DOCTRINAL CROSSROADS: MAJOR QUESTIONS, NON-DELEGATION AND CHEVRON DEFERENCE

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Thank you for the kind introduction and the opportunity to speak to you today. And thank you to the Pacific Legal Foundation—these sorts of conferences are massive undertakings, and require countless hours of thankless work and worry. I also must note that I am here today on my own accord, not on behalf of any client or my law firm. But of course, if a future President should make the mistake of nominating me for something in the future, and if anything I say here today is to be used against me or deemed too controversial, then I will say that what I have said reflected a general sense of the world, and not really any of my specific views.

So on to the topic—Doctrinal Crossroads: Major Questions, Non-Delegation and *Chevron* Deference. It is certainly now front of mind in not only the world of administrative law aficionados, but among corporate general counsels, think tanks, and the media. Let me pause on the media for a moment. If you were to read recent media coverage of this issue set, you would probably assume that the current revolution has been brewing for years, that conservatives have been fighting for decades and decades against *Chevron* deference, and administrative law has been a centerpiece of the conservative movement.

Not so, not true.

In reality, for many, many years—until very recently—conservative legal orthodoxy tended to favor and occasionally champion various judicial deference doctrines, under the assumption that it was a version of judicial modesty and restraint. You would hear this echo from corporate America, the academy, most think tanks, almost all trade associations, and Congress—on both sides of the aisle, particularly from some Senators over a certain age. It was the Reagan administration, after all, that litigated *Chevron* and then quickly embraced the idea of deference to executive branch agency decision making.

So, what has changed? How did we get to this flashpoint in administrative law thinking? It is not enough to cynically say all things are situational. Much of the media commentary goes in this direction: Republicans liked deference in the 1980s, Democrats liked it in the 1990s, and on and on. But partisan advantage, although convenient for cable news talking heads, does not explain where we are today—when the Supreme Court, with a majority of Republican

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appointees, has not decided a case based on *Chevron* deference since 2016—when a Republican was poised to re-take the reins of the administrative state.

Perhaps there is something to be said about a generational shift. Once upon a time, if you were a smart conservative lawyer interested in government and having a job where you could move the needle in your preferred direction, a staff position at the United States Congress was not the place to go. For decades, Congress was essentially one-party rule. It uniformly shared a "government can solve problems big and small" mindset, and for a significant period of time, seemed to be in business only to create new administrative agencies claiming to fix yet another perceived problem via vast delegations of authority.

No, rather than the legislature, the executive branch was the place to go for conservatives, beginning in the 1970s and reaching a crescendo in the 1980s. When we think of generational lions of the law, names like Scalia and Silberman pop to mind, and with the likes of Bork and Rehnquist and Randolph and Doug Ginsberg, among many others, that generation forged similar career paths, including significant time spent within the executive branch. And, whether consciously or not, how you come up in your career tends to influence how you see the world.

But there is more to the story than a simple generational shift, and much more than simply "out with the old and in the new." For example: Why then, did these legal giants seem to shift their views later in their careers? See, for example, the abysmal record of the Obama Administration's regulatory initiatives before the D.C. Circuit. Over time—and it is probably safe to say beginning in the 1990s—many of these so-called "independent agencies," several of which were created in the 1970s, shifted to become much more dominant and far-reaching.

Now, independent of what? They never really say, but such agencies have common characteristics. Usually there is some sort of multi-head, bipartisan structure; where the heads are picked through negotiation between the White House and Senate leadership; who usually cannot be removed without cause; where the terms tend to be staggered and of a duration that ensures that they can outlast a particular presidential administration; where the career staff tend to have outsized powers, or there are administrative law judges that are even more isolated from removal; all with a very broad grant of statutory authority to, and I am paraphrasing, fix things and make the world a better place. Those sorts of statutes were forged through what folks now call the good ole' days of legislative compromise. But in reality, no one could really agree on much, so they just kicked it to the agency to do the hard work, and went to the bill signing claiming to have solved yet another perceived problem. Then there are more recent behemoth statutes, which never really seemed to get a full airing in Congress, but then sailed through the process with a bicameralism and presentment sleight of hand.

Whether the agency is purportedly independent or not: When you combine this shiftless approach to governing, with the hubris of the unelected agency people, with courts deferring to all sorts of agency decisions big and small, it ought not be surprising that it all got carried away.

As one who ran a federal agency for a time—in my case it was the Federal Election Commission, one of these so-called independent agencies—I can say from personal experience that the last source or authority consulted was the statute. When I would ask, "where is that in the statute?," the answer would invariably be a variant of the same answer: There is this past enforcement matter from 1982, there is this other guidance document from 1988, this came up in

a presidential audit in the 1996 election cycle, there is an advisory opinion from 1978. All these agencies have built up their own version of a common law of the bureaucracy, which drifts farther and farther away from the statute over time. "Gaps needed to be filled," so they said, and "do not worry," they would say, "courts will defer to us."

This steady drift away from statutory authority, without much in the way of supervision, accountability or oversight, mostly flew under the radar—and still does. There would be some litigation here and there, a few would talk about it, but for the most part, questioning agency power was an underground movement.

