 676 F.3d 566, 576–578 (CA7 2012) (declining deference when the agency had itself "disclaimed the use of regulatory guides as authoritative"). If the interpretation does not do so, a court may not defer.

Next, the agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely "account [for] the presumption that Congress delegates interpretive lawmaking power to the agency." *Martin*, 499 U.S. at 15. So the basis for deference ebbs when "[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary" duties or "fall[s] within the scope of another agency's authority." *Arlington*, 569 U.S. at 309 (opinion of BREYER, J.). This Court indicated as much when it analyzed a "split enforcement" scheme, in which Congress divided regulatory power between two entities. *Martin*, 499 U.S. at 151. To decide "*whose* reasonable interpretation" of a rule controlled, we "presum[ed] Congress intended to invest interpretive power" in whichever actor was "best position[ed] to develop" expertise about the given problem. *Id.*, at 149, 153. The same idea holds good as between agencies and courts. "Generally, agencies have a nuanced understanding of the regulations they administer." Brief for Respondent 33. That point is most obvious when a rule is technical; think back to our "moiety" or "diagnosis" examples. But more prosaic-seeming questions also commonly implicate policy expertise; consider the TSA assessing the security risks of pâté or a disabilities office weighing the costs and benefits of an accommodation. Once again, though, there are limits. Some interpretive issues may fall more naturally into a judge's bailiwick. Take one requiring the elucidation of a simple common-law property term, see *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292–293 (CA10 1978), or one concerning the award of an attorney's fee, see *West Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239 (CA4 2003). Cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–650 (1990) (declining to award *Chevron* deference when an agency interprets a judicial-review provision). When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.[5]

Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. *Christopher*, 567 U.S. at 155 (quoting *Auer*, 519 U.S. at 462). That means, we have stated, that a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack." *Christopher*, 567 U.S. at 155 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988) and *Auer*, 519 U.S. at 462).[6] And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. *Long Island Care*, 551 U.S. at 170. That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one. *Thomas Jefferson*, 512 U.S. at 515. Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. See *Christopher*, 567 U.S. at 155–156.

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[5] For a similar reason, this Court has denied *Auer* deference when an agency interprets a rule that parrots the statutory text. See *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). An agency, we explained, gets no "special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Ibid.*

[6] The general rule, then, is not to give deference to agency interpretations advanced for the first time in legal briefs. See *Bowen*, 488 U.S. at 212–213. But we have not entirely foreclosed that practice. *Auer* itself deferred to a new regulatory interpretation presented in an *amicus curiae* brief in this Court. There, the agency was not a party to the litigation, and had expressed its views only in response to the Court's request. "[I]n the circumstances," the Court explained, "[t]here [was] simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462.

Here too the lack of "fair warning" outweighed the reasons to apply *Auer*. *Id.,* at 156 (internal quotation marks omitted).

* * *

The upshot of all this goes something as follows. When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase "when it applies" is important—because it often doesn't. * * *

III

That brings us to the lone question presented here—whether we should abandon the longstanding doctrine just described. * * *

A

Kisor first attacks *Auer* as inconsistent with the judicial review provision of the Administra-tive Procedure Act (APA). See 5 U.S.C. § 706. As Kisor notes, Congress enacted the APA in 1946—the year after *Seminole Rock*—to serve as "the fundamental charter of the administrative state." Section 706 of the Act, governing judicial review of agency action, states (among other things) that reviewing courts shall "determine the meaning or applicability of the terms of an agency action" (including a regulation). According to Kisor, *Auer* violates that edict by thwarting "meaningful judicial review" of agency rules. Courts under *Auer*, he asserts (now in the language of Section 706), "abdicate their office of determining the meaning" of a regulation.

To begin with, that argument ignores the many ways, discussed above, that courts exercise independent review over the meaning of agency rules. As we have explained, a court must apply all traditional methods of interpretation to any rule, and must enforce the plain meaning those methods uncover. There can be no thought of deference unless, after performing that thoroughgoing review, the regulation remains genuinely susceptible to multiple reasonable meanings and the agency's interpretation lines up with one of them. And even if that is the case, courts must on their own determine whether the nature or context of the agency's construction reverses the usual presumption of deference. Most notably, a court must consider whether the interpretation is authoritative, expertise-based, considered, and fair to regulated parties. All of that figures as "meaningful judicial review."

And even when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in "determin[ing] the meaning" of an ambiguous rule. 5 U.S.C. § 706. One possibility, as Kisor says, is to review the issue *de novo*. But another is to review the agency's reading for reasonableness. To see the point, assume that a regulatory (say, an employment) statute expressly instructed courts to apply *Auer* deference when reviewing an agency's interpretations of its ambiguous rules. Nothing in that statute would conflict with Section 706. Instead, the employment law would simply make clear *how* a court is to "determine the meaning" of such a rule—by deferring to an agency's reasonable reading. *Ibid*. Of course, that is not the world we know: Most substantive statutes do not say anything about *Auer* deference, one way or the other. But for all the reasons spelled out above, we have long presumed (subject always to rebuttal) that the Congress delegating regulatory authority to an agency intends as well to give that agency considerable latitude to construe its ambiguous rules. And that presumption operates just like the hypothesized statute above. Because of it, once again, courts do not violate Section 706 by applying *Auer*. To the contrary, they fulfill their duty to "determine the meaning" of a rule precisely by deferring to the agency's reasonable reading. See Sunstein & Vermeule, The Unbearable Rightness of *Auer*, 84 U. Chi. L. Rev. 297, 306 (2017) (If Congress intends "that the meaning of a regulation turns on the agency's interpretation of its meaning," then courts comply with Section 706's command to " 'determine the meaning' [of the regulation] by deferring to that view"); cf. *Arlington*, 569 U.S. at 317 (ROBERTS, C. J., dissenting) (similarly

addressing why *Chevron* deference comports with Section 706). Section 706 and *Auer* thus go hand in hand.

That is especially so given the practice of judicial review at the time of the APA's enactment. Section 706 was understood when enacted to "restate[ ] the present law as to the scope of judicial review." See Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947); see also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978) (noting that this Court gives some deference to the Manual "because of the role played by the Department of Justice in drafting the legislation"). We have thus interpreted the APA not to "significantly alter the common law of judicial review of agency action." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (internal quotation marks omitted). That pre-APA common law included *Seminole Rock* itself (decided the year before) along with prior decisions foretelling that ruling. Even assume that the deference regime laid out in those cases had not yet fully taken hold. At a minimum, nothing in the law of that era required all judicial review of agency interpretations to be *de novo*. Cf. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 635–636 (1996) (arguing that courts before the APA used "flexible, common law methods to review administrative action"). And so nothing suggests that Section 706 imposes that requirement. Or otherwise said: If Section 706 did not change the law of judicial review (as we have long recognized), then it did not proscribe a deferential standard then known and in use.

* * *

To supplement his * * * APA arguments, Kisor turns to policy, leaning on a familiar claim about the incentives *Auer* creates. According to Kisor, *Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. See Brief for Petitioner 37–41. That argument received its fullest elaboration in a widely respected law review article pre-dating *Auer*. See Manning, 96 Colum. L. Rev., at 654–669. More recently, the concern about such self-delegation has appeared in opinions from this Court, starting with several from Justice SCALIA calling for *Auer*'s reconsideration. See, *e.g., Christopher,* 567 U.S. at 158 (citing Manning, *supra,* at 655–668); *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 620–621 (2013) (SCALIA, J., concurring in part and dissenting in part) (citing Manning, *supra*); *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 69 (2011) (SCALIA, J., concurring) (principally relying on Manning, *supra*).

But the claim has notable weaknesses, empirical and theoretical alike. First, it does not survive an encounter with experience. No real evidence—indeed, scarcely an anecdote—backs up the assertion. As two noted scholars (one of whom reviewed thousands of rules during four years of government service) have written: "[W]e are unaware of, and no one has pointed to, any regulation in American history that, because of *Auer*, was designed vaguely." Sunstein & Vermeule, 84 U. Chi. L. Rev., at 308. And even the argument's theoretical allure dissipates upon reflection. For strong (almost surely stronger) incentives and pressures cut in the opposite direction. "[R]egulators want their regulations to be effective, and clarity promotes compliance." Brief for Administrative Law Scholars as *Amici Curiae* 18–19. Too, regulated parties often push for precision from an agency, so that they know what they can and cannot do. And ambiguities in rules pose risks to the long-run survival of agency policy. Vagueness increases the chance of adverse judicial rulings. And it enables future administrations, with different views, to reinterpret the rules to their own liking. Add all of that up and Kisor's ungrounded theory of incentives contributes nothing to the case against *Auer*.

