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This Essay takes stock of a pivotal moment at the Court: statutory interpretation at center stage in administrative law. The U.S. Supreme Court's most recent Term saw numerous landscape-shifting administrative law decisions. The most widely discussed was the Court's elimination of 40-year-old Chevron *deference in* Loper Bright Enterprises v. Raimondo. *The Court's decisions also effected significant change in the scope of Seventh Amendment jury trial rights and the length of time that individuals, businesses, and associations have to challenge agency actions.*

But taken together, the Court's decisions did not radically restructure the administrative state on constitutional grounds. Despite the substantial mindset shift in conceptions of how courts should review agency legal determinations and conduct enforcement actions, the Court rejected or failed to reach several constitutional law challenges. Instead, the Court's leading cases tended to resolve on carefully measured statutory grounds, at times with Justice alignments that transcended typical ideological or jurisprudential lines. Also, last Term's most significant administrative law decisions may give important predictive clues about how the Court will apply statutory constraints to free-ranging administrative claims to vast regulatory power in future years.

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INTRODUCTION

This Essay takes stock of a pivotal moment at the Court: statutory interpretation at center stage in administrative law. Last Term, the Court turned away several significant federal appeals court conclusions that agencies had violated constitutional requirements—on issues ranging from congressional delegation of power to the executive, presidential supervision, and the proper method for Congress to appropriate funds to executive agencies. Notably, several of those separation of powers issues are already front and center in the new Administration's executive orders and efforts to assert effective management over the heretofore unwieldy administrative state. The question whether—and to what extent—the Court will weigh in on these issues remains one to watch.

October Term 2023 at the Supreme Court featured several highly significant administrative law decisions—including the Court's departure from *Chevron* deference in *Loper Bright Enterprises v. Raimondo*. The Court resolved the substantial majority of its administrative law cases from the last Term on statutory grounds. That was true even when parties presented a companion constitutional claim, like the contention in *Loper Bright Enterprises v. Raimondo* that judicial deference to agency legal interpretations abdicates the judiciary's constitutional responsibility for interpreting law in the resolution of cases and controversies.

These decisions resulted from the Court applying longstanding principles of statutory interpretation to police the enacted bounds of governmental authority. In so doing, the Court kicked contested issues back to Congress and, ultimately, to the democratic process.

Escaping this trend, the Court's most impactful administrative law decision this past Term may prove to be the Court's reinvigoration of longstanding common-law jury rights under the Seventh Amendment in *Jarkesy v. Securities and Exchange Commission*. But even there, the Court simply took the case in the posture in which it found it. If the lower court decision had remained in place, the SEC's fraud enforcement proceedings would have been held unconstitutional on three constitutional grounds, rather than just for

lack of a jury trial. The Fifth Circuit's holdings that agency choice between intra-agency or federal court enforcement unconstitutionally manifests legislative power and that agency adjudicators, constitutionally, must be fireable at will would have had far-reaching implications for multiple agencies. The U.S. Supreme Court, at least for now, declined to reach either issue.

Aside from the notable exception of *Jarkesy's* jury-trial determination, the Court centered statutory interpretation in the majority of the remaining administrative law decisions in which it found legal deficiencies. In the *Loper Bright* decision itself, the Court resolved the appropriate deference to agency legal determinations by interpreting the terms of the Administrative Procedure Act. The Court declined to reach broader, more trenchant versions of the *Chevron* challenge, focused on the contours of Article III judicial power—despite those questions being fully briefed.

In this and other cases from the latest Term, the Court manifested the primacy of the congressional role in lawmaking. The practical upshot of the Court's decisions is that Congress will have the space, and responsibility, to act. Even where the Court declines to find a constitutional violation lurking in statutory text, the legal and policy concerns motivating the original constitutional challenge remain within congressional control through the political statutory enactment process. In such instances, Congress can resolve thorny questions of transparency, procedural rights, and accountability by reexamining the authority that it assigns to agencies and the supervisory power that it maintains in place for the President.[1]

Although the Court rested its administrative law decisions on constitutional grounds when absolutely necessary, such as in *Jarkesy*, such cases were the exception and not the rule. From the

1. One such example is the opportunity that Congress has to rework agency adjudication in light of *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024). *See* Jennifer L. Mascott, *Adjudicating in the Shadows*, NOTRE DAME L. REV. (forthcoming 2025), https://perma.cc/ZM49-FNAN; Will Yeatman & Keelyn Gallagher, *The Rise of Money Sanctions in Federal Agency Adjudication*, 76 ADMIN. L. REV. 857 (2024), https://perma.cc/KM7Z-Z28Y; *Reining in the Administrative State: Agency Adjudication and Other Agency Action: Hearing Before the H. Comm. on the Judiciary*, 118th Cong. (2024), https://perma.cc/46FN-2EVQ (statement of Jennifer Mascott).

most to the least far-reaching administrative law opinions, the Court generally reached its answers through the application of familiar statutory interpretation principles.

Three cases are the principal focus of this Essay: *Loper Bright*; *Corner Post, Inc. v. Board of Governors of the Federal Reserve*; and *Garland v. Cargill*. In *Loper Bright*, the Court interpreted Section 706 of the Administrative Procedure Act (APA) to require that courts review agencies' interpretations of law without deference to those agencies' views. In *Corner Post*, the Court interpreted the statute of limitations for APA challenges to agency rules to begin for each regulated party when the rule injures that party—not when the agency promulgates the rule. And in *Cargill*, the Court rejected an agency's interpretation that a bump stock is a "machinegun" within the meaning of the National Firearms Act of 1934.

This Essay proceeds in two parts. Part I reviews the Court's decisions in *Loper Bright*, *Corner Post*, and *Cargill*. These three cases demonstrate the central role of statutory interpretation in the Court's administrative law jurisprudence from October Term 2023. Part II considers two benefits of the Court's focus on statutory interpretation as opposed to reaching for constitutional cases and constitutional holdings. First, a focus on statutory text has the effect of confining judicial debates to a narrow range of possible outcomes. Thus, Congress can obviate a great deal of confusion by speaking clearly. Second, and relatedly, the Court's decisions should have the effect of shifting the lawmaking spotlight to where it belongs: Congress.

Difficult constitutional questions remain open after the 2023 Term. One example is the extent to which agency enforcement actions—beyond securities fraud claims and in agencies other than the Securities and Exchange Commission—require initial adjudication in Article III courts with the protection of jury trial rights. In time, the Court may say more on that issue and others. But this last Term, the Court focused on the limitations that *statutes* impose on the executive branch—beyond the constitutional tensions in current administrative agency structures and powers.

And beyond its more modest approach of holding agencies to

underlying statutory limits on their power rather than making trenchant constitutional pronouncements, the Court's statutory cases this Term also enjoyed several majority lineups crossing jurisprudential lines. Such cases transcended the administrative law docket, including criminal and more politically charged cases like *Fischer v. United States* and *Pulsifer v. United States*. In *Fischer*, Justice Jackson joined a six-Justice majority to hold that a federal criminal obstruction statute did not encompass certain offenses charged in the January 6th prosecutions (with Justice Barrett in dissent). And in *Pulsifer*, Justice Kagan wrote a majority for herself and five of her more conservative colleagues that interpreted federal sentencing law strictly—with Justice Gorsuch joining Justices Sotomayor and Jackson in dissent. Across the ideological spectrum, the Justices appear to have adopted a formalist approach to statutory interpretation that manifests in a variety of cases

In recent years, administrative agencies have frequently attempted to exercise power beyond the terms of authority granted by Congress. The Court's focus on statutory interpretation is above and beyond any potential constitutional conflicts. This focus demonstrates that statutory terms still themselves provide meaningful limits.[2] Furthermore, the Court's approach is indicative of the judiciary's respect for time-honored principles of interpretation that—in the long run—bring stability to our law.

I. THREE ILLUSTRATIVE CASES

For administrative law enthusiasts, the Supreme Court's 2023 Term was one of its most significant in recent memory. That is largely because the Court, in *Loper Bright Enterprises v. Raimondo*,[3] departed from so-called "*Chevron* deference."[4] A couple of other

2. *Cf.* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 748 (2017) (describing textualism as checking judicial discretion in statutory interpretation).

3. 144 S. Ct. 2244 (2024).

4. *Chevron* deference was a doctrine named for the Supreme Court's opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), *abrogated by Loper Bright*, 144 S. Ct. 2244.

cases—*SEC v. Jarkesy*[5] and *Corner Post, Inc. v. Board of Governors of the Federal Reserve*[6]—also involved headline-grabbing administrative law issues: respectively, the constitutionality of agency adjudication of securities fraud claims and the statute of limitations for challenges to agency regulations. Additionally, several more cases—such as *Cargill v. Garland*,[7] *Harrow v. Department of Defense*,[8] and *Rudisill v. McDonough*[9]—turned on particular questions of statutory interpretation in the administrative law context. This Part focuses on *Loper Bright*, *Corner Post*, and *Cargill*.