That was because part of this common law of the bureaucracy includes a dazzling array of arguments designed to avoid judicial review. Litigating against an agency rarely concerns the merits. Instead, much ink is spilled on jurisdiction, standing, venue, whether there was final agency action, mootness, ripeness, the list goes on and on, all offering courts exit ramps to avoid judicial review of agency action.

Plaintiffs, for their part, would struggle to challenge a new regulation, only to be thwarted by agency lawyers claiming in court that the regulation was quite necessary and sensible, that it did not really break much in the way of new ground, it merely clarified pre-existing norms, and it was not nearly as expansive as the confused plaintiff was claiming. And in any event, the agency would add, the plaintiff probably lacked standing to challenge the action at all.

Meanwhile, that same regulation would be read broadly to cover all sorts of new situations in the enforcement context, often shielded from public view, where an unfortunate respondent would rather settle and move on with their lives than be a test case—particularly when their high-paid lawyers would advise that judicial review would lead to nothing more and nothing less than judicial deference to the agency, all but compelling the respondent to settle otherwise meritorious claims.

Certainly, there were some victories for liberty along the way. We are now familiar with the tragic tale encountered by the Sacketts in their struggle against the EPA.

In 2012, the Supreme Court decided *Sackett v. EPA* for the first time.[1] Many of you, I am sure, are familiar with it, and the Kafkaesque regulatory process the EPA inflicted on the Sackett family. For those uninitiated, allow me to recap the facts, which poignantly capture the many problems of the modern administrative state.

The Sacketts purchased land near Priest Lake, Idaho and planned to build a new home.[2] But as they were preparing the land for construction, the EPA sent them a so-called compliance order claiming that the Sacketts' construction was prohibited because their land was covered by the Clean Water Act.[3] Even though it was several lots away from any body of water, the EPA asserted that the *land* qualified as navigable waters under the Act and thus, the Sacketts could not fill the land as necessary to build their home.[4]

[1] 566 U.S. 120 (2012) [hereinafter *Sackett II*].

[2] *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010) [hereinafter *Sackett I*].

[3] *Id.*

[4] *Id.*

The agency ordered the Sacketts to stop the construction.[5] They had to restore the land to an EPA-approved condition or face up to $32,500 a day in fines.[6] Here is the kicker: the EPA denied the Sacketts an administrative hearing and then argued that the Sacketts lacked any right to challenge the EPA's actions in court.[7] It seemed Woodrow Wilson's dream of the so-called experts being free of any influence or interference, even judicial review, had come true.[8] The case made its way to the Supreme Court in 2012 on that last question—whether the Sacketts had any right to challenge the EPA's actions in court—and the Supreme Court unanimously held that they did.[9]

To a group of lawyers and law students this should seem like a pretty straightforward proposition. A government agency sought to enjoin private individuals from using their personal property and imposed a crushing fine if they failed to comply. As Justice Alito noted in his concurrence, "in a Nation that values due process, not to mention private property, such treatment is unthinkable."[10] But to the agency, this was just standard operating procedure.[11] The EPA's authority was beyond debate, so they said. Such administrative hubris is not isolated to the EPA—it infects all agencies big and small.

One would think the Supreme Court's unanimous rebuke would be the end of it, but one would be wrong. For eleven years thereafter, the Sacketts tussled with the EPA and tried to develop their land. But without success. Eleven years later, the case returned to the Supreme Court, and just recently, the Court again ruled unanimously in favor of the Sacketts by reaching the seemingly obvious conclusion that the Clean Water Act extends only to wetlands that have a continuous surface connection with "waters" of the United States.[12] I guess that is why it was unanimous. But it took eleven years.

The Sacketts are regular people, not a major corporation with a legal department. Yet their case took 15 years start to finish, countless millions of dollars in legal fees, and two trips to the Supreme Court before they could build their family home on a 2/3 acre lot.

The Sacketts and their courageous fight started to get attention, and helped bring the problems with the administrative state to the fore. A few of us mentioned it every chance we got. Back in 2017, over six years ago, the theme of the Federalist Society's National Lawyers Convention was "Administrative Agencies and the Regulatory State."

While serving as Counsel to the President, I was honored to deliver the Barbara Olsen Memorial Lecture. During that Lecture, I made a few observations and predictions. I said:

> "The greatest threat to the rule of law in our modern society is the ever-expanding regulatory state, and the most effective bulwark against that threat is a strong judiciary."

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See generally Cochran v. SEC*, 20 F.4th 194, 218 (5th Cir. 2021) (en banc) (Oldham, J., concurring) (detailing President Wilson's disdain for democracy and universal suffrage, and his preference for expert-run bureaucracies).

[9] *Sackett II* at 131.

[10] *Id.* (Alito, J., concurring).

[11] *See* Brief for Respondent at 34–35, *Sackett II* (No. 10-1062), 2011 WL 5908950.

[12] *Sackett v. EPA*, 598 U.S. 651 (2023) [hereinafter *Sackett III*].