Finally, Kisor goes big, asserting (though fleetingly) that *Auer* deference violates "separation-of-powers principles." In his view, those principles prohibit "vest[ing] in a single branch the law-making and law-interpreting functions." *Id.,* at 45. If that objection is to

agencies' usurping the interpretive role of courts, this opinion has already met it head-on. Properly understood and applied, *Auer* does no such thing. In all the ways we have described, courts retain a firm grip on the interpretive function.; *Mortgage Bankers*, 135 S. Ct., at 1208, n. 4. If Kisor's objection is instead to the supposed commingling of functions (that is, the legislative and judicial) within an agency, this Court has answered it often before. See, *e.g., Withrow v. Larkin*, 421 U.S. 35, 54 (1975) (permitting such a combination of functions); *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) (same). That sort of mixing is endemic in agencies, and has been "since the beginning of the Republic." *Arlington*, 569 U.S. at 304–305, n. 4. It does not violate the separation of powers, we have explained, because even when agency "activities take 'legislative' and 'judicial' forms," they continue to be "exercises of[ ] the 'executive Power' "—or otherwise said, ways of executing a statutory plan. *Ibid.* (quoting U. S. Const., Art. II, § 1, cl. 1). So Kisor's last argument to dispatch *Auer* deference fails as roundly as the rest.

B

If all that were not enough, *stare decisis* cuts strongly against Kisor's position. "Overruling precedent is never a small matter." *Kimble v. Marvel Entertainment, LLC*, 135 S.Ct. 2401, 2409, (2015). Adherence to precedent is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014). "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). To be sure, *stare decisis* is "not an inexorable command." *Id.,* at 828. But any departure from the doctrine demands "special justification"—something more than "an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

And that is even more than usually so in the circumstances here. First, Kisor asks us to overrule not a single case, but a "long line of precedents"—each one reaffirming the rest and going back 75 years or more. *Bay Mills*, 572 U.S. at 798. This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law. Second, because that is so, abandoning *Auer* deference would cast doubt on many settled constructions of rules. As Kisor acknowledged at oral argument, a decision in his favor would allow relitigation of any decision based on *Auer*, forcing courts to "wrestle [with] whether or not *Auer*" had actually made a difference. Tr. of Oral Arg. 30; see *id.,* at 47 (Solicitor General agreeing that "every single regulation that's currently on the books whose interpretation has been established under *Seminole Rock* now [would have] to be relitigated anew"). It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.

And third, even if we are wrong about *Auer*, "Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173 (1989) (stating that when that is so, "[c]onsiderations of *stare decisis* have special force"). * * * It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies.

* * *

■ Chief Justice ROBERTS, concurring in part.

* * * We took this case to consider whether to overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). For the reasons the Court discusses in Part III–B, I agree that overruling those precedents is not warranted. I also agree with the Court's treatment in Part II–B of the bounds of *Auer* deference.

I write separately to suggest that the distance between the majority and Justice GORSUCH is not as great as it may initially appear. The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise. Justice GORSUCH, meanwhile, lists the reasons that a court might be persuaded to adopt an agency's interpretation of its own regulation: The agency thoroughly considered the problem, offered a valid rationale, brought its expertise to bear, and interpreted the regulation in a manner consistent with earlier and later pronouncements. Accounting for variations in verbal formulation, those lists have much in common.

That is not to say that *Auer* deference is just the same as the power of persuasion discussed in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions. But it is to say that the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation.

One further point: Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes by Congress. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I do not regard the Court's decision today to touch upon the latter question.

■ Justice GORSUCH, with whom Justice THOMAS joins, with whom Justice KAVANAUGH joins as to Parts I, II, III, IV, and V, and with whom Justice ALITO joins as to Parts I, II, and III, concurring in the judgment.

It should have been easy for the Court to say goodbye to *Auer* v. *Robbins*.[1] In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else."[2] Nor is *Auer*'s biased rule the product of some congressional mandate we are powerless to correct: This Court invented it, almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution. A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.

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

Respectfully, we owe our colleagues on the lower courts more candid and useful guidance than this. And judges owe the people who come before them nothing less than a fair contest, where every party has an equal chance to persuade the court of its

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[1] 519 U.S. 452 (1997).

[2] Larkin & Slattery, The World After *Seminole Rock* and *Auer*, 42 Harv. J. L. & Pub. Pol'y 625, 641 (2019) (internal quotation marks omitted).

interpretation of the law's demands. One can hope that THE CHIEF JUSTICE is right, and that whether we formally overrule *Auer* or merely neuter it, the results in most cases will prove the same. But means, not just ends, matter, and retaining even this debilitated version of *Auer* threatens to force litigants and lower courts to jump through needless and perplexing new hoops and in the process deny the people the independent judicial decisions they deserve. All to what end? So that we may *pretend* to abide *stare decisis*?

* * *

But notice: While pretending to bow to *stare decisis*, the majority goes about reshaping our precedent in new and experimental ways. True, the majority admits, this Court has in the past accorded *Auer* deference "'reflexive[ly],'" "without significant analysis of the underlying regulation" or "careful attention to [its] nature and context," and encouraged lower courts to do the same. But no more. From now on, the majority says, not only must judges "exhaust all the 'traditional tools' of construction" to decide whether the agency's interpretation is "reasonable," they must also make "an independent inquiry into whether the character and context of the agency interpretation" justifies deference. The majority candidly admits that it finds it impossible to "reduce" this new inquiry "to any exhaustive test," so it settles for laying out some "markers." What are the markers? We are told that courts should often—but not always—withhold deference from an interpretation offered by mid-level agency staff; often—but not always—withhold deference from a nontechnical, "prosaic-seeming" interpretation; often—but not always—withhold deference from an interpretation advanced for the first time in an *amicus* brief; and often—but not always—withhold deference from an interpretation that conflicts with an earlier one. The only certainty in all this is that the majority isn't really much moved by *stare decisis*; everyone recognizes, to one degree or another,that *Auer* cannot stand. And between our remaining choices—continuing to make up new deference rules, or returning to the text of the APA and the approach to judicial review that prevailed for most of our history—the answer should have been easy.

* * *

There are serious questions about whether *stare decisis* should apply here at all. To be sure, *Auer*'s narrow holding about the meaning of the regulation at issue in that case may be entitled to *stare decisis* effect. The same may be true for the specific holdings in other cases where this Court has applied *Auer* deference. But does *stare decisis* extend beyond those discrete holdings and bind future Members of this Court to apply *Auer*'s broader deference framework?

It seems doubtful that *stare decisis* demands that much. We are not dealing with a precedent that purported to settle the meaning of a single statute or regulation or resolve a particular case. The *Auer* doctrine claims to do much more than that—to prescribe an interpretive methodology governing every future dispute over the meaning of every regulation. In other contexts, we do not regard statements in our opinions about such generally applicable interpretive methods, like the proper weight to afford historical practice in constitutional cases or legislative history in statutory cases, as binding future Justices with the full force of horizontal *stare decisis*.[102] Why, then, should we regard as binding *Auer*'s statements about the weight to afford agencies' interpretations in regulatory cases? To the extent *Auer* purports to dictate "the interpretive inferences that future

[102] See Criddle & Staszewski, Against Methodological Stare Decisis, 102 Geo. L. J. 1573, 1577, and n. 12 (2014); C. Oldfather, Methodological Stare Decisis and Constitutional Interpretation, in Precedent in the United States Supreme Court 135, 135–136 (C. Peters ed. 2013).

Justices must draw in construing statutes and regulations that the Court has never engaged," it may well "exceed the limits of stare decisis."[103]

Even if our past expressions of support for *Auer* deference bear *some* precedential force, they certainly are not entitled (as the majority suggests) to the special, heightened form of *stare decisis* we reserve for narrow statutory decisions. In contrast to precedents that fix the meaning of *particular* statutes and generate reliance interests in the process, the *Auer* doctrine is an abstract default rule of interpretive methodology that settles nothing of its own force. And this Court has recognized that it is "inconsistent with the Court's proper role" to insist that Congress exercise its legislative power to overturn such erroneous and judicially invented "default rule[s]."[104] That should be especially so here because *Auer*'s default rule undermines judicial independence, which this Court has a special responsibility to defend.