A. Loper Bright *and the Formal End to* Chevron *Deference*

In *Loper Bright*, the Court reestablished the traditional standard of review for judicial interpretation of questions of law under the APA up through 1984. The Court had declined to apply *Chevron* deference in a number of statutory interpretation cases reviewing regulatory actions over the past decade, but it formally held for the first time this Term that the *Chevron* deference framework was inconsistent with the APA-mandated judicial review scheme. Against the backdrop of a fishing-industry regulatory statute, the Court clarified its departure from the *Chevron* doctrine. Stemming from a Reagan Administration-era Court decision, the doctrine had defined the judicial branch's review of agency interpretations of statutes for decades. In justifying its departure from *Chevron*'s framework, the Court had two potential paths: statutory interpretation and constitutional law. Choosing the path of statutory interpretation, the Court adopted an approach that gives Congress an opportunity to respond. The Court's decision also gives guidance to the lower courts about how to move forward under the APA rather than leaving the standard-of-review issue unaddressed, as the Court had done in numerous cases over the past decade. In those prior cases, the Court interpreted a statute's plain terms and context

5. 144 S. Ct. 2117 (2024).
6. 144 S. Ct. 2440 (2024).
7. 144 S. Ct. 1613 (2024).
8. 144 S. Ct. 1178 (2024).
9. 144 S. Ct. 294 (2024).

while declining to explain the status of the *Chevron* deference scheme.[10]

Loper Bright involved a challenge to a National Marine Fisheries Service regulation that demanded payment from fishermen for government monitors on their boats.[11] The Service's asserted statutory authority for the regulation was tenuous. The Magnuson-Stevens Act—which established the monitoring scheme—was silent on the question of whether fishermen or the government itself had to pay for the government officials on the fishing boats. In three other places, the Act explicitly required that fishermen in other, specific contexts (*e.g.*, foreign-flagged vessels) pay for the monitors.[12] But on the general point, the law did not address payment for the officials.[13]

The government treated this silence, or absence of authority, as an ambiguity triggering *Chevron* deference and exploited it to shift the cost of the monitors onto industry.[14] The government's interpretation played right into much of the criticism directed over the years at the *Chevron* doctrine, which had turned a framework applied in *Chevron v. NRDC* from 1984 into an interpretive methodology giving the benefit of the doubt to administrative agency interpretations of purportedly ambiguous statutes that the agencies administer.

Two anti-*Chevron* arguments headlined the skepticism and informed the challenges raised against the *Chevron* doctrine in *Loper Bright*. First, several in the administrative law community had charged over the years that deferring to agency interpretations

10. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.").

11. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2254–56 (2024).

12. *See id.* at 2255.

13. *See id.*

14. *See id.* at 2255–56; *see also* Caroline Cecot, *The Meaning of "Silence"*, 31 GEO. MASON L. REV. 515, 517 (2024) (describing the history of the rule in question); Brief for Appellees at 19, Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022) (No. 21-5166), 2021 WL 5982672 (arguing to the D.C. Circuit that "[e]ven if the Court concludes that the Fisheries Service's authority is ambiguous, the Court should defer to the agency's reasonable construction of its own statute under the familiar *Chevron* framework").

contravened Section 706 of the Administrative Procedure Act (APA).[15] Section 706 provides that courts "shall decide all relevant questions of law" when a party brings an APA challenge to an agency action.[16] In a landmark historical review in the *Yale Law Journal* in 2017, Aditya Bamzai shed important light on the disparity between the modern *Chevron* framework and the historical, original understanding of the APA's statutorily directed mode of reviewing questions of law for decades prior to the *Chevron* decision. Bamzai explained that courts traditionally respected an agency's understanding of a statutory standard or term when made contemporaneous with the enactment of the statute and when consistent with long-held understandings of that term.[17] But blanket deference to any agency interpretation, even on the conditions that the statutory text was ambiguous and the agency's view was permissible, could not be squared with the historical understanding of Section 706.[18] And Justice Kavanaugh, while serving on a federal appeals court several years before he would go on the Supreme Court bench, generally called into question interpretive deference schemes triggered by "ambiguity." He noted that our system of interpretation includes no agreed-upon standard for even assessing the threshold of uncertainty that is required before deeming a statutory concept to be ambiguous.[19]

Second, some jurists and scholars had argued over the years that *Chevron* deference contravened Article III of the Constitution and the Due Process Clause. On Article III: Because "the Judicial Power

15. *See* Michael B. Rappaport, Chevron *and Originalism: Why* Chevron *Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 WAKE FOREST L. REV. 1281, 1291–92 (2022); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 1001 (2017); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–96 (1998). *But see* Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 183–85 (2021); Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1642 (2019).

16. 5 U.S.C. § 706.

17. *See* Bamzai, *supra* note 15, at 916.

18. *See id.* at 1000–01.

19. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137–38 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

of the United States"[20] contemplates interpretive supremacy in individual cases and controversies, deference to an administrative agency's view would improperly intrude on the role of the Article III judiciary in interpreting law.[21] On due process: *Chevron* biased the judicial process in commanding that one litigant's interpretation of the law received deference over another.[22]

The Court had all of these arguments before it in *Loper Bright*. The case had been consolidated with another that raised the same issue: *Relentless, Inc. v. Department of Commerce*.[23] The petitioners in each case raised both the statutory and constitutional issues. The *Loper Bright* petitioners raised the Article III point and the due process point before arguing that "*Chevron* is also egregiously wrong as a matter of statutory construction"—citing Section 706.[24] The same was true for the *Relentless* petitioners.[25]

But the Court rested its decision in *Loper Bright* exclusively on the meaning of Section 706 of the APA. Chief Justice Roberts's opinion pointed to the "all relevant questions of law" language of the APA, concluding that Section 706 "makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference."[26] For that reason, "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."[27] The Court's opinion referenced Article III in its analysis, but it based its holding on an interpretation of the

20. U.S. CONST. art III, § 1.

21. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions."); *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 864–67 (2001) (surveying the literature).

22. *See generally* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

23. *See* Eli Nachmany, *With a Cert Grant in* Relentless, Inc. v. Department of Commerce, Loper Bright *Gets Some Company*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 13, 2023), https://perma.cc/FVR5-UZ6D.

24. Brief for Petitioners at 28, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024), (No. 22-451), 2023 WL 4666165.

25. Brief for Petitioners at 24–25, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 2244 (2024), (No. 22-1219), 2023 WL 8237503.

26. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024).

27. *Id.* at 2263.

APA.[28] Justice Thomas concurred "to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers."[29] The Court's opinion did not disagree with this view, but neither did it endorse the concern.

In confining its decision to the statutory text (as opposed to reaching a constitutional holding), the Court did not tie Congress's hands. That is consistent with several other recent landmark cases in which the Court gave Congress space to clarify the meaning of statutory text.[30] Often, such cases come to the Court with a statutory challenge and a constitutional challenge. And in choosing to resolve the case on statutory grounds, the Court can check administrative overreach without concluding that the legislature transgressed the constitutional guardrails. Moreover, legislative amendment of statutes in response to Supreme Court decisions is a long-running phenomenon.[31] Sometimes the question before the Court will demand a constitutional resolution.[32] But October Term 2023 did not reflect a strong desire on the part of the Court to reach for such constitutional resolutions when a judgment was already warranted because administrative action had extended beyond the bounds of statutory text.

A couple of other aspects of the Court's opinion in *Loper Bright* merit mention. To start, the Court allowed that the best reading of a statute may well be "that it delegates discretionary authority to

28. *Id.* at 2257–58.

29. *Id.* at 2274 (Thomas, J., concurring).

30. *See infra* Part II.A. Indeed, Congress is now considering bills that would restore *Chevron*'s framework, see Stop Corporate Capture Act, S. 4749, 118th Cong. (July 23, 2024), or enshrine the new standard of de novo review, see Separation of Powers Restoration Act, S. 4527, 118th Cong. (June 12, 2024). Senator Elizabeth Warren is the leading sponsor of the Stop Corporate Capture Act, while Senator Eric Schmitt is the leading sponsor of the Separation of Powers Restoration Act.

31. *See infra* Part II.B.

32. *See, e.g.*, *infra* Part I.D; *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (disallowing statutory interpretations that avoid constitutional holdings if "such construction is plainly contrary to the intent of Congress").

an agency."[33] In such cases, the Court observed, "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[34] Moreover, the Court analyzed the *stare decisis* considerations that weighed in the *Chevron* doctrine's favor.[35] Although it still decided to move away from *Chevron* deference, the Court did "not call into question prior cases that relied on the *Chevron* framework."[36] In so doing, the Court appears to have prevented the reopening of scores of *Chevron*-reliant rulings in *Loper Bright*'s wake.