> I noted that as a Tenth Circuit Judge, Neil Gorsuch was right when he wrote: "the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the constitution of the framers design. Maybe the time has come to face the Behemoth."
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> I also said: "Justice Scalia's tragic death put these issues front and center in the 2016 election. In my lifetime I cannot remember a presidential election that turned so critically on the role of judges. The President knew this, which is why he issued his list of candidates for the Supreme Court."
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> I also announced 5 more names to the President's Supreme Court list, including Brett Kavanaugh and Amy Coney Barrett.
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> I then gave a talk that took a deep dive into major questions, non-delegation, *Chevron* deference, and a host of other problems with the current administrative state. I even delved into the saga of *Chenery I* and *Chenery II* – where praising *Chenery I* was an applause line. Perhaps now the Senate understands why Justice Gorsuch cited Justice Robert Jackson as a major influence?[13]

Six years later, standing here today, Barrett and Kavanaugh are both on the Supreme Court, there is an increasing scrutiny on the administrative state, the major questions doctrine is no longer a Kavanaugh dissent in a net neutrality case but is instead the law of the land, and *Chevron* deference is before Supreme Court in *Loper-Bright* and *Relentless*.[14] In the words of the Chief Justice, "the case is submitted."

Now, many late to the game are trying to make sense of what is happening and are struggling to analyze various strands of judicial precedent, often forcing dissonance when they really ought to hear harmony.

Certainly, the various doctrines find their genesis in different parts of the Constitution and do not apply to all branches equally. As a matter of analytical purity, *Chevron* empowers the executive to legislate, shifting power away from the legislature, whereas major questions limits the executive and forces congressional action before acting.

But *Chevron* deference, no matter its fate, is not an isolated doctrine—it is not an exception to some other doctrine, which only matters in certain cases, and only on Wednesdays if we feel like it. *Chevron* is not separate and apart from major questions, or non-delegation, or final agency action, or standing or all the other barriers that have been erected through the common law of the bureaucracy.

All of these are subsets of the real issue.

What is at stake is the presumption that the government wins—and not an elected government making decisions through a constitutional system of limited power, with all of its attendant checks and balances. By "the government," here, I mean the unelected. Even those

[13] Donald F. McGahn II, White House Counsel, Federalist Society, Nat'l Lawyers Convention: Barbara K. Olson Memorial Lecture (Nov. 17, 2017).

[14] *See Loper Bright Enterp. v. Raimondo*, No. 21-5166; *Relentless v. Dep't of Commerce*, No. 22-1219.

who actually win an election inherit a vast bureaucracy with a tremendous amount of inertia, often moving in directions opposite of that upon which the candidate campaigned.

And appointing your own people? Good luck—it takes years to work through the Senate's confirmation process, so especially when it comes to the so-called independent agencies, you are lucky to get your appointees in place by year three.[15] And even then, it is to a multi-headed agency.

But the delay is not limited to independent agencies. Critical legal positions are not filled for months and months. By way of example, when I was Counsel to the President, we did not have a Senate-confirmed head of the Office of Legal Counsel or OIRA until deep into the first year.[16] The effective ending of recess appointments is probably a partial culprit, but regardless, it is yet another example of the federal bureaucracy continuing apace without elected executive supervision.

Yet in an era when it has become fashionable to label virtually everything a "threat to democracy," unelected governance seems exempt from that list curated by the chattering class elites. Why? Dare I ask—because it achieves the policy results they seek? And this anti-democratic world view gets justified by the usual sky-is-falling rhetoric about big corporations causing big problems. But is that really what this is about?

Justice Gorsuch certainly does not think so. In the recent *Loper Bright* argument, he observed:

> The cases I saw routinely on the courts of appeals -- and I think this is what niggles at so many of the lower court judges -- are the immigrant, the veteran seeking his benefits, the Social Security Disability applicant, who have no power to influence agencies, who will never capture them, and whose interests are not the sorts of things on which people vote, generally speaking.
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> And, there, *Chevron* is almost always and, in fact, I didn't see a case cited, and perhaps I missed one, where *Chevron* wound up benefitting those kinds of peoples. And it seems to me that it's arguable, and, certainly, the other side makes this argument powerfully, that *Chevron* has this disparate impact on different classes of persons.
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> But you've left open the possibility that a judge, if left to his own devices, would say the fairest ruling is in favor of the immigrant, it's in favor of the veteran, and it's in favor of the Social Security Disability applicant, but because of a fictionalized statement about what Congress wanted when it didn't think about the problem, the government always wins.[17]

Beyond generation shift, beyond the growth of so-called independent and other agencies, Justice Gorsuch really cuts to chase here, and shows there are different schools of thought in play.

The traditional view—which to most audiences is probably the common view—looks at regulation through an economic lens. We hear talk of imposing cost-benefit analysis, and how much regulation "costs," with incomprehensible figures thrown about. This is fine as far as it

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[15] *See* Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1661–62 (2015).

[16] *See* Nomination of Steven A. Engel to Dep't of Justice, Office of Legal Counsel, PN58, 115th Cong. (Nov. 7, 2017); Nomination of Neomi Rao to Administrator of Office of Information & Reg. Affairs, PN478, 115th Cong. (July 10, 2017).

[17] Transcript of Oral Argument at 132–34, *Relentless v. Dep't of Commerce* No. 22-1219.

goes. But frankly, such analyses are based upon projections and economic models. And who develops those models? Other government bureaucrats.