Nor is it entirely clear that Congress *could* overturn the *Auer* doctrine legislatively. The majority describes *Auer* as a "presumption" about how courts should interpret statutes granting rulemaking power to agencies. Congress can, of course, *rebut* the presumption on a statute-by-statute basis, or even for all past statutes. But can Congress *eliminate* the *Auer* presumption for future statutes? Perhaps—but legislation like that would raise questions, which the majority does not address, about the ability of one Congress to entrench its preferences by attempting to control the interpretation of legislation enacted by future Congresses.[105] We should not be in the business of tossing " 'balls ... into Congress's court,' "that would explode with constitutional questions if Congress tried to pick them up.

* * *

Coming closer to the mark, the majority worries that "abandoning *Auer* deference would cast doubt on many settled constructions" of regulations on which regulated parties might have relied. But, again, decisions construing particular regulations might retain *stare decisis* effect even if the Court announced that it would no longer adhere to *Auer*'s interpretive methodology. After all, decisions construing particular statutes continue to command respect even when the interpretive methods that led to those constructions fall out of favor. Besides, if the majority is correct that abandoning *Auer* would require revisiting regulatory constructions that were upheld based on *Auer* deference, the majority's revision of *Auer* will yield exactly the same result. There are innumerable lower court decisions that have followed this Court's lead and afforded *Auer* deference mechanically, without conducting the inquiry the Court now holds is required. Today's ruling casts no less doubt on the continuing validity of those decisions than we would if we simply moved on from *Auer*.

Overruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and "follow [the] agency's [view] only to the extent it is persuasive."[119] By contrast, the majority's attempt to remodel *Auer*'s rule

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[103] Kozel, Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis, 97 Texas L. Rev. 1125, 1159 (2019); see Raso & Eskridge, *Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 Colum. L. Rev. 1727, 1765–1766 (2010) (concluding that in practice, this Court has not treated administrative-deference regimes such as *Chevron* and *Auer* as binding precedents).

[104] *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2096 (2018).

[105] See, *e.g.*, Alexander & Prakash, Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation, 20 Const. Comment. 97 (2003); Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum. L. Rev. 2027, 2109–2110, and nn. 231–233 (2002).

[119] *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006); see *Christopher*, 567 U.S. at 159 (applying *Skidmore* after concluding that agency's interpretation did not merit *Auer* deference).

into a multi-step, multi-factor inquiry guarantees more uncertainty and much litigation. Proceeding in this convoluted way burdens our colleagues on the lower courts, who will have to spend time debating deference that they could have spent interpreting disputed regulations. It also continues to deny the people who come before us the neutral forum for their disputes that they rightly expect and deserve.

But this cloud may have a silver lining: The majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*. As reengineered, *Auer* requires courts to "exhaust all the 'traditional tools' of construction" before they even consider deferring to an agency. And those tools include all sorts of tie-breaking rules for resolving ambiguity even in the closest cases. Courts manage to make do with these tools in many other areas of the law, so one might hope they will hardly ever find them inadequate here. And if they do, they will now have to conduct a further inquiry that includes so few firm guides and so many cryptic "markers" that they will rarely, if ever, have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading.

But whatever happens, this case hardly promises to be this Court's last word on *Auer*. If today's opinion ends up reducing *Auer* to the role of a tin god—officious, but ultimately powerless—then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it. Alternatively, if *Auer* proves more resilient, this Court should reassert its responsibility to say what the law is and afford the people the neutral forum for their disputes that they expect and deserve.

■ Justice KAVANAUGH, with whom Justice ALITO joins, concurring in the judgment.

I agree with Justice GORSUCH's conclusion that the *Auer* deference doctrine should be formally retired. I write separately to emphasize two points.

First, I agree with THE CHIEF JUSTICE that "the distance between the majority and Justice GORSUCH is not as great as it may initially appear." (opinion concurring in part). The majority's approach in Part II–B of its opinion closely resembles the argument advanced by the Solicitor General to "clarif[y] and narro[w]" *Auer*. Importantly, the majority borrows from footnote 9 of this Court's opinion in *Chevron* to say that a reviewing court must "exhaust all the 'traditional tools' of construction" before concluding that an agency rule is ambiguous and deferring to an agency's reasonable interpretation. If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation. In other words, the footnote 9 principle, taken seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations.

Formally rejecting *Auer* would have been a more direct approach, but rigorously applying footnote 9 should lead in most cases to the same general destination. Umpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules. So too here.

To be sure, some cases involve regulations that employ broad and open-ended terms like "reasonable," "appropriate," "feasible," or "practicable." Those kinds of terms afford agencies broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule. But that is more *State Farm* than *Auer*. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983).

In short, after today's decision, a judge should engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation, and can simultaneously be appropriately deferential to an agency's reasonable policy choices within the discretion allowed by a regulation.

Second, I also agree with THE CHIEF JUSTICE that "[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress." Like THE CHIEF JUSTICE, "I do not regard the Court's decision" not to formally overrule *Auer* "to touch upon the latter question."

NOTES AND QUESTIONS

1. Commenters evaluating Justice Kagan's majority opinion in *Kisor* have described it as adopting a new five-step *Auer* standard. Can you identify the five steps?

2. Part of what made the controlling weight standard of *Seminole Rock* and *Auer* attractive to courts was its simplicity, making judicial decisionmaking easier and contributing to consistency across jurisdictions with its straight-forward command: if the answer isn't obvious, the agency's interpretation controls. The *Kisor* majority's five-step process is more complicated, and offers more opportunities for judges to disagree with one another over what the law requires. *Cf.* Kristin E. Hicman & Mark R. Thomson, *The* Chevron*ization of* Auer, 103 Minn. L. Rev. Headnotes 103 (2019). What problems are resolved by the more complicated approach to *Auer* deference, and is the tradeoff worth it?

3. Chief Justice Roberts and Justices Kavanaugh and Alito, in separate opinions, suggest that the *Kisor* majority's description of the *Auer* standard, if taken seriously by the lower courts, will yield few cases in which courts actually give an agency's interpretation of its own regulations the "controlling weight" that the *Auer* standard demands. Do you agree? Why or why not?

H. JUSTICIABILITY ISSUES: COMMITTED TO AGENCY DISCRETION

CHAPTER 7, SECTION B: PREREQUISITES TO JUDICIAL REVIEW

In the coverage of what it means for an issue to be committed to agency discretion by law, we have added the following discussion problem reflecting the dispute over President Trump's efforts to fund construction of a wall at the U.S. border with Mexico.

DISCUSSION PROBLEM

President Trump's efforts to obtain funding to build a wall on the U.S. border with Mexico have put him in conflict with Congress. Although Congress did appropriate some funding for constructing a wall, the amount of that appropriation was substantially less than President Trump requested, with many members of Congress actively objecting to any appropriation at all. President Trump then announced his intention to spend eight billion dollars to build the wall when Congress had appropriated less than two billion doallars for that purpose. To obtain the extra funds, President Trump has relied on emergency powers that Congress conferred on the president in the National Emergency Act of 1976 as the legal authority for reallocating funds from other construction projects for which Congress did appropriate funds. With the help of the Secretary of Defense and the Secretary of the Treasury, President Trump has identified significant funds appropriated by Congress to the Defense Department on sufficiently broad terms that President Trump believes he can reallocate the funds to the Department of Homeland Security to fund border wall construction without relying on his emergency powers. President Trump has cited *Lincoln v. Vigil* as the basis for his conclusion that his decision to reallocate such funds is unreviewable. Members of Congress have filed amicus briefs objecting and supporting challenges to the President's action.

Consider again the facts of *Lincoln v. Vigil*. In that case, the Supreme Court recognized as unreviewable an agency's decision to reallocate a lump sum appropriation from one program to another. Do you think that a court would, or should, react differently to President Trump's efforts to reallocate funds to construct the border wall?

I. JUSTICIABILITY ISSUES: THE TIMING OF JUDICIAL REVIEW

CHAPTER 7, SECTION B: THE TIMING OF JUDICIAL REVIEW

In the Second Edition's coverage of finality doctrine, on page 867, the second note after the excerpt from *Bennett v. Spear*, discusses the Supreme Court's unanimous holding in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), that an EPA Administrative Compliance Order is immediately reviewable as final agency action. In *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016), the Court used similar reasoning to that in *Sackett* to conclude that an agency determination that a property includes "waters of the United States" for Clean Water Act Purposes is final agency action subject to immediate review. A negative determination provides a five-year safe harbor from any enforcement action, while a positive action deprives the land owner of the benefits of the safe harbor. Thus, said the Court said, either a negative or positive determination has "direct and appreciable legal consequences." The Court rejected the alternative of violating the Clean Water Act and defending the violation by arguing that the land did not include jurisdictional waters because such a course of action would create a risk of incurring a large penalty. The Court also rejected the alternative of applying for a permit to pursue activity with respect to the property that would be otherwise prohibited because the permitting process is "arduous, expensive, and long."