Loper Bright was a landmark decision. But in *Loper Bright*, the Court declined to rely on Article III. Instead, the Court's opinion interpreted the APA—which Congress can change if it wants. And given the Court's recognition of Congress's ability to delegate policymaking space to agencies, *Loper Bright* preserves the legislature's flexibility. Deference to agency determinations of fact[37] and policy also remain undisturbed by the *Loper Bright* decision. The APA's

33. *Loper Bright*, 144 S. Ct. at 2263. Adrian Vermeule arguably predicted this aspect of the Court's opinion in recent scholarly work. *See* Adrian Vermeule, *The Deference Dilemma*, 31 GEO. MASON L. REV. 619, 620 (2024) ("[T]he Court will . . . say that de novo interpretation might of course yield the conclusion that, in a given statute, Congress has delegated primary responsibility to agencies to fill in statutory gaps or ambiguities, subject to judicial review to ensure that agencies have remained within the scope of the delegation and chosen policy on reasonable grounds."); *see also* Adrian Vermeule, Chevron *by Any Other Name*, THE NEW DIGEST (June 28, 2024), https://perma.cc/T38C-HDD8 ("When judges identify the 'best reading' of the statute, that best reading might itself just be that an explicit or implicit congressional delegation of such authority to the agency has occurred."). For all of the debate over Section 706, this reading of the Court's opinion is consistent with Cass Sunstein's argument that *Chevron* was consistent with the APA because, in such instances, "the law means what the agency says it means." Sunstein, *supra* note 15, at 1642.

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

35. *Id.* at 2270–73. Two of the leading voices in favor of retaining *Chevron* as a matter of stare decisis, Kent Barnett and Chris Walker, see generally Kent Barnett & Christopher J. Walker, Chevron *and Stare Decisis*, 31 GEO. MASON L. REV. 475 (2024), had filed a brief in *Loper Bright* to this effect. *See* Brief of Law Professors Kent Barnett and Christopher J. Walker as Amici Curiae in Support of Neither Party, *Loper Bright*, 144 S. Ct. 2244 (2024) (No. 22-451), 2023 WL 4824944.

36. *Loper Bright*, 144 S. Ct. at 2273.

37. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); 5 U.S.C. § 706(2)(E).

standard for judicial correction of agency policymaking when that policy is "arbitrary" or "capricious" preserves quite a bit of deference to agencies.[38] And the breadth of that discretion turns simply on the breadth, or narrowness, of the statutory term or standard that Congress has inserted into the agency's authorizing statute. Questions may remain about the extent to which Congress can delegate power to agencies (within what the Court described as "constitutional limits"[39]). But in grounding its opinion in the APA as opposed to Article III, leaving space for some delegation, and keeping in place prior opinions that relied on *Chevron*, the *Loper Bright* Court delivered a measured opinion that displayed consideration for both stability and the congressional role. These considerations are separate and apart from any additional constitutional concerns that might exist related to agency structure and jurisdiction.

Over this Term and several preceding it, Supreme Court decisions have revealed that much of administrative overreach flows from misinterpretations of underlying statutory authorities.[40] Arguably, the Court's decisions holding agency feet to the fire, within their statutory authority, are even more trenchant in terms of limiting agencies because they suggest that an agency action is unlawful regardless of any additional constitutional questions that might be in play. The Court's stringent review of agency overreach ideally should incentivize agencies to consult governing statutory terms and context with more care before acting. With the Court enforcing the confines of statutory terms with increased vigor, Congress may also have more incentive to draft statutory terms that directly and decisively address key policy issues before agencies. Such an approach would help to defuse the tendency of agencies to shoehorn ever-expanding claims of authority into outdated statutes that do not readily address the policy proposals at hand.[41] In addition,

38. *See* 5 U.S.C. § 706(2)(A).

39. *Loper Bright*, 144 S. Ct. at 2273.

40. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355 (2023); West Virginia v. EPA, 142 S. Ct. 2587 (2022); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022).

41. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L.

Congress can more routinely exercise its oversight, authorization, and appropriations to hold agencies to accurate interpretations of their statutory power. Judicial enforcement of statutory terms and structure increases the effectiveness of Congress answering this call.

B. The Straightforwardness of Corner Post

Loper Bright garnered a substantial amount of attention. Yet the Court's opinion in *Corner Post* also has far-reaching import. *Corner Post* concerned the proper application of a federal statute of limitations provision against the backdrop of the judicial review chapter of the APA, also at issue in *Loper Bright*. In *Corner Post*, the Court held that the statute of limitations for challenging an agency rule begins to run once a party has been impacted by the rule, not at the time of the rule's creation.

The litigation in *Corner Post* involved a challenge to a Federal Reserve Board regulation setting a maximum interchange fee on debit card transactions.[42] Corner Post is a truck stop and convenience store that accepts debit cards as a form of payment.[43] Although Corner Post "is not a bank regulated by the rule," it "must pay the fees charged by the banks who are regulated by the rule."[44]

The Board had issued the challenged regulation in 2011. Corner Post started business operations in 2018.[45] Because the regulation harmed Corner Post, the company wanted to challenge the rule under the APA. Just one problem: litigants suing the United States must generally sue "within six years after the right of action first accrues."[46] Thus, if the right of action to challenge the Board regulation accrued when the Board promulgated it in 2011, then Corner Post was out of luck. Corner Post would not have been able to

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REV. 1, 3 (2014); *see also, e.g.*, *West Virginia*, 142 S. Ct. at 2610 (describing the government's efforts to employ a long-extant but rarely used statutory provision "to substantially restructure the American energy market").

42. *Id.* at 2448 (majority opinion).

43. *Id.*

44. *Id.* at 2460 (Kavanaugh, J., concurring).

45. *Id.* at 2448 (majority opinion).

46. 28 U.S.C. § 2401(a).

challenge the regulation under that reading of the relevant statute of limitations even if the regulation was harming its operations. Indeed, no new business established after 2017, yet subject to the still-ongoing and effective regulation, would have been able to assert a challenge to the regulation's legality.

In contrast to that improbable interpretation, the Court instead concluded that "[a] claim accrues when the plaintiff has the right to assert it in court."[47] In cases with claims arising under section 704 of the APA, that is when the plaintiff is injured by final agency action."

This interpretation has significant consequences; in theory, every regulation is perpetually vulnerable to challenge by a newly created regulated entity. But Justice Barrett's majority opinion for the Court did not focus on pragmatism and these consequences. Rather, the opinion focused on the structure and text of the APA as well as the ordinary meaning of the term "accrue" in 1948, when Congress and the President originally enacted the federal statute of limitations.

The Court cited dictionaries that were contemporaneous with the statute of limitations' enactment in 1948, two years after enactment of the APA, to ascertain the "well-settled meaning" of the term "accrue" at that time. The Court also relied on precedents "embod[ying] the plaintiff-centric traditional rule that a statute of limitations begins to run only when the plaintiff has a complete and present cause of action."[48] Consequently, the Court determined that the relevant point of time necessarily is when the "APA plaintiff . . . suffers an injury from final agency action," not the earlier date on which the agency finalized its action.[49]

The result flows from the ordinary meaning of the term "accrue" in the general statute of limitations provision applicable to suits against the government as that term applies to injuries from APA final agency actions. Specifically, the provision in 28 U.S.C. § 2401(a) provides that litigants must file complaints in actions

47. *Corner Post*, 144 S. Ct. at 2448.

48. *Id.* at 2452.

49. *Id.* at 2450.

against the United States "within six years after the right of action first accrues."[50] Section 702 within the APA's chapter on judicial review in turn provides that a person suffering "or aggrieved by agency action . . . is entitled to judicial review."[51] Section 704 specifies that such reviewable actions must be "final agency action[s]."[52] Like *Loper Bright*, *Corner Post* reflects—in spite of the case's significant consequences—an unexceptional judicial exercise in statutory interpretation.

In a concurrence that may over time prove to highlight the most important aspect of the *Corner Post* opinion, Justice Kavanaugh offered a related observation with implications for the separate question of what remedy the APA provides when a regulation is unlawful. As highlighted by Justice Kavanaugh's opinion, Corner Post's right to sue is a result of the APA's authorization of the vacatur of rules.[53]

Staking a position in the ongoing administrative law debate about the scope of federal court remedial power under the APA, Justice Kavanaugh noted that vacatur offered the only opportunity for Corner Post to obtain relief in the litigation.[54] The vacatur question asks whether a court can get rid of an unlawful agency rule entirely—or whether Section 706 simply authorizes the setting aside of the rule as to a particular party.

By its terms, Section 706 authorizes courts to "hold unlawful and *set aside* agency action."[55] Some have advanced the view that this language merely empowers courts to set aside a given agency *action*—thereby limiting relief to the party before the Court.[56] The Solicitor General urged this position at oral argument in *United States*

50. 28 U.S.C. § 2401(a).
51. 5 U.S.C. § 702.
52. 5 U.S.C. § 704.
53. *Id.* at 2460. (Kavanaugh, J., concurring).
54. *Id.*
55. 5 U.S.C. § 706(2) (emphasis added).
56. *See, e.g.*, John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL.: BULL. 119 (2023).

v. Texas,[57] and Justice Gorsuch (joined by Justices Thomas and Barrett) adopted the view in a concurrence in the case.[58] As Justice Gorsuch put it, "set aside" is merely "a command to disregard an unlawful rule in the decisional process," not a remedial authority.[59] This concurrence teed up the issue for future discussion.