Under President Obama, his team ended any illusion of economic cost-benefit analysis as anything but another tool in the justification toolkit. The government-centric folks have perfected the art. Look at the supposed "social cost of carbon" calculations—these show that cost-benefit analysis is just something that can be cynically manipulated for preferred outcomes.[18] But this, in my view, is what is still being shopped around in most so-called conservative circles as well. To me, it seems more focused on picking winners and losers via regulatory policy, disguised as pseudo-scientific economic liberty.

But there is another school of thought, which is much more revolutionary, and incidentally conservative, to which Gorsuch speaks. To wit: Liberty is a value in and of itself, regardless of economic harm. It is not based on the whims of corporate America—which may hit your ears a little funny, given the often-repeated myth that big business is conservative. But given the current wave of virtue-signaling from the corporate world, we must be especially wary of simply picking winners and losers through a corporate or macroeconomic lens.

And it does nothing to fix the problems encountered by the Sacketts thanks to the EPA; or the Little Sisters of the Poor thanks to the contraceptive mandate, which incidentally, was not in any statute, but simply a creation by regulatory fiat; or the Realtors thanks to the continued rent moratorium when the President himself admitted it was unlawful; or now the fisherman forced to pay for government inspectors—the individual plaintiffs who have been harmed and the plaintiffs in real cases that are changing things. It is why I also go into detail about the facts in Sackett. The facts matter, and too often some of these cases turn into law review theoretical discussions, even at the Supreme Court.

The rule of law, the non-delegation doctrine, enforcement discretion, due process, penalties, so-called "voluntary settlements," judicial review, final agency action. This is where real change can occur, where the emphasis is placed more clearly on the individual forced to navigate an administrative bureaucracy. As Justice Gorsuch wrote in *Kisor v. Wilkie*:

> Maybe the powerful, well-heeled, popular, and connected can wheedle favorable outcomes from a system like that—but what about everyone else? They are left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge." And in such a system "[t]he rule of law begins to bleed into the rule of men.[19]

And to the extent some argue this "government wins" presumption is necessary, that it creates stability and the like, I think Paul Clement put that fallacy to rest when he argued in *Loper Bright*:

> *Chevron* is something only the government could love because every court in the country has to agree on the current administration's view of a debatable statute. You don't get the

[18] *See, e.g.*, EPA Report on the Social Cost of Greenhouse Gasses, No. EPA-HQ-OAR-2021-0317 (Nov. 2023).
[19] *Kisor v. Wilke*, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring).

> kind of uniformity that you actually want, which is a stable decision that says this is what the statute means.[20]

In other words, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[21] There have been a number of rule of law wins at the Supreme Court lately. The Vaccine Mandate, the Student Loan cases, the Eviction Moratorium, Clean Power, WOTUS, all "won" on the grounds that the President and/or his administration did not have the power to do what they were attempting to do.[22] We will see how *Loper Bright* and *Relentless* come down in short order.

But as my time winds down, I would also like to take a moment to highlight what is happening in the lower courts, as they give a window into what the future may bring. There are a number of circuit judges who, perhaps even more than the Supreme Court, have already begun to put their stamp on the today's topic. This is no longer an abstract theory, or fodder for law review articles—there have been a number of stellar opinions written by sitting judges. And in a change from the past, these sorts of issues are no longer just for the D.C. Circuit. Certainly Judges Rao, Katsas and Walker continue to pull the heavy oar, but I would suggest reading the work of Andy Oldham, Amul Thapar, Patrick Bumatay, John Nalbandian, Lisa Branch, and David Stras, to name just a few. Each of these Judges has an unwavering commitment to the principles of textualism and originalism and all are willing to exercise their judicial power to "say what the law is" rather than acquiesce to the sprawling and powerful administrative state. A sampling of some recent administrative law opinions demonstrates the character and integrity of each of these jurists.

First up was Judge Lisa Branch's brilliant rejection of the Centers for Disease Control's (CDC) attempt to halt all evictions during the pandemic. At the height of the COVID-19 pandemic madness, the Director of the CDC invoked Section 361 of the Public Health Service Act to impose a national residential eviction moratorium.[23] In that order, the CDC noted that "[e]victions threaten to increase the spread of COVID-19," so the CDC decreed that "landlords are prohibited from evicting a covered person from a residential property for the non-payment of rent."[24] The statute on which this unprecedented decree was saddled simply authorized the promulgation of "such regulations as . . . are necessary to prevent the introduction, transmission, or spread of communicable diseases from . . . one State or possession into any other State or possession."[25] The statute, of course, does not say a word about housing, or evictions—issues clearly far afield from the CDC's expertise.

So a group of landlords sued claiming the CDC's breathtaking order exceeded the authority Congress vested in the agency, and in all events threatened to impose torrid costs on landlords

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[20] Transcript of Oral Argument at 26–27, *Loper Bright Enterp. v. Raimondo*, No. 21-5166.

[21] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[22] *See Nat'l Fed. of Indep. Bus. v. Dep't of Labor, Occ. Safety & Health Admin.*, 595 U.S. 109 (2022); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021); *West Virginia v. Env't Prot. Agency*, 597 U.S. 697 (2022); *Sackett III*.

[23] *See Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, 4 F.4th 1220, 1238 (11th Cir. 2021) (Branch, J., dissenting).