Circuit courts are interpreting *Sackett* and *Hawkes* as clear signals from the Supreme Court that they should apply the *Bennett v. Spear* two-part test to allow petitioners to obtain review whenever agency action would require regulated parties either to suffer the adverse consequences of acquiescing in the agency's position or to take significant affirmative steps to escape those consequences. Circuit courts are overruling their own precedents and adopting much more permissive attitudes toward petitioners who can avoid the practical adverse consequences of agency actions only by taking significant affirmative steps. *Sackett* and *Hawkes* are having similar effects on judicial applications of the other two timing doctrines—ripeness and exhaustion. *E.g.*, *Rhea Lana v. Department of Labor*, 824 F. 3d 1023 (D.C. Cir. 2016); *Texas v. EEOC*, 827 F. 3d 372 (5th Cir. 2016).

United States Army Corps of Engineers v. Hawkes Co., Inc.
136 S. Ct. 1807 (2016).

■ Chief Justice ROBERTS delivered the opinion of the Court.

The Clean Water Act regulates the discharge of pollutants into "the waters of the United States." Because it can be difficult to determine whether a particular parcel of property contains such waters, the U.S. Army Corps of Engineers will issue to property owners an "approved jurisdictional determination" stating the agency's definitive view on that matter. The question presented is whether that determination is final agency action judicially reviewable under the Administrative Procedure Act.

I

A

The Clean Water Act prohibits "the discharge of any pollutant" without a permit into "navigable waters," which it defines, in turn, as "the waters of the United States." During the time period relevant to this case, the U.S. Army Corps of Engineers defined the waters of the United States to include land areas occasionally or regularly saturated with water—such as "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [and] playa lakes"—the "use, degradation or destruction of which could affect interstate or foreign commerce."The Corps has applied that definition to assert jurisdiction over "270–to–300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States."

It is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does. The Clean Water Act imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit from the Corps. The costs of obtaining such a permit are significant. For a specialized "individual" permit of the sort at issue in this case, for example, one study found that the average applicant "spends 788 days and $271,596 in completing the process," without "counting costs of mitigation or design changes." Even more readily available "general" permits took applicants, on average, 313 days and $28,915 to complete.

The Corps specifies whether particular property contains "waters of the United States" by issuing "jurisdictional determinations" (JDs) on a case-by-case basis. JDs come in two varieties: "preliminary" and "approved." While preliminary JDs merely advise a property owner "that there *may* be waters of the United States on a parcel," approved JDs definitively "stat[e] the presence or absence" of such waters. Unlike preliminary JDs, approved JDs can be administratively appealed and are defined by regulation to "constitute a Corps final agency action."They are binding for five years on both the Corps and the Environmental Protection Agency, which share authority to enforce the Clean Water Act.

B

Respondents own a 530–acre tract near their existing mining operations. The tract includes wetlands, which respondents believe contain sufficient high quality peat, suitable for use in golf greens, to extend their mining operations for 10 to 15 years.

In December 2010, respondents applied to the Corps for a Section 404 permit for the property. A Section 404 permit authorizes "the discharge of dredged or fill material into the navigable waters at specified disposal sites." Over the course of several communications with respondents, Corps officials signaled that the permitting process would be very expensive and take years to complete. The Corps also advised respondents that, if they wished to pursue their application, they would have to submit numerous assessments of various features of the property, which respondents estimate would cost more than $100,000.

In February 2012, in connection with the permitting process, the Corps issued an approved JD stating that the property contained "water of the United States" because its wetlands had a "significant nexus" to the Red River of the North, located some 120 miles away. Respondents appealed the JD to the Corps' Mississippi Valley Division Commander, who remanded for further factfinding. On remand, the Corps reaffirmed its original conclusion and issued a revised JD to that effect.

Respondents then sought judicial review of the revised JD under the Administrative Procedure Act (APA). The District Court dismissed for want of subject matter jurisdiction, holding that the revised JD was not "final agency action for which there is no other adequate remedy in a court," as required by the APA prior to judicial review. The Court of Appeals for the Eighth Circuit reversed, and we granted certiorari.

II

The Corps contends that the revised JD is not "final agency action" and that, even if it

were, there are adequate alternatives for challenging it in court. We disagree at both turns.

A

In *Bennett v. Spear,* we distilled from our precedents two conditions that generally must be satisfied for agency action to be "final" under the APA. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."

The Corps does not dispute that an approved JD satisfies the first *Bennett* condition. Unlike preliminary JDs—which are "advisory in nature" and simply indicate that "there may be waters of the United States" on a parcel of property—an approved JD clearly "mark[s] the consummation" of the Corps' decisionmaking process on that question. It is issued after extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property, and is typically not revisited if the permitting process moves forward. Indeed, the Corps itself describes approved JDs as "final agency action," and specifies that an approved JD "will remain valid for a period of five years,"

The Corps may revise an approved JD within the five-year period based on "new information." That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal. By issuing respondents an approved JD, the Corps for all practical purposes "has ruled definitively" that respondents' property contains jurisdictional waters.

The definitive nature of approved JDs also gives rise to "direct and appreciable legal consequences," thereby satisfying the second prong of *Bennett*. Consider the effect of an approved JD stating that a party's property does *not* contain jurisdictional waters—a "negative" JD, in Corps parlance. As noted, such a JD will generally bind the Corps for five years. Under a longstanding memorandum of agreement between the Corps and EPA, it will also be "binding on the Government and represent the Government's position in any subsequent Federal action or litigation concerning that final determination." A negative JD thus binds the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act, creating a five-year safe harbor from such proceedings for a property owner. Additionally, although the property owner may still face a citizen suit under the Act, such a suit—unlike actions brought by the Government—cannot impose civil liability for wholly past violations. In other words, a negative JD both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging pollutants without a permit. Each of those effects is a "legal consequence" satisfying the second *Bennett* prong.

It follows that affirmative JDs have legal consequences as well: They represent the denial of the safe harbor that negative JDs afford. Because "legal consequences ... flow" from approved JDs, they constitute final agency action.

This conclusion tracks the "pragmatic" approach we have long taken to finality.

B

Even if final, an agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court. The Corps contends that respondents have two such alternatives: either discharge fill material without a permit, risking an EPA enforcement action during which they can argue that no permit was required, or apply for a permit and seek judicial review if dissatisfied with the results.

Neither alternative is adequate. As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties." If respondents discharged fill material without a permit, in the mistaken belief that their property did not contain jurisdictional waters, they would expose themselves to civil penalties of up to $37,500 for

each day they violated the Act, to say nothing of potential criminal liability. Respondents need not assume such risks while waiting for EPA to "drop the hammer" in order to have their day in court.

Nor is it an adequate alternative to APA review for a landowner to apply for a permit and then seek judicial review in the event of an unfavorable decision. As Corps officials indicated in their discussions with respondents, the permitting process can be arduous, expensive, and long. On top of the standard permit application that respondents were required to submit, the Corps demanded that they undertake, among other things, a "hydrogeologic assessment of the rich fen system including the mineral/nutrient composition and pH of the groundwater; groundwater flow spatially and vertically; discharge and recharge areas"; a "functional/resource assessment of the site including a vegetation survey and identification of native fen plan communities across the site"; an "inventory of similar wetlands in the general area (watershed), including some analysis of their quality"; and an "inventory of rich fen plant communities that are within sites of High and Outstanding Biodiversity Significance in the area." Respondents estimate that undertaking these analyses alone would cost more than $100,000. And whatever pertinence all this might have to the issuance of a permit, none of it will alter the finality of the approved JD, or affect its suitability for judicial review. The permitting process adds nothing to the JD.

The Corps nevertheless argues that Congress made the "evident [ ]" decision in the Clean Water Act that a coverage determination would be made "as part of the permitting process, and that the property owner would obtain any necessary judicial review of that determination at the conclusion of that process." But as the Corps acknowledges, the Clean Water Act makes no reference to standalone jurisdictional determinations, so there is little basis for inferring anything from it concerning the reviewability of such distinct final agency action. And given "the APA's presumption of reviewability for all final agency action," "[t]he mere fact" that permitting decisions are "reviewable should not suffice to support an implication of exclusion as to other" agency actions, such as approved JDs.

■ [Ed. The concurring opinions of Justices Kennedy, Thomas, Alito, Kagan and Ginsburg are omitted.]