Citing the scholarly work of Mila Sohoni, Justice Kavanaugh took a different tack in *Corner Post*.[60] In his view, the APA endows courts with the power to erase an unlawful rule altogether—a remedy that would inure to the benefit of all parties affected by the rule, even if they are not before the court and even if the statutes of limitations on their respective causes of action have run.[61] The vacatur debate is a question of statutory interpretation, but it is closely related to an ongoing constitutional law debate: whether Congress *could* authorize vacatur of a rule, given the remedial limits of Article III.[62] Justice Kavanaugh's concurrence did not wade into that issue. Instead, his concurrence stands as the strongest statement from a member of the current Supreme Court on the statutory question; doubtless, litigants will cite this concurrence when urging vacatur. Continuing with the general theme, the APA-authorizes-vacatur view preserves space for Congress to change the law if it wants to check courts' remedial powers in regulatory litigation.

As Justice Kavanaugh saw it, Corner Post's right to relief turned on the vacatur question because Corner Post had not been

57. Transcript of Oral Argument at 4–5, United States v. Texas, 143 S. Ct. 1964 (2023) (No. 22-58).

58. *See* United States v. Texas, 143 S. Ct. at 1981 (Gorsuch, J., joined by Thomas and Barrett, JJ., concurring in the judgment).

59. *Id.* at 1982.

60. Corner Post, Inc. v. Bd. of Govs. of Fed. Rsrv. Sys., 144 S. Ct. 2440, 2467 (2024) (Kavanaugh, J., concurring) (citing Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020)).

61. *Id.* at 2461–62.

62. Indeed, these two questions were the subjects of the 2023 Ames Moot Court Competition at Harvard Law School, which a team of editors of this very journal—competing as the Judge Laurence H. Silberman Team—won. *See 2023 Ames Moot Court Competition*, HARV. L. SCH. (Nov. 15, 2023, 7:30 PM), https://hls.harvard.edu/ames-moot-court/ames-moot-court-competition-archive/2023-ames-moot-court-competition [https://perma.cc/P7W4-GBSH].

regulated by the rule but merely faced downstream adverse consequences from its implementation.[63] Because "an injunction barring the agency from enforcing the rule against the plaintiff would not help the plaintiff," Corner Post would require the full-bodied remedy of vacatur if it was to enjoy relief.[64]

In sorting through whether such relief was structurally available under the APA, Justice Kavanaugh analyzed "[l]ongstanding precedent" alongside "[t]he text and history of the APA."[65] Justice Kavanaugh's concurrence noted that the Supreme "Court has affirmed countless decisions that vacated agency actions, including agency rules."[66] He also cited multiple dictionaries for the proposition that "[w]hen Congress enacted the APA in 1946, the phrase 'set aside' meant 'cancel, annul, or revoke,'" and he pointed to contemporaneous judicial practice and other, pre-APA statutes to bolster this conclusion.[67]

It may well be the case that—as Justice Jackson's dissent claims—the "far-reaching results of the Court's ruling in this case are staggering."[68] The dissent lamented that the Court's interpretation "means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face."[69] But the Court's ruling is not the end of the story; at least, it does not have to be. If Congress is uncomfortable with the upshot of the APA's plain meaning, it can amend the statute.[70] This ready-made solution

63. *Corner Post*, 144 S. Ct. at 2460 (Kavanaugh, J., concurring).

64. *See id.* at 2462.

65. *Id.*

66. *Id.* at 2463 (citing Dep't of Homeland Sec. v. Regents of Univ. of Cal., 591 U.S. 1, 36 & n. 7 (2020); then citing Whitman v. Am. Trucking Assns., Inc., 531 U.S. 457, 486 (2001); and then citing Bd. of Govs. of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 364–65 (1986)).

67. *Id.*

68. *Id.* at 2470 (Jackson, J., dissenting).

69. *Id.*

70. *See* Agency Stability Restoration Act of 2024, S. 4751, 118th Cong. (July 23, 2024). Shortly after the Court decided *Corner Post*, John Duffy—a member of the Administrative Conference of the United States (ACUS)—commented that ACUS was considering a recommendation to Congress to overturn *Corner Post* via statute. *See* The Federalist

to a disfavored statutory interpretation ruling is central to our system of separated powers. The courts interpret the laws, but Congress makes them (and can change them).

C. Pure Statutory Interpretation in Cargill

Another, more particularized decision demonstrates the point as well. The Court's opinion in *Garland v. Cargill* involved a hotly contested issue—guns—but came down to traditional statutory interpretation.[71] In issuing its ruling, the Court emphasized the importance of Congress and the President's role in lawmaking vis-à-vis the distinct role of agencies in carrying out or executing that legal authority. Moreover, as a concurrence by Justice Alito pointed out, the Court's opinion left space for Congress and the President to enact a desired statutory change if they are uncomfortable with the Court's ruling.[72] *Cargill* is another example of the Court in OT23 elevating Congress and the President's respective roles in the legislative process and concomitantly constraining agency power. The Supreme Court's enforcement of statutory bounds underscores that administrative agencies cannot make new law. When agencies promulgate regulations or issue enforcement orders transgressing textual and structural statutory limits, agencies are effectively attempting to do just that. And today's Supreme Court will call them on it.

Society, *Courthouse Steps Decision:* Corner Post, Inc. v. Board of Governors of the Federal Reserve System, YOUTUBE, at 58:20 (July 9, 2024), https://www.youtube.com/watch?v=4e3tafXXOIg [https://perma.cc/JU5Q-DJA4]; *see also id.* at 55:36 ("One of the things that the majority and dissent [in *Corner Post*] agreed upon was that the ball is in Congress's court." (remarks of John Duffy)). And the Court itself noted that if observing the traditional rule for statutes of limitations "is a poor fit for modern APA litigation, the solution is for Congress to enact a distinct statute of limitations for the APA." *Corner Post*, 144 S. Ct. at 2460 (majority opinion).

71. 144 S. Ct. 1613 (2024). While *Cargill* was not about the Second Amendment, the Court did decide a Second Amendment case this last Term: *United States v. Rahimi*. There, the Court reviewed the constitutionality of "[a] federal statute prohibit[ing] an individual subject to a domestic violence restraining order from possessing a firearm" upon a finding that the person presented a danger to an intimate partner or that person's child. United States v. Rahimi, 144 S. Ct. 1889, 1894 (2024). In this case, the Court upheld the statute as constitutional. *See id.* at 1896–97.

72. *Cargill*, 144 S. Ct. at 1627 (Alito, J., concurring).

The events leading to the decision in *Cargill* were tragic. In October 2017, in the midst of a country music festival in Las Vegas, a gunman armed with a semiautomatic rifle opened fire from his hotel room on the crowd of festivalgoers.[73] The gunman had outfitted his firearm with a device called a "bump stock," which facilitates a practice called "bump firing."[74] As the Court explained, "[a] shooter who bump fires a rifle uses the firearm's recoil to help rapidly manipulate the trigger."[75] Because the bump stock allowed the gunman to shoot his semiautomatic rifle at a higher rate of speed, the device allowed the gunman to kill and wound with efficiency. In the end, he killed fifty-eight people and wounded over five hundred more.[76]

Immediately after the shooting, Congress moved to ban bump stocks. But these efforts did not achieve consensus. Horrified by the mass shooting, multiple members of Congress introduced legislation that would proscribe "bump stocks and other devices 'designed . . . to accelerate the rate of fire of a semiautomatic rifle.'"[77] These bills stalled and, ultimately, did not become law.[78] While some members of Congress urged passage of a bump stock ban, others expressed concern about gun rights and individual liberty.[79]

Not content with Congress's inaction, the Bureau of Alcohol, Tobacco, and Firearms (ATF)—an administrative agency—decided to take initiative and issue a regulation banning bump stocks.[80] The statutory authority on which the ATF relied was the National Firearms Act of 1934. The Act restricts access to "machinegun[s]"—a statutory term that Congress defined to include "any part designed

73. *Id.* at 1618 (majority opinion).

74. *Id.* at 1617–18.

75. *Id.* at 1617.

76. *See id.* at 1618.

77. *Id.* (quoting S. 1916, 115th Cong. § 2 (2017)); *see also* H.R. 3947, 115th Cong. § 2 (2017); H.R. 3999, 115th Cong. § 1 (2017).

78. *See Cargill*, 144 S. Ct. at 1618.

79. *See* Amber Phillips et al., *A bump stock ban may have enough support to pass the House*, WASH. POST (Oct. 11, 2017), https://www.washingtonpost.com/graphics/2017/politics/bump-stock-ban-whip-count (collecting statements from "concerned or opposed" legislators (capitalization adapted)).