[24] CDC Order, 85 Fed. Reg. at 55292, 55296 (2020).

[25] 42 U.S.C. § 264(a).

by preventing them from evicting tenants who failed to pay rent.[26] So the landlords sought an injunction against the CDC. But the majority denied that request, explaining that the injury imposed by the order was not irreparable. The majority shockingly mused that it could not "see how the temporary inability to reclaim rental properties constitutes an irreparable injury."[27] Nor did the majority credit the landlords' claim that many tenants were likely to be insolvent and thus unlikely to fork over months—or years—worth of past-due rent, if and when the CDC lifted its unprecedented moratorium.[28]

Judge Lisa Branch, however, was not so easily led astray. She carefully reviewed the statutory text relied upon by the CDC and found it a thin reed on which to base a multi-billion-dollar regulatory program imposed by a *health* agency to regulate *housing* issues—an area traditionally reserved to the States.

As she explained, "[i]t is an 'ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'"[29] Accordingly, Judge Branch refused to "'read the Public Health Service Act to grant the CDC the power to insert itself into the landlord-tenant relationship without some clear, unequivocal textual evidence of Congress's intent to do so.'"[30] And because "[t]here [wa]s no unmistakably clear language in the Public Health Service Act indicating Congress's intent to invade the traditionally State-operated arena of landlord-tenant relations, this clear statement rule supports the conclusion that § 264(a) does not authorize the CDC Order."[31]

The CDC's shocking grab of authority, Judge Branch argued, violated the Constitution's structure and permitted the executive to arbitrarily exercise coercive power over the entire nation without so much as a whiff of approval from Congress.[32] Judge Branch was not alone for long; her brilliant opinion was eventually vindicated by the Supreme Court in *Alabama Association of Realtors v. Dep't of Health & Hum. Servs*.[33]

Judge Amul Thapar has long maintained a similar skepticism of agency authority and the deference doctrines that insulate agency action from judicial review. As a district judge, and now as a judge on the Sixth Circuit, Judge Thapar has consistently resisted various agency deference doctrines as "abdication by ambiguity," which interfere with the judicial duty to interpret the law in the first instance.[34] This story is as old as the administrative state itself. Agencies rush past statutory and constitutional limits on their own authority. But when called on it, they point to deference doctrines to tempt judges to walk the primrose path, avoid difficult decisions, and defer to the executive instead.

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[26] *See Brown*, 4 F.4th at 1223–24.

[27] *Id.* at 1226.

[28] *See id.* at 1226–29.

[29] *Id.* at 1251 (Branch, J., dissenting) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989).

[30] *Id.* at 1251–52 (quoting *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 523 (6th Cir. 2021)).

[31] *Id.* at 1252 (internal quotation marks omitted).

[32] *See id.*

[33] 141 S. Ct. 2485 (2021) (per curiam).

[34] *Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018); *see also M.L. Johnson Fam. Props., LLC v. Bernhardt*, 237 F. Supp. 3d 528, 544 (E.D. Ky. 2017) (rejecting deference doctrines which act to "insulate [an agency's] own decisions from judicial review").

Judge Thapar, however, rejects these doctrines wholesale. In *Duncan v. Muzyn*,[35] for example, various plaintiffs sued the Tennessee Valley Authority Retirement System (TVA) after the TVA cut various pension benefits. As its first line of defense, the agency asserted *Auer* deference, and claimed the court was compelled to defer to the agency's interpretation of the appropriateness of its actions under agency regulations.[36] But Judge Thapar rejected that argument summarily.[37] For one, Judge Thapar correctly noted that "simply calling something ambiguous does not make it so."[38] The language of a provision, Judge Thapar explained, is not "ambiguous merely because the parties interpret it differently."[39] Rather, ambiguity is necessarily comparative. Where a provision is amenable to multiple interpretations all of which are equally plausible, a provision may be deemed ambiguous.[40] So too where a provision's language would permit "*no* reasonable interpretation."[41] But where one interpretation proves superior to others, language is unambiguous, and the task is for the judge to decide the meaning of the law, rather than to defer to an agency's preferred interpretation.[42] In that case, Judge Thapar rejected the agency's plea to ambiguity, declined the deference sought, and simply established his own interpretation of what the law compelled. Ultimately, the agency prevailed in that litigation, but not because of a shadowy deference doctrine counseling judges to stand aside, but rather because the statute Congress wrote foreclosed plaintiffs' claims.

The great Benjamin Franklin once mused "in this world, nothing is certain except death and taxes."[43] But in the Sixth Circuit, Judge John Nalbandian has worked to make certain that individuals harmed by final agency action retain the right to pre-enforcement review. *CIC Servs., LLC v. IRS*,[44] provides a perfect example.