NOTES AND QUESTIONS

The Court's unanimous opinions in *Sackett* and *Hawkes* allow parties who disagree with the government to have access to judicial review at a comparatively early stage in an agency's decisionmaking process. The decisions seem to be part of an effort by the Court to allow parties to obtain review of an agency decision without first having to risk suffering a penalty or a collateral cost of a government decision and without first having to endure the cost and delay of a lenghthy administrative decision making process. Lower courts have cited *Sackett* and *Hawkes* in holding immediately reviewable issues that they might previously have held to be not final or ripe for review, perhaps because a petitioner has not exhausted an available administrative remedy.

What do you think explains this trend? What are the advantages and disadvantages to the more flexible approach to justiciability reflected in *Sackett* and *Hawkes*?

In *Abbott Labs*, the Supreme Court held that many issues that are raised by a legislative rule are subject to pre-enforcement review. Circuit courts have addressed an arguably analogous question in many cases, with inconsistent results. Can an individual or firm that is adversely affected by an interpretative rule or a policy statement (often referred

to collectively as guidance documents) obtain pre-enforcement review of the document? There are differences both between circuits and among the judges of each circuit with respect to that question, and the Court has never addressed it. The following opinions of a divided panel of the Federal Circuit illustrate the continuing debate with respect to this question.

Gray v. Secretary of Veterans Affairs

875 F. 3d 1102 (Fed. Cir. 2017),
reh. en banc denied, 884 F. 3d 1379 (2018),
cert. granted by *Gray v. Wilkie* (Nov. 2, 2018).

■ O'Malley, Circuit Judge.

Robert H. Gray and Blue Water Navy Vietnam Veterans Association petition this court under 38 U.S.C. § 502 to review certain revisions the Department of Veterans Affairs ("VA") made to its Adjudication Procedures Manual M21-1 ("M21-1 Manual") in February 2016. These revisions pertain to the VA's interpretation of provisions of the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, codified as amended at 38 U.S.C. § 1116. Because the VA's revisions are not agency actions reviewable under § 502, we dismiss for lack of jurisdiction.

I. BACKGROUND

A. The Agent Orange Act

To receive disability compensation based on service, a veteran must demonstrate that his or her disability was service-connected, meaning that it was "incurred or aggravated ... in line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16). Establishing service connection generally requires three elements: "'(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service'—the so-called 'nexus' requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)). The claimant has the responsibility to support a claim for service connection. 38 U.S.C. § 5107(a).

Congress has enacted presumptive service connection laws to protect certain veterans who faced exposure to chemical toxins during service, but would find it difficult or impossible to satisfy the obligation to prove a "nexus" between their exposure to toxins and their disease or injury. Among these laws is the Agent Orange Act, which established a framework for the adjudication of disability compensation claims for Vietnam War veterans with diseases medically linked to herbicide exposure in the Republic of Vietnam during the Vietnam War. Under the Agent Orange Act, any veteran who "served in the Republic of Vietnam" during the Vietnam era and who suffers from any of certain designated diseases "shall be presumed to have been exposed during such service" to herbicides "unless there is affirmative evidence to establish that the veteran was not exposed." *Id.* § 1116(f). The Agent Orange Act also established several statutory presumptions and a methodology for the VA to create additional regulatory presumptions that certain diseases were "incurred in or aggravated by" a veteran's service in Vietnam. *Id.* § 1116(a). The VA then proceeded to determine which diseases would qualify for presumptive service connection and to define what service "in the Republic of Vietnam" encompasses.

In May 1993, the VA issued regulations establishing presumptive service connection for certain diseases associated with exposure to herbicides in Vietnam. The relevant regulation conditions application of the presumption on the claimant having "served in the Republic of Vietnam," including "service in the waters offshore and service in other locations *if* the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. §

3.307(a)(6)(iii) (1993) (emphasis added). Absent on land service, the VA concluded that the statute and regulation do not authorize presumptive service connection for those veterans serving in the open waters surrounding Vietnam—known as "Blue Water" veterans. We considered the VA's position in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), and concluded that it was neither an unreasonable interpretation of the congressionally mandated presumption nor of the VA's own regulations relating thereto. *Id.* at 1190–95.

The dispute now before us arises from the VA's decision not just to exclude open water service from the definition of service in the "Republic of Vietnam," but to also exclude those veterans who served in bays, harbors, and ports of Vietnam from presumptive service connection. In other words, absent documented service on the land mass of Vietnam or in its "inland waterways"—defined as rivers and streams ending at the mouth of the river or stream, and excluding any larger bodies of water into which those inland waters flow—the VA has concluded that no presumptive service connection is to be applied. The VA did not implement this additional restriction by way of notice and comment regulation as it did its open waters restriction, and it has not published its view on this issue in the Federal Register. Instead, the VA has incorporated this new restriction into the M21-1 Manual, which directs VA adjudicators regarding the proper handling of disability claims from Vietnam-era veterans. It is this Manual revision which Gray challenges and asks us to declare invalid.

B. The M21-1 Manual and the 2016 Revision

As we explained recently, "[t]he VA consolidates its [internal] policy and procedures into one resource known as the M21-1 Manual." *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017) ("*DAV*"). The M21-1 Manual "is an internal manual used to convey guidance to VA adjudicators." VA Adjudications Manual, M21-1; Rescission of Manual M21-1 Provisions Related To Exposure to Herbicides Based on Receipt of the Vietnam Service Medal, 72 Fed. Reg. 66,218, 66,219 (Nov. 27, 2007) [hereinafter 2007 M21-1 Manual Revisions]. "The M21-1 Manual provides guidance to Veterans Benefits Administration employees and stakeholders to allow the VBA to process claims benefits quicker and with higher accuracy." *DAV*, 859 F.3d at 1074. The M21-1 Manual is available to the public through the KnowVA website. The M21-1 Manual provisions are not binding on anyone other than the VBA employees, however; notably, the Board of Veterans' Appeals ("Board") is not bound by any directives in the M21-1 Manual and need not defer to any administrator's adherence to those guidelines. *See* 38 C.F.R. § 19.5.

* * *

[I]n February 2016, the VA published a "Memorandum of Changes" announcing a change in policy and an accompanying revision of the M21-1 Manual. J.A. 207. The revised M21-1 Manual defines "inland waterways" as follows:

> ***Inland waterways*** are fresh water rivers, streams, and canals, and similar waterways. Because these waterways are distinct from ocean waters and related coastal features, service in these waterways is service in the [Republic of Vietnam]. VA considers inland waterways to end at their mouth or junction to other offshore water features, as described below. For rivers and other waterways ending on the coastline, the end of the inland waterway will be determined by drawing straight lines across the opening in the landmass leading to the open ocean or other offshore feature, such as a bay or inlet. For the Mekong and other rivers with prominent deltas, the end of the inland waterways will be determined by drawing a line across each opening in the landmass leading to the open ocean.
>
> ***Note:*** Inland waterway service is also referred to as ***brown-water Navy service***.

By virtue of this manual change, the VA instructed all claims processors in its 56 regional offices to exclude all Navy personnel who served outside the now-defined "inland

waterways" of Vietnam—i.e., in its ports, harbors, and open waters—from presumptive service connection for diseases or illnesses connected with exposure to Agent Orange. Thus, the VA instructed its adjudicators to exclude all service in ports, harbors, and bays from presumptive service connection, rather than service in only some of those waterways. Petitioners seek review of this revision pursuant to 38 U.S.C. § 502.

II. DISCUSSION

"A party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists." *DAV*, 859 F.3d at 1075. Under 38 U.S.C. § 502, we have jurisdiction to review only those agency actions that are subject to 5 U.S.C. §§ 552(a)(1) and 553. We *do not* have jurisdiction to review actions that fall under § 552(a)(2). "Section 553 refers to agency rulemaking that must comply with notice-and-comment procedures under the Administrative Procedure Act." *DAV*, 859 F.3d at 1075. The parties agree that § 553 is not at issue in this proceeding. The parties instead focus on § 552; their debate is whether the manual provisions challenged in this action fall under § 552(a)(1), giving us authority to consider them in the context of this action, or § 552(a)(2), prohibiting our review here.

In relevant part, § 552(a)(1) provides:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> ....
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.

§ 552(a)(2) provides that:

> Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—
>
> ....
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; [and]
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public;
>
> ....

The government contends that, because M21-1 Manual provisions are expressly governed by § 552(a)(2), this court may not review them unless and until they are applied in and govern the resolution of an individual action. This is so, according to the government, regardless of how interpretive or policy-laden the judgments are that resulted in the formulation of those manual provisions. Gray contends that the government's view of § 552 is too myopic. He contends that a manual provision can fall under § 552(a)(1) where, regardless of its designation, it constitutes an interpretive rule of general applicability that adversely affects the rights of an entire class of Vietnam veterans. In other words, Gray contends that it is not the way in which the VA chooses to implement its policies and statutory interpretations that implicates our jurisdiction, it is the impact of what the VA is doing that matters. While Gray's points are not without force—and the VA even concedes that the impact of its manual changes is both real and far reaching—we conclude that we may not review Gray's challenge in the context of this action.