80. *Cargill*, 144 S. Ct. at 1618.

and intended . . . for use in converting a weapon into a machinegun."[81] A "machinegun," in turn, is a weapon that "shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[82] Thus, "[w]ith a machinegun, a shooter can fire multiple times, or even continuously, by engaging the trigger only once."[83] Meanwhile, with a semiautomatic rifle, a shooter must "release and reengage the trigger between shots"—regardless of how fast that release and reengagement happens.[84]

The Court noted the distinction between a bump stock-outfitted semiautomatic rifle and a statutorily defined machinegun. Using a bump stock, a shooter can fire a semiautomatic rifle more rapidly. But no matter how fast she bump fires a rifle, a shooter cannot fire more than one shot by a single function of the trigger. For this reason, even congressional advocates of more stringent restrictions (such as Senator Dianne Feinstein) doubted the ATF's authority to issue the regulation.[85] Naturally, challenges to the regulation made their way into the courts, and the one underlying *Cargill* made it all the way to the Supreme Court. Consistent with its rulings in a host of cases from recent years,[86] the Court rejected the agency's attempt to stretch statutory text in support of a regulatory program.[87]

The Court analyzed the statutory text in detail. It began with the exact nature of a single function of the trigger of a firearm. The Court described the "premise that there is a difference between a shooter flexing his finger to pull the trigger and a shooter pushing the firearm forward to bump the trigger against his stationary finger" as "mistaken."[88] The Court further observed that "[e]ven if a semiautomatic rifle with a bump stock could fire more than one shot 'by a single function of the trigger,' it would not do so

81. 26 U.S.C. § 5845(b).
82. *Id.*
83. *Cargill*, 144 S. Ct. at 1617.
84. *Id.*
85. *See id.* at 1618.
86. *See infra* Part II.A.
87. *See Cargill*, 144 S. Ct. at 1624.
88. *Id.* at 1623.

'automatically.'"[89] Justice Sotomayor's dissent focused on the text as well, arguing that "[a] bump-stock-equipped semiautomatic rifle is a machinegun because (1) with a single pull of the trigger, a shooter can (2) fire continuous shots without any human input beyond maintaining forward pressure."[90] The dissent also invoked the presumption against statutory ineffectiveness—the idea that courts should not read a statute in a way that "enable[s] offenders to elude its provisions in the most easy manner."[91] But the majority responded that "[a] law is not useless merely because it draws a line more narrowly than one of its conceivable statutory purposes might suggest."[92] Against the backdrop of a highly charged issue, the debate in *Cargill* was confined to the text of the law—and hemmed in by the statute's express language.

Justice Alito penned a short concurrence to distinguish policy concerns about the limits of the National Firearms Act from the role of the Court in a case like *Cargill*. He emphasized the nature of the dispute before the Court, writing that "there is simply no other way to read the statutory language" than the way that the majority read it.[93] Still, he opined "that the Congress that enacted [the National Firearms Act] would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock. But the statutory text is clear, and [the Court] must follow it."[94] In a nod to those concerned about gun violence, Justice Alito acknowledged that the mass shooting "strengthened the case for amending [the Act]."[95] But he concluded that "an event that highlights the need to amend a law does not itself change the law's meaning."[96]

An enterprising member of Congress—seeking to break the partisan logjam—could see and cite Justice Alito's concurrence as a call

89. *Id.* at 1624.
90. *Id.* at 1630 (Sotomayor, J., dissenting).
91. *Id.* at 1634 (quoting The Emily, 22 U.S. (9 Wheat.) 381, 389–90 (1824)).
92. *Id.* at 1626 (majority opinion).
93. *Id.* at 1627 (Alito, J., concurring).
94. *Id.*
95. *Id.*
96. *Id.*

to action. But no matter how urgent, no matter how convenient, administrative agencies cannot change or add to the laws enacted by Congress and the President. As Justice Alito explained in his concurrence, "[t]he horrible shooting spree in Las Vegas in 2017 did not change the statutory text or its meaning."[97] Moreover, Justice Alito's concurrence pointed out that the agency's decision to circumvent the legislative process—and ban bump stocks through a regulation based on a 1934 law—may have prevented Congress from stepping in.[98] In the end, the Court's opinion in *Cargill* used statutory interpretation to demonstrate the centrality of Congress and the President, not implementing agencies, in the lawmaking process.

D. A Word on Jarkesy

Any discussion of the OT23 administrative law docket would be incomplete without mentioning *SEC v. Jarkesy*.[99] On its face, *Jarkesy* appears to complicate this Essay's main thesis that the Court's most recent Term centered statutory interpretation in administrative law. Rather than statutory interpretation, *Jarkesy* involved a series of constitutional challenges to the administrative adjudication scheme that Congress established for securities fraud enforcement. The Fifth Circuit had essentially forced the Court's hand to consider

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97. *Id.*

98. *See id.* During Congress's consideration of a bump stock ban, some Republicans opposed to new legislation had taken the position that ATF already had the authority to regulate bump stocks. *See* Mike DeBonis, *House Republicans shy away from action on 'bump stocks,' hoping the ATF deals with it*, WASH. POST (Oct. 11, 2017), https://perma.cc/WJ5E-2Z52. Naturally, this position would have allowed legislators to avoid the political consequences of either supporting or outright opposing a ban. At the time, Republican Representative Thomas Massie issued a statement in which he argued that pursuing a bump stock ban to the exclusion of other legislative goals (at the time, repeal of Obamacare and tax cuts) was "a perversion of the GOP agenda" that he thought his "colleagues recognize . . . , which is why they're hoping the ATF will do it." *Id.*; *see also* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1479 (2015) ("Legislators can avoid disputes by passing the buck and leaving the agency to resolve conflicts between interest groups. In addition, members can benefit from delegation when their constituents' interests are divided, because the agency will make the ultimate decision.").

99. 114 S. Ct. 2117 (2024).

the case by declaring a federal statutory provision unconstitutional on several grounds. But the Court's minimalist resolution of the constitutional conflict reflected a measured approach that rested on historically accepted principles of individual rights—without laying the groundwork to declare "most of Government . . . unconstitutional."[100] Additionally, the Court's opinion largely preserved statutory authority to prosecute securities fraud. It insisted only that the prosecutions be carried out with the accountability of Article III judicial consideration and the Seventh Amendment jury trial rights applicable by the constitutional text to "suits at common law."[101]

Starting in 2010, Congress had authorized the Securities and Exchange Commission (SEC) to choose between prosecuting securities fraud in federal court (consistent with historical tradition) or within its own in-house agency tribunals.[102] The SEC has the option of bringing its case in federal court in the usual course of order; here, an alleged fraudster would enjoy the various procedural protections that the Constitution guarantees—including a right to a trial by jury and a decision by an Article III judge.[103] Alternatively, the 2010 Dodd-Frank Act had authorized the SEC to bring a securities fraud enforcement action in its own, in-house tribunal.[104] There, the subject of the enforcement action would not enjoy the right to a jury, and the proceeding would be overseen by an administrative law judge (ALJ)—ostensibly an executive official but currently statutorily constrained from at-will presidential removal.[105] The statute gave no guidance to the SEC, and provided no legal standards, for

100. *Cf.* Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (describing the implications of applying a robust version of the nondelegation doctrine, similar to the one endorsed by the Fifth Circuit).

101. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

102. *Jarkesy*, 144 S. Ct. at 2125.

103. *See id.*

104. *Id.*

105. *See id.* at 2125–26.

how the agency should choose between going to court or staying in-house.[106] Remaining in-house would free the prosecution from the supervision or input of any federal judge until an initial determination of liability had been made, any penalties had been imposed, and appellate review had been conducted within the agency itself.

The SEC had demonstrated a preference for bringing enforcement actions within its own tribunals.[107] There, the SEC could maintain control over issuing new regulations interpreting and applying its perceived regulatory authority, investigating its suspicions of violations of those regulations, and adjudicating consequent guilt or innocence—all within the commission. Given the relaxed procedural protections, these proceedings enabled the SEC to issue subpoenas for records and enter settlement proceedings without contemporaneous external Article III judicial supervision.[108] The SEC's win rate within its in-house tribunal was staggeringly high.[109] Unsurprisingly. So the SEC's choice to bring an in-house securities fraud action against George Jarkesy was par for the course within the post-Dodd Frank SEC. Sure, Jarkesy could seek review in a federal court. But instead of basing its review on facts found by a jury, the court would need to defer to the agency's findings of fact from the jury-less in-house proceeding.[110]

Instead of assenting to this procedure, Jarkesy brought several challenges to the constitutionality of the statute underlying it. He found a receptive audience at the Fifth Circuit, which ruled in his

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106. *See* Jarkesy v. SEC, 34 F.4th 446, 461 (5th Cir. 2022), *aff'd* SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

107. *See* Jean Eaglesham, *SEC Wins With In-House Judges*, WALL ST. J. (May 7, 2015), https://perma.cc/PM3N-FDCS; *see also* Joseph A. Grundfest, *Fair or Foul? SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORDHAM L. REV. 1143, 1151–52 (2016) ("In fiscal years 2014 and 2015, the percentage of actions filed against publicly traded issuers in the administrative forum had more than doubled [from 2013] to 75 percent.").

108. *See* Elizabeth Wang, Comment, Lucia v. SEC*: The Debate and Decision Concerning the Constitutionality of SEC Administrative Proceedings*, 50 LOY. L.A. L. REV. 867, 870 (2017); Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J.F. 124 (2016).

109. *See* Eaglesham, *supra* note 107.