The issue there was a new tax policy. Congress passed an innocuous statute requiring taxpayers to maintain and submit records pertaining to certain reportable transactions.[45] But the statute did not define "reportable transactions" and instead delegated to the Secretary of the Treasury and the IRS the obligation to define reportable transactions.[46] The IRS did so with a guidance notice extending the reporting requirement to certain transactions between a parent company and a captive insurer under its control.[47] Once deemed reportable, a taxpayer is required to disclose these transactions to the IRS at threat of severe civil and criminal sanctions.[48]

But there were some outstanding questions about the substance and procedure by which the IRS's new definition was implemented.[49] For one, the agency did not go through notice-and-

[35] 885 F.3d 422, 425 (6th Cir. 2018).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 425–26.
[43] Letter from Benjamin Franklin to Jean-Baptiste LeRoy (Nov. 13, 1789).
[44] 925 F.3d 247, 259 (6th Cir. 2019).
[45] *Id.* at 249.
[46] *Id.* at 249–50.
[47] *Id.*
[48] *Id.* at 249.
[49] *Id.* at 250–51.

comment rulemaking. Instead, it decided to simply publish some thoughts, *i.e.*, a guidance document, mandating reporting on an entirely new class of transactions, without ever giving regulated industry an opportunity to offer comment or object to the novel interpretation.[50]

So a tax advisor filed suit asserting various challenges to the guidance, including that the IRS violated the Administrative Procedures Act (APA) by failing to offer notice-and-comment proceedings, and by publishing arbitrary and capricious guidance.[51]

Ignoring the substance of the claim, the Sixth Circuit majority found the suit barred under a capacious view of the Anti-Injunction Act (AIA) since the plaintiff's claim concerned the IRS and was thematically related to the collection of taxes.[52]

But Judge Nalbandian dissented. He explained the suit was not a challenge to the collection of a tax, but rather a claim challenging the *procedures* by which the IRS issued its arbitrary guidance document.[53] Such APA challenges, Judge Nalbandian explained, are favored in the law, and fall outside of the reach of the AIA because they do not challenge the imposition of a tax.[54] Moreover, Judge Nalbandian recognized the absurdity of the majority's manufactured Hobson's choice:

> Under the majority's decision, CIC now only has two options: (1) acquiesce to a potentially unlawful reporting requirement that will cost it significant money and reputational harm or (2) flout the requirement, i.e., 'break the law,' to the tune of $ 50,000 in penalties for *each* transaction it fails to report. *See* 26. U.S.C. § 6707(a)–(b). Only if it (or someone else) follows the latter path—and only when (or if) the Government comes to collect the penalty—will any court be able to pass judgment on the legality of the regulatory action.[55]

In all events, Judge Nalbandian noted, "plaintiffs who do follow that path are not only subject to financial penalties but also criminal penalties."[56]

The majority's view was wrong because under it, "the only lawful means a person has of challenging the reporting requirement . . . is to violate the law and risk financial ruin and criminal prosecution. . . . And it leaves [Plaintiff] in precisely the bind that pre-enforcement judicial review was meant to avoid."[57]

The practical implication of the majority's errant view would render vast swaths of Treasury and IRS guidance unreviewable by federal courts—a result at war with the presupposition that government action is subject to review by a neutral arbiter.[58]

Vindicating Judge Nalbandian's approach, the Supreme Court reversed the Sixth Circuit's erroneous opinion 9-0, in an opinion mirroring Judge Nalbandian's analysis.[59]

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[50] *Id.*
[51] *Id.*
[52] *Id.* at 258–59.
[53] *Id.* at 259.
[54] *Id.* at 262–64.
[55] *Id.* at 263.
[56] *Id.*
[57] *Id.*
[58] *See id.* at 264.
[59] *See CIC Servs., LLC v. IRS*, 593 U.S. 209 (2021).

Judge Patrick Bumatay has similarly written on the importance of judicial review of agency structures without mandating plaintiffs submit themselves to arguably unconstitutional proceedings to obtain judicial review.

Many administrative agencies have established in-house "judges" (ALJs) who are empowered with the authority to host judicial-like proceedings (hear testimony, host evidentiary hearings, apply law to facts, and impose penalties for regulatory or statutory violations). These judges are not independent in any real sense—they are part and parcel of the prosecuting agency, and often demonstrate a real bias toward the agency's perspective.

The FTC is one such agency. Its ALJs exercise judicial functions over FTC enforcement proceedings and may enter final orders punishing or penalizing regulated entities.[60] In the general course, those final orders are subject to review in a court of appeals, only after the administrative process has been concluded.[61]

In *Axon*, the FTC initiated an investigation claiming Axon's purchase of a close competitor constituted a violation of the FTC Act's ban on unfair methods of competition.[62] As that proceeding dragged on, Axon filed suit in a district court raising various constitutional issues including that the FTC's ALJs were unconstitutionally entitled to dual-layer removal protection, and that the FTC's mix of adjudicative and prosecutorial functions violated the separation of powers.[63] Good points on both counts. The question presented was whether Congress, in establishing a mechanism by which final agency action could be reviewed by a court of appeals necessarily ousted jurisdiction for district courts to hear constitutional challenges to the agency's structure and function.[64]

The Ninth Circuit majority said yes.[65] It held that that, by vesting courts of appeals with authority to review final agency actions, Congress had "impliedly precluded district court jurisdiction over claims of the type brought by Axon."[66] But Judge Bumatay disagreed.