We recently considered a challenge under § 502 to another revision to the M21-1 Manual. *DAV*, 859 F.3d at 1074–75. The Manual revision at issue in *DAV* provided guidance regarding the term "medically unexplained chronic multisymptom illness," which appeared in a statute and regulation related to presumptive service connection for Persian

Gulf War veterans. In determining whether § 502 granted this court jurisdiction to consider a direct challenge to the Manual revision, we identified "three relevant factors to whether an agency action constitutes substantive rulemaking under the APA: '(1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency.' " Id. at 1077 (alteration in original) (quoting *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)). We noted that the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." *Id.* Applying these factors, we found that the challenged Manual revisions "d[id] not amount to a § 553 rulemaking and d[id] not carry the force of law." *Id.*

We then held that the revisions "clearly f[e]ll under" § 552(a)(2) and not § 552(a)(1). *Id.* at 1078. We explained that "[w]here, as here, manual provisions are interpretations adopted by the agency, not published in the Federal Register, not binding on the Board itself, and contained within an administrative staff manual, they fall within § 552(a)(2)—not § 552(a)(1)." *Id.* We concluded that this was so, regardless of the extent to which the manual provision might be considered interpretive or a statement of policy. On these grounds, we dismissed the challenge for lack of jurisdiction.

Our holding in *DAV* compels the same result here. Like that in *DAV*, the manual provision at issue here is an interpretation adopted by the agency; the M21-1 Manual "convey[s] guidance to VA adjudicators," but "[i]t is not intended to establish substantive rules." 2007 M21-1 Manual Revisions, 72 Fed. Reg. at 66,219. The revisions at issue were not published in the Federal Register or the Code of Federal Regulations. The Board remains "bound only by 'regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department' "—and not the M21-1 Manual. *DAV*, 859 F.3d at 1077 (quoting 38 U.S.C. § 7104(c)). And, of course, the provisions in question are contained within an administrative staff manual: the M21-1 Manual. While it is admittedly true that compliance with this Manual revision by all internal VA adjudicators will affect the concerned veterans, at least initially, it also remains true that the Board is not bound to accept adjudications premised on that compliance. As we found in *DAV*, where the action is not binding on private parties or the agency itself, we have no jurisdiction to review it.

To be clear, it is not the moniker applied to this VA policy statement that is controlling. There are circumstances where we have found agency actions reviewable under § 552(a)(1) precisely because they had a binding effect on parties or entities other than internal VA adjudicators. *See, e.g.*, *LeFevre v. Sec'y, Dep't of Veterans Affairs*, 66 F.3d 1191, 1196–98 (Fed. Cir. 1995). We addressed several of those cases in *DAV* and explained why they differed from the circumstances at issue there. 859 F.3d at 1075–77. While the Manual provisions here differ from those at issue in *DAV*, their scope and binding effect are identical. We, accordingly, must reach the same conclusion regarding the scope of our jurisdiction here as we did in *DAV*.

As we also explained in *DAV*, this disposition does not leave Petitioners without recourse. For example, "[a] veteran adversely affected by a M21-1 Manual provision can contest the validity of that provision as applied to the facts of his case under 38 U.S.C. § 7292." *DAV*, 958 F.3d at 1078. Individual veterans and organizations such as Blue Water also may petition the VA for rulemaking. *See* 5 U.S.C. § 553(e). We have held that "§ 502 vests us with jurisdiction to review the Secretary's denial of a request for rulemaking made pursuant to § 553(e)." *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011). Because the February 2016 revision to the M21-1 Manual falls under § 552(a)(2) and not § 552(a)(1) or § 553, however, we lack jurisdiction under § 502 to hear Petitioners' direct challenge to the revision.

We recognize the costs that today's outcome imposes on Petitioners and the veterans

they represent. Petitioners sought direct review in this court to bypass yet another years-long course of individual adjudications or petitions for rulemaking. Given the health risks that many of these veterans face, Petitioners' urgency is understandable. But we are constrained by the narrow scope of the jurisdiction that Congress has granted to us.

* * * We must await an individual action to assess the propriety of the VA's interpretation of the Agent Orange Act and attendant regulations.

■ DYK, Circuit Judge, dissenting in part and concurring in the judgment.

The majority holds that we lack jurisdiction to review revisions to a Department of Veterans Affairs manual used by the agency to adjudicate veterans benefits. The majority concludes it is bound to reach this result by the recent decision of another panel in [*DAV*]. There, the panel categorically held that "[w]here, as here, manual provisions are interpretations adopted by the agency, not published in the Federal Register, not binding on the Board [of Veterans' Appeals], and contained within an administrative staff manual, they fall" outside the scope of 5 U.S.C. §§ 552(a)(1) and 553. *DAV*, 859 F.3d at 1078. It follows that there is no jurisdiction under 38 U.S.C. § 502.

I agree we are bound by *DAV* to hold that the manual revisions are not reviewable. But I respectfully suggest that *DAV* was wrongly decided. The analysis of 5 U.S.C. § 552(a)(1) in *DAV*—rendered without substantial briefing on that statutory provision—conflicts with our prior decisions applying that subsection to VA actions. The rule established by *DAV* also departs from the approach of other courts of appeals, which have held that analogous agency pronouncements are reviewable. Nothing in § 502 suggests that we should be less generous in our review with respect to VA than other courts have been with respect to other agencies. And *DAV* imposes a substantial and unnecessary burden on individual veterans, requiring that they undergo protracted agency adjudication in order to obtain preenforcement judicial review of a purely legal question that is already ripe for our review.

I

* * *

Many of the rules that govern whether and how to apply the presumption of service connection are set forth in a VA document known as the Adjudications Procedures Manual M21-1, "an internal manual used to convey guidance to VA adjudicators" in dealing with veterans' benefits claims. As described by the majority, the Manual has for at least a decade included service in the "inland waterways" of Vietnam as sufficient to warrant the presumption. In a 2009 letter, VA supplemented this provision by defining "inland waterways" to include rivers and deltas but not harbors and bays. Petitioner Gray challenged that definition before the Court of Appeals for Veterans Claims, which found it to be both irrational and inconsistent with VA's own regulations. The matter was remanded for further action by the Secretary.

In February 2016, following the remand by the Court of Appeals for Veterans Claims, VA revised the portion of the Manual concerning its interpretation of the Agent Orange Act's requirement that the veteran have "served in the Republic of Vietnam." These revisions for the first time established a detailed test for determining whether service aboard a vessel in the vicinity of Vietnam suffices to establish a presumption of service connection. First, mirroring its 2009 letter, VA inserted a new instruction that "[s]ervice on offshore waters does not establish a presumption." Manual § IV.ii.1.H.2.a. In other words, while service in inland waterways qualifies, service in the offshore waters of Vietnam does not constitute service in the Republic of Vietnam. The revised Manual then goes on to narrowly define "inland waterways" at the same time it broadly defines "offshore waters": "***Offshore waters*** are the high seas and any coastal or other water feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to regular tidal influence. This includes salty and brackish waters situated between rivers and the open ocean." *Id.* § IV.ii.1.H.2.b. Finally, the Manual notes that these revisions change the treatment of Qui

Nhon Bay Harbor and Ganh Rai Bay: service in these bays previously entitled a veteran to the presumption, but they now fall outside the Manual's definition of inland waterways. *Id.* § IV.ii.1.H.2.c. The Manual revisions significantly restrict the right to the presumptive service connection. The question before us is whether the revisions are subject to preenforcement judicial review.

II

Our jurisdiction here rests on 38 U.S.C. § 502, which provides, "An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review." Section 553 defines the requirements for notice-and-comment rulemaking. Section 552(a)(1) defines the circumstances when publication in the Federal Register is required and covers, among other things, "statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). While I agree with *DAV* that the Manual is not the type of document that is reviewable because it is subject to the notice-and-comment rulemaking provisions of § 553, it is nevertheless an interpretation of general applicability under § 552(a)(1).