110. *See* 15 U.S.C. § 78y(a)(4).

favor and declared the relevant statutory provisions unconstitutional on three grounds.[111] First, the court held that the in-house proceeding unconstitutionally deprived Jarkesy of his Seventh Amendment right to a trial by jury in certain suits at common law.[112] Second, the court ruled that Congress had unconstitutionally insulated SEC ALJs from presidential removal in violation of Article II of the Constitution.[113] Third, the court determined that allowing the SEC to choose between going to federal court and staying in-house was a violation of the nondelegation doctrine because it delegated legislative power to the SEC without providing an intelligible principle to guide the agency's exercise of discretion.[114]

The government appealed to the Supreme Court, which granted certiorari to review the Fifth Circuit's declaration that a federal statute was unconstitutional.[115] Judicial review of the kind in which the Fifth Circuit engaged is profound—presenting a "counter-majoritarian difficulty" in which a court applies its constitutional interpretation to override a law enacted by the people's elected representatives in Congress and the President.[116]

But to rule for the government in *Jarkesy*, the Court would have had to disagree with the Fifth Circuit on the Seventh Amendment, nondelegation, *and* removal. An adverse holding on one of these constitutional issues would force a decision on another. And while the Seventh Amendment issue presented an interesting question about jury trial rights in administrative enforcement actions, the nondelegation issue threatened to open a far more consequential can of worms. The Court has not relied on the nondelegation doctrine—at least the Article I nondelegation doctrine[117]—to declare a

111. *See generally Jarkesy*, 34 F.4th 446.

112. *Id.* at 451.

113. *Id.* at 463.

114. *Id.* at 461.

115. *See* SEC v. Jarkesy, 143 S. Ct. 2688 (2023) (mem.) (granting certiorari).

116. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

117. *See* Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. REV. 513, 516 (2023) (distinguishing the Article I nondelegation doctrine—which enforces the Vesting Clause of Article I—from other nondelegation doctrines).

federal statute unconstitutional since the 1930s, when it cited the doctrine while striking blows to the very heart of the administrative state in several New Deal-era cases.[118] A majority of the Justices on the Court appear to support the revival of the Article I nondelegation doctrine.[119] Still, the doctrine's actual invocation would be a significant event, providing a modern roadmap for challenging the constitutionality of a host of statutes.

From the outset, however, the Court appeared uninterested in reaching the nondelegation issue. The oral argument in the case centered on the Seventh Amendment issue,[120] and the Court in its opinion affirmed the Fifth Circuit on that point only.[121]

As the Court explained, securities fraud actions are akin to common law fraud suits.[122] The remedy of civil monetary penalties is the kind of remedy that a court of law—as opposed to a court of equity—could award at common law.[123] Therefore, the Court held that the lack of a jury for securities fraud actions violated the Seventh Amendment.[124]

Significantly for the practical import of the Court's ruling, the Court's opinion still allows prosecution of securities fraud. The SEC just needs to do so under the more immediate supervision of a federal court, in line with the constitutional tradition of separated powers requiring alignment between multiple branches of

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118. *See* Jennifer L. Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1, 2 (2018) (discussing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

119. *See* Allstates Refractory Contractors, LLC v. Su, 144 S. Ct. 2490, 2491 (2024) (mem.) (Thomas, J., dissenting from denial of certiorari) ("At least five Justices have already expressed an interest in reconsidering this Court's approach to Congress's delegations of legislative power.").

120. *See* Zach Schonfeld, *Supreme Court's conservatives voice concerns about SEC's in-house enforcement*, THE HILL (Nov. 29, 2023), https://perma.cc/F9QB-L6QX ("In more than two hours of arguments, the justices spent much of their time on [the question of] whether the SEC's in-house system deprives individuals of their Seventh Amendment right to a jury trial.").

121. SEC v. Jarkesy, 144 S. Ct. 2117, 2127–28 (2024).

122. *See id.* at 2130.

123. *See id.* at 2129.

124. *Id.* at 2139.

government to impose liability or adjudicate guilt.

Jarkesy reflects a tailored approach, providing precise review of the relevant and dispositive components of a federal appellate court's multi-holding constitutional ruling. Similarly, the Court rejected an Appropriations Clause challenge to the CFPB's funding structure in *Consumer Financial Protection Bureau v. Community Financial Services Association of America*.[125] And it held in multiple cases that plaintiffs did not have Article III standing to challenge certain executive branch actions.[126] The Court did indeed apply a robust version of procedural review in *Ohio v. EPA* to stay the enforcement of an Environmental Protection Agency federal implementation plan.[127] But overall, while OT23 saw the Court end *Chevron* deference, declare SEC in-house adjudications of securities fraud unconstitutional, and open up agency actions to potentially perpetual challenge, the full sweep of the Term saw a number of instances where the Court turned back constitutional challenges to particular administrative practices.[128]

II. STATUTORY INTERPRETATION AT CENTER STAGE

In recent years, scholars have criticized the Supreme Court for frustrating the operation of government.[129] Properly understood, however, the Court's recent administrative law and structural

125. *See* 144 S. Ct. 1474, 1479 (2024). Mascott notes that she filed an amicus brief in this case.

126. *See* Murthy v. Missouri, 144 S. Ct. 1972, 1981 (2024); FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1552 (2024).

127. *See* 144 S. Ct. 2040, 2054 (2024).

128. The Court's Term further vindicates Kristin Hickman's thesis about "the Roberts Court's structural incrementalism" in administrative law cases. *See generally* Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75 (2022) (capitalization adapted); *see also* Thomas A. Koenig & Benjamin R. Pontz, Note, *The Roberts Court's Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL'Y 221, 222–23 (2023) (describing "the Roberts Court's broader commitment to methodologically constrained judging that takes a minimalist approach to reining in exercises of power that overstep constitutional boundaries").

129. *See, e.g.*, Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. (forthcoming 2025); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

constitutional decisions have *facilitated* the proper operation of government under our system of separated powers.

In October Term 2023, the Court used statutory interpretation to resolve highly salient conflicts involving deference to administrative agencies, the statute of limitations for APA suits, and the regulation of bump stocks. These decisions—along with other key rulings from OT23—demonstrate the centrality of statutory interpretation to administrative law at the Court. That centrality is in harmony with key cases from the last several Supreme Court terms. And in focusing so strongly on statutory interpretation, the Court is giving Congress an opportunity to enter the fray. This manifestation of respect for the role of the legislature is a worthwhile judicial endeavor.

A. The Limiting Function of Statutory Interpretation

When Congress enacts a statute, only the Constitution can supersede the text of the law. The text, therefore, establishes the boundaries of argumentation in a given case.

If Congress, for example, enacted a law that explicitly banned ownership of bump stocks, one might grumble about policy disagreements or even assert a constitutional challenge to the statute. But no one could quibble with an ATF regulation that implemented the ban—at least not on the grounds that it conflicted with the underlying statute. Against the backdrop of this statutory text, the Court could not have ruled the way that it did in *Cargill*. But *Cargill*, like many other significant administrative law cases in recent years, arose because an agency attempted to go beyond the boundaries that Congress and the President had established by enacted statute. The Court's rejection of these attempts—an increasing trend, saying perhaps more about the modern administrative behemoth than the modern Supreme Court—reinforces the rule of law.

Time and again, when interpreting statutes, the Court explains that it must "start with the text."[130] This textualist methodology narrows the range of materials available to a jurist in a statutory

130. *See, e.g.*, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1218 (2023); Babb v. Wilkie, 140 S. Ct. 1168, 1172 (2020).

interpretation case.[131] Text is not the only relevant consideration. Context, precedent, and canons of interpretation also figure into the analysis. A good textualist will use all of the tools at her disposal—within the limits of the methodology—when interpreting a statute. But when practiced properly, textualism omits policy preferences from the interpretive task and greatly narrows the range of possible disagreements in a statutory interpretation case.

Textualism as a theory continues to work itself pure. Leading textualists regularly debate the appropriateness of certain interpretive canons. Consider the conversation between Justice Kagan's dissent in *West Virginia v. EPA* and Justice Barrett's concurrence in *Biden v. Nebraska*. In *West Virginia*, the Court formally recognized the "major questions doctrine"—a canon of interpretation that requires a clear statement from Congress before a court will assume that Congress meant to confer sweeping regulatory authority, of an economically and politically significant nature, in an ancillary provision of a long-extant statute.[132] Dissenting in the case, Justice Kagan described the doctrine as giving courts a "get-out-of-text-free card[]."[133] In a later case, *Biden v. Nebraska*, Justice Barrett wrote that she took "seriously the charge that the [major questions] doctrine is inconsistent with textualism" before explaining that she conceived of the doctrine as a way of "emphasiz[ing] the importance of *context* when a court interprets a delegation to an administrative agency."[134]

Debates over canons of interpretation were on display—both explicitly and implicitly—this latest Term at the Court as well. Consider Justice Kavanaugh's concurrence in *Rudisill v. McDonough*. The Court decided *Rudisill*, a case about veterans benefits, in favor

131. The Supreme Court's embrace of textualism is largely attributable to the influence of Justice Scalia on the Court. *See* Diarmuid O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 306 (2017).

132. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022).

133. *Id.* at 2641 (Kagan, J., dissenting); *see also* Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 468 (2021) (questioning the consistency of the major questions doctrine with textualism).

134. 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

of a veteran claiming entitlement to certain educational benefits.[135]

The Court resolved *Rudisill* based on the plain meaning of the post-9/11 education-benefits law, but it observed at the end that "[i]f the statute were ambiguous, the pro-veteran canon would favor [the claimant]."[136] The canon counsels courts to resolve ambiguities in veterans benefits statutes in favor of veterans, who have put their lives on the line for the country.[137] Justice Kavanaugh (joined by Justice Barrett) concurred to cast doubt on the appropriateness of applying the canon.[138]

By contrast, the Court's opinion in *Harrow v. Department of Defense* applied a clear statement rule of statutory interpretation, requiring Congress to speak clearly if it means to assign jurisdictional consequences to a statutory deadline.[139] At oral argument, several Justices questioned the foundations of this jurisdictional clear statement rule.[140] But the Court's opinion in *Harrow* applied the presumption without fanfare (and without any separate concurrences or dissents), suggesting that this clear statement rule is not terribly controversial among the Justices.[141] Moreover, to the extent that clear statement rules merely restate a standard rule of language, such as that a statutory text needs to effectively communicate the existence of a given authority to empower federal action, clear statement rules are just shorthand for statements about how language operates. One other way to understand clear statement presumptions is that they are principles that embody constitutional structure—*e.g.*, if the federal government lacks power to act outside

135. *See* Rudisill v. McDonough, 144 S. Ct. 945, 958–59 (2024).

136. *Id.* at 958.

137. *See* Chadwick Harper, *Give Veterans the Benefit of the Doubt:* Chevron*,* Auer*, and the Veteran's Canon*, 42 HARV. J.L. & PUB. POL'Y 931, 946–49 (2019).

138. *See Rudisill*, 144 S. Ct. at 961 (Kavanaugh, J., concurring).

139. *See* Harrow v. Dep't of Def., 144 S. Ct. 1178, 1183 (2024). Nachmany notes that he was part of a Covington team that filed an amicus brief in *Harrow*.

140. *See* Eli Nachmany, *The Supreme Court Applies an Uncontroversial Clear Statement Rule*, YALE J. ON REGUL.: NOTICE & COMMENT (June 6, 2024), https://www.yalejreg.com/nc/the-supreme-court-applies-an-uncontroversial-clear-statement-rule-by-eli-nachmany/ [https://perma.cc/U26P-8HJR] (describing the oral argument).

141. *See id.*

the existence of a source of positive law, then the presumption should be the absence of federal authority unless the statute crosses the threshold of clearly demonstrating a grant of power.

Finally, although it did not appear to figure into the administrative law cases, a debate about the rule of lenity permeated several other statutory interpretation cases over the course of the Term.[142] The rule of lenity is consistent with inherent structural constitutional presumptions in that it simply clarifies that absent a demonstrated federal enactment criminalizing behavior, the presumption is that an enacted statute has not changed once-lawful activity into criminal action.

Moving forward, coalescence around the proper conception of the rule of lenity may heighten in importance, given that several of the Justices have hinted that the rule of lenity may be applicable in civil regulatory cases involving statutory interpretation.[143] Further, Justices along the full range of the jurisprudential spectrum raised the rule's potential application in decisions before them last Term. For example, in *Snyder v. United States*, the Court interpreted an anti-bribery statute not to criminalize state and local officials' acceptance of gratuities for their past acts.[144] The Court grounded its reasoning in ordinary statutory interpretation. But Justice Gorsuch concurred to state that lenity was at work, if "unnamed," in the Court's reasoning.[145]

Dissenting in another case from the last Term, Justice Gorsuch urged the application of lenity—and, in a lineup that might strike some less-than-careful Court watchers as ideologically curious, he was joined by Justices Sotomayor and Jackson.[146] Moreover, in perhaps one of the most interesting lineups of the Term, Justice Jackson joined five of the Court's "conservative" Justices in the majority in

142. The rule of lenity refers to "[t]he maxim that penal statutes should be narrowly construed." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128 (2010).

143. *See* Eli Nachmany, *The Civil-Criminal Convergence*, 59 WAKE FOREST L. REV. 693, 733–34, 750 & n.357 (2024).

144. 144 S. Ct. 1947, 1959–60 (2024).

145. *Id.* at 1960 (Gorsuch, J., concurring).

146. Pulsifer v. United States, 144 S. Ct. 718, 738 (2024) (Gorsuch, J., dissenting).

Fischer v. United States, while Justice Barrett wrote a dissent that was joined by two of the Court's "liberal" Justices, in a case involving the narrow construction of a criminal statute that the government had used to prosecute defendants in connection with the events of January 6, 2021.[147]

Back to the major questions cases: *West Virginia v. EPA* and *Biden v. Nebraska* are significant for another reason. They—along with *Sackett v. EPA*,[148] *NFIB v. OSHA*,[149] and *Alabama Association of Realtors v. HHS*[150]— represent recent, pre-OT23 statutory interpretation cases holding that the Biden Administration had strayed beyond the statutory text to establish a desired regulatory program. The Court's grounding of its rulings in statutory interpretation was especially important in cases like *West Virginia v. EPA* and *Sackett*, as it staved off the need to decide whether the statutes at issue violated the nondelegation doctrine or the Commerce Clause, respectively.[151]

Several of these recent cases involved the application of what the Court now has labeled the "major questions" doctrine. But the principles underlying the doctrine are not a new innovation. Rather, one scholarly analysis, by Louis Capozzi (affiliated with Penn Carey Law School), traces the origins of the canon from nearly as long ago as the late 19th century.[152] That history dates at least to 1897, when the Court held that the Interstate Commerce Commission, often described as the first multimember agency of the modern era, did not have an expansive ratemaking power because

147. Fischer v. United States, 144 S. Ct. 2176 (2024).

148. 143 S. Ct. 1322 (2023).

149. 142 S. Ct. 661 (2022).

150. 141 S. Ct. 2485 (2021).

151. *See* Brief for Petitioners at 44, West Virginia v. EPA, 142 S. Ct. 2587 (2022), 2021 WL 5921627 ("The Court should construe Section 111 [of the Clean Air Act] to avoid substantial non-delegation questions." (capitalization adapted)); *Sackett*, 143 S. Ct. at 1358 (Thomas, J., concurring) (suggesting that the statute at issue in the case may violate the Commerce Clause).

152. *See* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 197 (2023).

Congress had not "expressly given" such a power to the agency.[153]

One might argue that the Court is getting these cases wrong as a matter of statutory interpretation.[154] But that debate, for each individual case, must occur within the actual textual and structural confines of the statute at issue in the case under review. Statutory interpretation is a technical exercise that occurs within the confines of the text before the court.[155] And when Congress speaks clearly, no canon of interpretation can supersede a court's mandate to "give effect to the unambiguously expressed intent of Congress."[156] Essentially, the major questions doctrine simply can be understood as the principle that enacted statutes have to demonstrate by their own terms and structure that a particular range of government activity is authorized. Otherwise, no positive source of law permits the federal government's assertion of authority over otherwise-unregulated private or local and state activity.

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153. Interstate Com. Comm'n v. Cincinnati, N.O. & T.P.R. Co., 167 U.S. 479, 500 (1897); *see also* Capozzi, *supra* note 152, at 203 (discussing the case); *but cf.* Squitieri, *Who Determines Majorness?*, *supra* note 133, at 473 (suggesting that the Court "first invoked" the major questions doctrine in 1994). Multimember commissions existed as early as 1789 enacted by legislation in the First Federal Congress, such as commissions continuing on Articles of Confederation-era initiatives like war debt repayment. *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1291 (2006).

154. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 401 (2015) (suggesting that certain D.C. Circuit administrative law decisions were motivated by libertarian policy preferences and went "beyond the boundaries of appropriate interpretation of the law as it now stands").

155. Mila Sohoni deconstructs the major questions cases as "separation of powers cases in the guise of disputes over statutory interpretation." Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262–63 (2022). Yet some contend that the major questions principle is more properly thought of as a context-driven canon of interpretation that has little to do with constitutional values. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring); *see also* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 916 (2024) (explaining that the importance of the question provides context for a statute's linguistic meaning). Moreover, a defender of substantive canons of interpretation could take the position that—for the purpose of judicial interpretation of statutory text—the background principle of separation of powers informs the meaning of the statute. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring).

156. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), *abrogated by Loper Bright*, 144 S. Ct. 2244.

As discussed at the beginning of this Part, *Cargill* would have been a far different case—and the ATF's regulatory initiative would have been on far sturdier ground—if the National Firearms Act had explicitly banned firearms or if Congress had acted after the mass shooting in Las Vegas. The same is true in *Loper Bright*, which never would have made it to the Supreme Court if the Magnuson-Stevens Act had explicitly provided that fishermen had to pay for government monitors on their boats.