To Judge Bumatay, the background presumption was that "Congress intended subject matter jurisdiction in the district courts for all claims arising under federal law."[67] And "[a]bsent legislative language to the contrary, challenges to an agency's structure, procedures, or existence, rather than to an agency's adjudication of the merits on an individual case, may be heard by a district court."[68]

The majority tried to subject the regulated party to an impossible choice. It could submit to the agency's potentially multi-year process, and obtain judicial review on the back end, after having been subjected to what Axon claimed to be unconstitutional proceedings.[69] This option, of course, assumes the agency would not strategically moot the case, and that Axon does not

[60] *See Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 183 (2023) [hereinafter *Axon II*].
[61] *See* 15 U.S.C. § 45.
[62] *Axon II* at 183.
[63] *Id.*
[64] *Id.*
[65] *See Axon Enter., Inc. v. Fed. Trade Comm'n*, 986 F.3d 1173 (9th Cir. 2021).
[66] *Id.* at 1178.
[67] *Id.* at 1190 (Bumatay, J., concurring in part and dissenting in part).
[68] *Id.* at 1191 (emphasis omitted).
[69] *Id.* at 1193.

prevail before the agency. In either case, there would be no appealable order and Axon would be forever barred from raising its constitutional claims before an Article III court. On the other hand, Axon could intentionally lose before the FTC to ensure itself a forum for adjudication of its constitutional claims.[70] But such a requirement would brush up against the well-established presumption that parties need not risk "'severe punishment' 'before testing the validity of [a] law.'"[71]

In other words, the majority's view would "effectively shut the courtroom doors to a party seeking relief from alleged constitutional infringement."[72]

On certiorari, the Supreme Court unqualifiedly agreed with Judge Bumatay's dissent and entered an opinion in which all nine justices agreed the courthouse doors remained open for litigants to assert constitutional challenges to agency action without awaiting the conclusion of an agency's prosecution or enforcement proceedings.

Respect for separation of powers also animated Eighth Circuit Judge David Stras's brilliant opinion regarding judicially-created causes of action. In *Ahmed v. Weyker*,[73] the court confronted a messy situation. A federally-deputized police officer had falsified records and induced the arrests of and criminal complaints against several citizens based on her lies.[74] The arrestees, upon being cleared, filed Fourth Amendment, false-arrest, and damages claims against the lying officer. The suit against the officer in her state capacity was easy: 42 U.S.C. § 1983 allows damages suits to vindicate violations of federal law committed by state officers. But no such statute exists for obtaining damages against *federal* officers for violations of federal law. Yet, the plaintiffs also asserted a so-called *Bivens* damages claim against the officer in her federal capacity.[75]

In times past, courts have operated beyond their constitutional mandate to fashion new remedies for rights even where Congress has declined to do so.[76] The inspiration for this judicial adventurism derives from ethereal notions of justice and concert to see wrongs made right; but there is no tether to law. Yet law is what judges are empowered to interpret and apply.[77]

Engaging in the essentially legislative act of creating new causes of action, and imposing financial liability on the Federal government without Congress's consent is, as some courts have explained, "'disfavored' judicial activity"[78]—but I will put be less polite: the *Bivens* project is pure lawlessness.

Judge Stras agrees. In his opinion for the Court, Judge Stras found the *Bivens* line of cases to be out of fashion and outside the constraints of law. He explained that *Congress*—not courts—is the body "equipped" to "weigh the costs and benefits of creating 'a new substantive legal

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[70] *See id.*

[71] *Id.* (quoting *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 490 (2010)).

[72] *Id.* at 1197.

[73] 984 F.3d 564, 566 (8th Cir. 2020).

[74] *Id.* at 566–67.

[75] *Id.* at 566.

[76] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

[77] *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 610-611 (1973) ("[U]nder our constitutional system courts are not roving commissions assigned to pass judgment" on Congress's actions and inactions).

[78] *Ziglar v. Abbasi*, 582 U.S. 120, 121 (2017).

liability.'"[79] And he refused to extend the wrongly-decided *Bivens* line of cases to a new context not authorized by the elected Congress.[80]

Underlying his analysis was a deep respect for the separation of powers.[81] Judges lack the competence, and indeed, the authority, to legislate from the bench, creating new substantive liability for the Federal government. That task belongs solely to Congress, which must face the music for its action, and indeed, its inaction. Wresting that unique authority from the elected branches to the judiciary violates the structure of our Constitution and stunts legislative innovations. In such an enterprise, Judge Stras would have no part.

Then there are the recent Fifth Circuit opinions authored by Judge Andy Oldham, which really capture all that is being discussed here today.

First up: *Louisiana v. Dep't of Energy*,[82] where several states, led by Louisiana, brought a suit challenging one of DOE's many recent actions drastically regulating the energy and water usage of dishwashers and laundry machines. The Fifth Circuit agreed the agency's action was arbitrary and capricious.[83] Now, arbitrary and capricious sounds decidedly old-fashioned, and is not one of the current doctrines that is usually uttered in settings such as this. But in the hands of the Fifth Circuit, it is now.

Here's the background: Obama's DOE supercharged the energy efficiency standards program to limit the amount of electricity and water various household appliances could use, meaning the machines we all rely upon would take an absurdly long time and would not work well.[84] During the Trump Administration, a group petitioned DOE to fix the rules since, as the Fifth Circuit characterized their petition: "the Department's burdensome energy regulations made dishwashers incapable of, well, washing dishes."[85] In 2020, DOE adopted final rules addressing some of the concerns for dishwashers and laundry machines.[86]

So clean clothes and clean dishes for all? Not so fast. On the day of his inauguration, President Biden issued an Executive Order directing DOE and other agencies to reconsider certain rules, including the 2020 Dishwasher Rule and the 2020 Laundry Rule.[87] By 2022, DOE had issued a Repeal Rule, revoking both rules.[88] A lawsuit ensued.