Other circuits have held that agency pronouncements such as those involved here are subject to preenforcement review. Thus, for example, the District of Columbia Circuit has found agency guidance documents reviewable where, as here, the petitioners present purely legal claims. ***

Nothing in § 502 suggests that we should be less generous in our review of actions taken by VA. There is, of course, a "well-settled presumption that agency actions are reviewable," unless Congress clearly precludes such review. *LeFevre*, 66 F.3d at 1198. There is no such clear preclusion in the VA statute. To the contrary, here—as in the other circuit cases discussed above—in the relevant jurisdictional provision, "Congress has declared its preference for preenforcement review of agency rules." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1347 (Fed. Cir. 2003).

III

Preenforcement review of manual provisions is entirely consistent with the language of § 502. In that statute, as noted earlier, Congress chose to define our jurisdiction with reference to the Administrative Procedure Act's provisions concerning the requirements for public notice of agency actions. *See* 38 U.S.C. § 502. Agency actions requiring notice-and-comment rulemaking were made reviewable by reference to § 553. In addition, Congress made reviewable other agency actions described in § 552(a)(1). Section 552(a) establishes a hierarchy of government records. Several categories of records most directly affecting members of the public must be published in the Federal Register; many routine or internal agency records must be publicly available; and still others need only be available by request. With respect to interpretive rules, § 552(a)(2)(B) directs that if they are "of general applicability," the Federal Register publication requirement of § 552(a)(1)(D) applies. In short, "statements of general policy or interpretations of general applicability formulated and adopted by the agency," must be published in the Federal Register and are thus reviewable under § 502. The relevant question for jurisdictional purposes, then, is whether the Manual revisions here are properly characterized as "statements of general policy or interpretations of general applicability." If so, we have jurisdiction under § 502.

DAV never directly addressed this question of the scope of "interpretations of general applicability." *DAV*'s analytical omission is not surprising given that the petitioners in that case focused their jurisdictional argument primarily on whether the Manual revisions at issue were substantive rules requiring notice and comment under § 553. The panel nonetheless rejected the applicability of § 552(a)(1). Latching onto the undisputed fact that the Manual is an "administrative staff manual" under § 552(a)(2)—a provision not referenced in § 502—the *DAV* court held that we lack jurisdiction "[w]here, as here, manual provisions are interpretations adopted by the agency, [1] not published in the Federal

Register, [2] not binding on the Board itself, and [3] contained within an administrative staff manual, they fall within § 552(a)(2)—not § 552(a)(1)." 859 F.3d at 1078.

None of these three theories is supportable. First, the fact that the Manual revisions were not in fact published in the Federal Register does not support the majority's result. As the majority in this case and the panel opinion in *DAV* acknowledge, an agency's choice of whether and where to publish a rule are not controlling. Indeed, neither the majority here nor *DAV* cites any case in which the decision not to publish was even relevant in deciding the scope of § 552(a)(1). A contrary rule would permit the agency to defeat judicial review by the simple expedient of failing to fulfill its obligation to publish the document in the Federal Register.

Second, the fact that the Manual is not binding on the Board is equally irrelevant. We have previously rejected this very theory. * * *

As recognized by the majority, the Manual revisions' impact is extensive: "the VA instructed all claims processors in its 56 regional offices to exclude all Navy personnel who served outside the now-defined 'inland waterways' of Vietnam ... from presumptive service connection for diseases or illnesses connected with exposure to Agent Orange." VA, too, "concedes that the impact of its manual changes is both real and far reaching." Even though not binding on the Board, the Manual does bind the front-line benefits adjudicators located in each VA Regional Office. *See, e.g.*, *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009). Over 1.3 million claims were decided by the ROs in 2015, yet during that same period only 52,509 appeals of those decisions were filed before the Board. Those few veterans who do seek Board review can expect to wait an additional three years between the filing of their appeal and a Board decision. With roughly 96% of cases finally decided by VBA employees bound by the Manual, its provisions constitute the last word for the vast majority of veterans. To say that the Manual does not bind the Board is to dramatically understate its impact on our nation's veterans. Review of the Manual revisions is essential given the significant "hardship [that] would be incurred ... if we were to forego judicial review." *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1316 (Fed. Cir. 2006).

Finally, as the majority here appears to agree, *DAV*'s reliance on the form of the Manual cannot defeat jurisdiction. Nothing about the statute suggests that a document described in subsection (a)(2) could not also be subject to subsection (a)(1)'s more demanding requirements. Given the statute's "goal of broad disclosure" and the Supreme Court's instructions to construe its exemptions narrowly and exclusively, *U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989)*, we should not read new limitations into § 552.

Implicit to *DAV*'s reasoning, in this respect, is the notion that § 552(a)(1) and § 552(a)(2) are mutually exclusive. In other words, *DAV* instructs that provisions of agency manuals, because described in subsection (a)(2), are therefore not rules of general applicability for purposes of subsection (a)(1). *See DAV*, 859 F.3d at 1077–78. There is no support for this view. Congress did not in fact "expressly exempt" actions described in § 552(a)(1) from § 552(a)(2). To the contrary, a range of content commonly found in staff manuals—such as descriptions of an agency's organization, rules of procedure, and, importantly, generally applicable policies and interpretations—is expressly described in subsection (a)(1) despite also arguably being covered by the reference to manuals in subsection (a)(2)(C). Even if subsections (a)(1) and (a)(2) could be regarded as mutually exclusive, the Manual at issue here is not merely an "administrative staff manual": the Manual provides the rules of decision to be applied by agency adjudicators in responding to veterans' benefits claims. The revisions challenged here go well beyond "administrative" directions. They announce "interpretations of general applicability" subject to § 552(a)(1)'s publication requirement and, accordingly, to our review under § 502.

* * *

The provisions of agency manuals and similar documents have been previously held subject to preenforcement review. The *DAV* decision and the majority decision here represent an unwarranted narrowing of our jurisdiction. I respectfully suggest the *DAV* case was wrongly decided.

NOTES AND QUESTIONS

1. Do you think that a veteran who believes that he has suffered an illness caused by his exposure to agent orange during his service in a "bay, harbor, or port" in Vietnam should be required to apply for benefits, lose in a VA regional office because the personell in the regional office were bound by the guidance document, and appeal the negative decision that is based on the guidance document to the Board of Veterans Appeals before the veteran can get a court to answer the question whether the guidance document is legal? Which opinion—the majority or the dissent-- is more consistent with the attitude toward access to judicial review suggested by the Supreme Court's opinions in the *Sackett and Hawkes* cases discussed in this subchapter?

2. Political conditions in the U.S. today are extremely polarized. When a president of one party replaces a president of another party, agencies often follow the lead of the president and his appointees by making dramatic changes in regulatory rules and policies. Some of those changes can be made only through use of the notice and comment process that is required to change a legislative rule. In those circumstances, the agencies in the new administration must explain any change they make, as we discuss in Part C of Chapter 5.

Many major changes in agency interpretations of an agency's legislative rules and policies for enforcing its rules can be made through issuance of an interpretative rule or policy statement. As we discuss in Part B of Chapter 5, interpretative rules and policy statements are exempt from the notice and comment process. An agency can amend or rescind an interpretative rule or policy statement in a matter of minutes without using any mandatory decision making process.

If guidance documents are not subject to pre-enforcement review, an agency can amend or rescind scores of guidance documents without ever stating any reason for the resulting changes in its interpretations of its rules or its enforcement policies. Some scholars believe that our present politically-polarized society provides a particularly powerful justification for pre-enforcment review of guidance documents. If guidance documents are subject to pre-enforcement review, an agency would have to at least state reasons for any major change in its interpretations of its rules or its enforcement policies.

3. In *An Empricial Study of Agencies and Industries,* 36 Yale Journal on Regulation 165 (2019), Nicholas Parrillo reported the results of the comprehensive study of guidance documents that he conducted for the Administrative Conference of the United States. Parrillo made several points: (1) agencies issue large numbers of guidance documents; (2) guidance documents are extraordinarily valuable as means through which regulated firms, beneficiaries of regulation, and the general public can find out how agencies are interpreting and enforcing rules and statutes; and (3) guidance documents often have a powerful effect on the behavior of regulated firms because it is almost always easier and less risky for a firm to conform its conduct to the non-binding interpretations and enforcement policies of an agency than to risk a costly battle with the agency. Parrillo then noted that agencies differ with respect to the means they make available through which a regulated firm can attempt to persuade an agency to change an interpretative rule or a policy statement. He urged agencies to adopt and to publicize readily accessible means of

persuading an agency to change an interpretation or enforcement policy. Should courts consider whether an agency has created such a mechanism as part of its process of deciding whether a guidance document is subject to pre-enforcement review? Why or why not?

J. JUSTICIABILITY ISSUES: STANDING

CHAPTER 7, SECTION C: STANDING TO OBTAIN JUDICIAL REVIEW

The Justices divided in *Federal Election Commission v. Akins* with respect to the meaning of the requirement that an injury must be "concrete and particularized" to qualify as an injury for standing purposes. The Court attempted to resolve both of those issues in the following case.

Spokeo, Inc. v. Robins
136 S. Ct. 1540 (2016).

■ Justice ALITO delivered the opinion of the Court.

This case presents the question whether respondent Robins has standing to maintain an action in federal court against petitioner Spokeo under the Fair Credit Reporting Act of 1970 (FCRA or Act), 84 Stat. 1227, as amended, 15 U.S.C. § 1681 *et seq.*

Spokeo operates a "people search engine." If an individual visits Spokeo's Web site and inputs a person's name, a phone number, or an e-mail address, Spokeo conducts a computerized search in a wide variety of databases and provides information about the subject of the search. Spokeo performed such a search for information about Robins, and some of the information it gathered and then disseminated was incorrect. When Robins learned of these inaccuracies, he filed a complaint on his own behalf and on behalf of a class of similarly situated individuals.

The District Court dismissed Robins' complaint for lack of standing, but a panel of the Ninth Circuit reversed. The Ninth Circuit noted, first, that Robins had alleged that "Spokeo violated *his* statutory rights, not just the statutory rights of other people," and, second, that "Robins's personal interests in the handling of his credit information are individualized rather than collective." Based on these two observations, the Ninth Circuit held that Robins had adequately alleged injury in fact, a requirement for standing under Article III of the Constitution.

This analysis was incomplete. As we have explained in our prior opinions, the injury-in-fact requirement requires a plaintiff to allege an injury that is both "concrete *and* particularized." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181 (2000). The Ninth Circuit's analysis focused on the second characteristic (particularity), but it overlooked the first (concreteness). We therefore vacate the decision below and remand for the Ninth Circuit to consider *both* aspects of the injury-in-fact requirement.

I

The FCRA seeks to ensure "fair and accurate credit reporting. §1681(a)(1). "To achieve this end, the Act regulates the creation and the use of "consumer report[s]" by "consumer reporting agenc[ies]" for certain specified purposes, including credit transactions, insurance, licensing, consumer-initiated business transactions, and employment. *See* §§ 1681a(d)(1)(A)–(C); §1681b. Enacted long before the advent of the Internet, the FCRA applies to companies that regularly disseminate information bearing on an individual's "credit worthiness, credit standing, credit capacity, character, general reputation, personal

characteristics, or mode of living." § 1681a(d)(1).

The FCRA imposes a host of requirements concerning the creation and use of consumer reports. As relevant here, the Act requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports, § 1681a(b), to notify providers and users of consumer information of their responsibilities under the Act, § 1681e(b), to limit the circumstances in which such agencies provide consumer reports "for employment purposes," § 1681b(b)(1),.and to post toll-free numbers for consumers to request reports, § 1681i(a)..

The Act also provides that "[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any [individual] is liable to that [individual]" for, among other things, either "actual damages" or statutory damages of $100 to $1,000 per violation, costs of the action and attorney's fees, and possibly punitive damages. § 1681n(a).

Spokeo is alleged to qualify as a "consumer reporting agency" under the FCRA. It operates a Web site that allows users to search for information about other individuals by name, e-mail address, or phone number. In response to an inquiry submitted online, Spokeo searches a wide spectrum of databases and gathers and provides information such as the individual's address, phone number, marital status, approximate age, occupation, hobbies, finances, shopping habits, and musical preferences. According to Robins, Spokeo markets its services to a variety of users, including not only "employers who want to evaluate prospective employees," but also "those who want to investigate prospective romantic partners or seek other personal information." Persons wishing to perform a Spokeo search need not disclose their identities, and much information is available for free.

At some point in time, someone (Robins' complaint does not specify who) made a Spokeo search request for information about Robins, and Spokeo trawled its sources and generated a profile. By some means not detailed in Robins' complaint, he became aware of the contents of that profile and discovered that it contained inaccurate information. His profile, he asserts, states that he is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree. According to Robins' complaint, all of this information is incorrect.

Robins filed a class-action complaint in the United States District Court for the Central District of California, claiming, among other things, that Spokeo willfully failed to comply with the FCRA requirements enumerated above.

The District Court initially denied Spokeo's motion to dismiss the complaint for lack of jurisdiction, but later reconsidered and dismissed the complaint with prejudice. The court found that Robins had not "properly pled" an injury in fact, as required by Article III.

The Court of Appeals for the Ninth Circuit reversed. Relying on Circuit precedent, the court began by stating that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." The court recognized that "the Constitution limits the power of Congress to confer standing." But the court held that those limits were honored in this case because Robins alleged that "Spokeo violated *his* statutory rights, not just the statutory rights of other people," and because his "personal interests in the handling of his credit information are individualized rather than collective." The court thus concluded that Robins' "alleged violations of [his] statutory rights [were] sufficient to satisfy the injury-in-fact requirement of Article III."

We granted certiorari.

I

A

* * *

Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The

plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Id.*, at 560–561. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). Where, as here, a case is at the pleading stage, the plaintiff must "clearly ... allege facts demonstrating" each element. *Warth v. Seldin*, 422 U.S. 490, 518 (1975).

* * *

B

This case primarily concerns injury in fact, the "[f]irst and foremost" of standing's three elements. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998). Injury in fact is a constitutional requirement, and "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820, n.3 (1997).

To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S., at 560. We discuss the particularization and concreteness requirements below.

1

For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Ibid.*, n. 1.

Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be "concrete." Under the Ninth Circuit's analysis, however, that independent requirement was elided. As previously noted, the Ninth Circuit concluded that Robins' complaint alleges "concrete, *de facto*" injuries for essentially two reasons. First, the court noted that Robins "alleges that Spokeo violated *his* statutory rights, not just the statutory rights of other people." Second, the court wrote that "Robins's personal interests in the handling of his credit information are *individualized rather than collective*." Both of these observations concern particularization, not concreteness. We have made it clear time and time again that an injury in fact must be both concrete *and* particularized. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

A "concrete" injury must be "*de facto* "; that is, it must actually exist. Black's Law Dictionary 479 (9th ed. 2009). When we have used the adjective "concrete," we have meant to convey the usual meaning of the term—"real," and not "abstract." Webster's Third New International Dictionary 472 (1971); Random House Dictionary of the English Language 305 91967). Concreteness, therefore, is quite different from particularization.

2

"Concrete" is not, however, necessarily synonymous with "tangible." Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. See, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise).

In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 775–777 (2000). In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in

Lujan that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 504 U.S., at 578. Similarly, Justice Kennedy's concurrence in that case explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.*, at 580.

Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness. See, *e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138. For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure. Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25 (1998).

In the context of this particular case, these general principles tell us two things: On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete. It did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement. We take no position as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct.

■ Justice THOMAS, concurring.

[Ed. Justice Thomas's concurring opinion discussed the difference between private rights and public rights. He concluded as follows (citations omitted).]

When Congress creates new private causes of action to vindicate private or public rights, these Article III principles circumscribe federal courts' power to adjudicate a suit alleging the violation of those new legal rights. Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights. A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of those private rights. A plaintiff seeking to vindicate a public right embodied in a federal statute, however, must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population.

■ Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

[Ed. Justice Ginsburg's dissenting opinion agreed with most of the reasoning in the majority opinion but expressed the view that no remand was needed because Robins had alleged a sufficiently concrete injury.]

Robins would not qualify, the Court observes, if he alleged a "bare" procedural

violation, one that results in no harm, for example, "an incorrect zip code." Far from an incorrect zip code, Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market. The FCRA's procedural requirements aimed to prevent such harm. I therefore see no utility in returning this case to the Ninth Circuit to underscore what Robins' complaint already conveys concretely: Spokeo's misinformation "cause[s] actual harm to [his] employment prospects."

NOTES AND QUESTIONS

1. It seems clear that a report that contains an incorrect zip code would not qualify as causing "concrete" injury, but can you tell from the opinion what incorrect information would qualify? How about a report of an outstanding debt without any indication that it is contested? Or a report that a debt has been outstanding for three years when it was paid two months ago? Or a reported salary that is lower than the individual's actual salary beause it is two years out of date?

2. The majority in *Spokeo* said, "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Yet, the majority also says "that Congress may elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law" and that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." Do you understand the distinction the majority is making?

3. In his concurring opinion, Justice Thomas distinguished between statutes that create a public right and statutes that create a private right. Do you find that distinction helpful? How confident are you that courts can make that distinction?