As usual, the Feds made the usual arguments designed to avoid judicial review, and the court dispensed with those in short order, yet did so with a rhetorical flourish one does not typically see when talking about jurisdiction. Relying on a D.C. case from 2021, which summarized forty years of past decisions, the court said:

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[79] *Ahmed*, 984 F.3d at 570–71.
[80] *See id.* at 571.
[81] *See id.* at 567–68.
[82] 90 F.4th 461 (5th Cir. 2024).
[83] *Id.* at 465.
[84] *Id.* at 465–66.
[85] *Id.* at 465.
[86] *Id.* at 466.
[87] *Id.*
[88] *Id.*

> "DOE gives us no reason to depart from this long-held view of our sister circuit. Instead, it argues that federal standing doctrine should embrace a Government-always-wins rule. Its argument goes like this:
>
> • DOE's Repeal Rule precluded manufacturers from making dishwashers or laundry machines under the 2020 Rules;
>
> • Because no manufacturer had a chance to make the new machines, the States cannot show they would purchase the never-made machines;
>
> • Therefore, no one could ever have standing to challenge the Repeal Rule because no one could ever purchase the nonexistent products.
>
> Heads the [Feds] win; tails petitioners lose."[89]

Not surprisingly, DOE lost on the merits. And by now, the agency's moves should sound familiar: Set a desired policy completely divorced from the authorizing statute; ignore the APA's requirements, the statutory text, and plain old facts; use every sort of procedural argument—like standing—and seek deference in court. It goes on and on and on. Rinse and repeat.

The second case worth highlighting is *Wages & White Lion Investments v. FDA*.

On its face, this case concerns the FDA's handling of e-cigarettes. But in actual fact, the case has very little to do with the details of e-cigarettes, and everything to do with the outrageous antics of the FDA. Judge Oldham, here writing for the en banc court, begins: "Over several years, the Food and Drug Administration ('FDA') sent manufacturers of flavored e-cigarette products on a wild goose chase."[90] Let me be clear here: This is not the first line of concurrence; this is the first line of an en banc majority opinion from a circuit court. And this barn-burner of a first line was merely a foreshadowing.

Because my paraphrasing could not do it justice, and since this is Harvard, where quotation marks appear to be optional, I will read directly from the opinion, which continues:

> First, the agency gave manufacturers detailed instructions for what information federal regulators needed to approve e-cigarette products. Just as importantly, FDA gave manufacturers specific instructions on what regulators did *not* need. . . . And the agency promulgated hundreds of pages of guidance documents, hosted public meetings, and posted formal presentations to its website—all with the (false) promise that a flavored-product manufacturer *could*, at least in theory, satisfy FDA's instructions. The regulated manufacturers dutifully spent untold millions conforming their behavior and their applications to FDA's say-so.
>
> Then, months after receiving hundreds of thousands of applications predicated on its instructions, FDA turned around, pretended it never gave anyone any instructions about anything, imposed new testing requirements without any notice, and denied all one million flavored e-cigarette applications for failing to predict the agency's *volte face*. Worse, after telling manufacturers that their marketing plans were "critical" to their applications, FDA candidly admitted that it did not read a single word of the one million plans. Then FDA denied that its voluminous guidance documents and years-long instructional

[89] *Id.*

[90] *Wages & White Lion Investments, L.L.C. v. FDA*, 90 F.4th 357, 362 (5th Cir. 2024) (en banc).

> processes meant anything. Why? Because, the agency said, it always reserved the implied power to ignore every instruction it ever gave and to require the very studies it said could be omitted, along with the secret power to not even read the marketing plans it previously said were "critical." It was the regulatory equivalent of Romeo sending Mercutio on a wild goose chase—and then admitting there never was a goose while denying he even suggested the chase. *Cf.* William Shakespeare, Romeo and Juliet act 2, sc. 4."[91]

After taking the FDA's arguments to task in turn, Judge Oldham continues:

> As the Supreme Court recently reminded us: "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021) [Gorsuch, for the Court]. No principle is more important when considering how the unelected administrators of the Fourth Branch of Government treat the American people. And FDA's regulatory switcheroos in this case bear no resemblance to square corners. As for the agency's harmless-error argument, the Supreme Court recently, unanimously, and summarily rejected it. *Calcutt v. FDIC*, 598 U.S. 623 (2023) (per curiam).[92]

Not surprisingly, the en banc Fifth Circuit said the FDA lost.

So, as you reflect on what has been said this morning, and what will be said this afternoon, where serious people discuss weighty concepts like major questions, non-delegation, and *Chevron* deference, let us see all these concepts as subsets of answering the same question: Was the Gorsuch rule violated, meaning did the government square its corners? And did the government violate the Oldham Doctrine—The old switcheroo?

Thank you.

[91] *Id.*

[92] *Id.* at 362–63.