Consider also the statutory framework at issue in *Corner Post*. If Congress had eschewed the usual, pro-plaintiff presumption and explicitly provided that the APA cause of action accrues when a rule is finalized, no one could have disputed the issue. Some will argue, in support of *Chevron* deference and in criticism of the nondelegation doctrine, that Congress and the President cannot possibly legislate every detail. But banning bump stocks, establishing a funding mechanism for the regulatory scheme of having government monitors on fishing boats, and specifying when an APA right of action accrues are not questions that involve great detail. They are exactly the kinds of questions that Congress has the ability to answer in a straightforward manner.

B. Legislative Primacy in Law

The Constitution separates powers. The Court's leading administrative law decisions last Term reflected a profound respect for this principle and for the legislature's central role in formulating law. Whatever the law Congress enacts, the President then is to have complete supervisory power, and responsibility, over exercises of authority under it.[157]

In practice, the trajectory of Court decisions over the past half-century has demonstrated reluctance to enforce separated powers through judicial review. The Court frequently instead opts to cure constitutional issues through statutory interpretation. In so doing, the Court preserves space for Congress to respond, and act, if

157. *See, e.g.*, Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477 (2010); Myers v. United States, 272 U.S. 52 (1926); *see also* Jennifer L. Mascott, *Who Are Officers of the United States?*, 73 STAN. L. REV. 443 (2018).

Congress disagrees with the Court's interpretation of its enacted laws. This call-and-response has also put Congress, the executive, and the public on notice: if Congress squarely presents a constitutional question, the Court will answer it. But until then, the Court will strictly enforce the textual and structural boundaries of the laws Congress and the President have enacted—regardless of the creativity with which administrative agencies might attempt free-wheeling updates to the text outside of responsible and accountable executive supervision.

In reality, a judicial pronouncement on a statute's meaning can become the last word quite easily. Congress, by original design, often is collectively slow to act. But when it does, the separately required majorities of both the House and Senate reflect granular, concrete interests of distinct geographic regions across the nation in a way that no other elected body in our system can.[158] Congress has at times proven responsive to policy or constitutional concerns even when the Court has explicitly declined to assert them. An emblematic example is the aftermath of *Morrison v. Olson*, which saw Congress allow the pernicious independent counsel statute to lapse in 1999 even after eight Justices bowed to it over a strong dissent from Justice Scalia.[159] And, historically, the need to gather majority support for statutes has helped fend off the broadest assertions of federal power by Congress.

Loper Bright did not originate from a vapor. For years, significant agency regulatory positions flip-flopped from presidential administration to presidential administration—despite no change in the underlying statutory text from which those positions purportedly derived.[160] Along with these regulatory shifts, agencies in recent

158. *See* Jennifer L. Mascott, *Early Customs Law and Delegation*, 87 GEO. WASH. L. REV. 1388 (2020).

159. *See* 487 U.S. 654 (1988); Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1462 (2009) (describing the independent counsel statute as "a major mistake" and observing that "Congress itself came to that conclusion in 1999 when it declined to reauthorize the statute").

160. *See, e.g.*, Eugene Scalia, Chevron *Deference Was Fun While It Lasted*, WALL ST. J. (Jan. 9, 2024), https://www.wsj.com/articles/chevron-deference-was-fun-while-it-

years made increasingly bold assertions of power on the basis of questionable statutory authority.[161] To the extent that *Chevron* deference ever made sense as a policy matter, the bench and bar had come to question its wisdom in recent years. Regulations had become further unmoored from statutory text as more decades passed since the Court handed down *Chevron*.[162] Deferring to administrative interpretations of statutes became a less desirable and less tenable practice.[163]

But *Loper Bright* did not end the conversation. To the contrary, the Court has acknowledged the possibility of Congress delegating a window of *policymaking* authority to an executive agency—even though the *law* interpretation function is that of the courts in particular cases. Congress just has to have delegated concretely, to the administrative entity, the policy authority being claimed under a statute. For example, the timing standard under *Corner Post* is susceptible of a straightforward legislative fix if Congress ever were interested in tightening the timeframe within which one may challenge agency action. And the same is true of *Cargill*, in which one of the most conservative Justices on the Court even noted in a concurrence that Congress could look into restricting access to bump stocks. Once the Court has performed its function, Congress has room to do its job as well.

Congressional response to Supreme Court decisionmaking is

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lasted-legal-scotus-partisan-regulation-changes-bddbfe27; Aaron L. Nielson, *Deconstruction (Not Destruction)*, DAEDALUS, Summer 2021, at 148–49.

161. *See* Jennifer L. Mascott & Eli Nachmany, *The Supreme Court reminds the executive branch: Congress makes the laws*, WASH. POST (July 1, 2022), https://www.washingtonpost.com/opinions/2022/07/01/west-virginia-epa-supreme-court-ruling-carbon-emissions-congress-laws/.

162. *See, e.g.*, Richard W. Murphy, *Abandon* Chevron *and Modernize* Stare Decisis *for the Administrative State*, 69 ALA. L. REV. 1, 37–38 (2017).

163. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (determining that the EPA had acted unreasonably by asserting "an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization"); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (noting that the major questions doctrine embodies the principle that enacted statutes are to be interpreted in line with what their text and structure actually provides).

nothing new. Two recent examples are illustrative.[164] *First*, Congress enacted the supplemental jurisdiction statute, 28 U.S.C. § 1367, to respond to a 1989 holding in *Finley v. United States* that federal courts could not assert pendent jurisdiction over federal tort claims against parties other than the United States without an independent basis of federal jurisdiction.[165] Within a year of that decision, Congress and the President had enacted the statutory change.[166] *Second*, consider the Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Court interpreted the statute of limitations for Title VII pay discrimination claims to extend only 180 days after the original pay determination.[167] The House of Representatives passed a bill that year to reverse the Court's ruling, but the Senate declined to adopt it.[168] During the 2008 election cycle, Democrats campaigned on their support of the bill,[169] and after the Democrats captured both houses of Congress and the White House, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009 to amend the statute of limitations.[170] In a way, *Corner Post* is a reverse *Ledbetter*—and Congress's power to change course on the statute of

164. Other examples abound. Consider the Wheeler-Lea Act of 1938, in which Congress gave the (then relatively new) Federal Trade Commission the power to investigate unfair or deceptive practices. *See* Pub. L. No. 75–447, 52 Stat. 111 (1938). Congress enacted this provision after the Supreme Court ruled in *FTC v. Raladam Co.*, 283 U.S. 643 (1931), that an "unfair methods of competition" violation under the statute required harm (or prospective harm) to competitors. *See id.* at 649. The amendment responded to *Raladam* by establishing that the Commission could act to prevent FTC Act violations without meeting this requirement. *See* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 12 n.68 (2006) ("Congress superseded *Raladam* with the Wheeler-Lea Amendment."). For more recent instances, see generally Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions*, 92 TEX. L. REV. 1317 (2014).

165. *See* 490 U.S. 545, 552–53 (1989).

166. *See* Jonathan Remy Nash, *Courts Creating Courts: Problems of Judicial Institutional Self-Design*, 73 ALA. L. REV. 1, 44 n.233 (2021).

167. *See* 550 U.S. 618, 621 (2007).

168. *See Democrats' Secret Weapon: Lilly Ledbetter*, N.Y. TIMES (Aug. 28, 2008), https://archive.nytimes.com/campaignstops.blogs.nytimes.com/2008/08/28/the-democrats-secret-weapon-lilly-ledbetter/ [https://nyti.ms/3Tuu34o].

169. *See id.*

170. *See* Pub. L. No. 111–2, 123 Stat. 5 (2009).

limitations issue in light of the decision is the same.

Congress can narrow the range of possible judicial interpretations by being clear. If the legislature passed a law banning vehicles in a park, jurists may debate the reach of the provision to bicycles and airplanes.[171] But the provision plainly forbids automobiles; a judge would be hard-pressed to interpret the law in such a way as to allow a car in the park.[172] And although a "no vehicles in the park" ordinance may be ambiguous as to bicycles, the legislature can clear that up easily. A judge may be able to interpret "vehicles" not to encompass bicycles. But assume that the legislature enacts an amendment to the law and states clearly the following: "A bicycle constitutes a vehicle." The specificity of the new statute (and of the legislature's clear statement about bicycles) constrains the judge's interpretive discretion. Similarly, in administrative law, "[o]ne legislative tool that can cut against an agency using its general authority is to create a specific statute."[173]

The idea that Congress can just change the law is not entirely satisfying to some.[174] So it goes. Difficulty with getting Congress to enact one's policy preferences is a familiar problem for those who go to Washington, but it is part of the constitutional design. The rigorous requirements of bicameralism and presentment raise the bar for congressional action.[175] And congressional capacity to legislate has declined.[176] Moreover, one commentator has warned that

171. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

172. *See id.* ("Plainly this [rule] forbids an automobile.").

173. Joel Thayer, *If You're Worried About Lina Khan, Then Support Specific Authority Bills*, 27 HARV. J.L. & PUB. POL'Y PER CURIAM 5 (2024).

174. *See* Kenneth R. Berman, *Exceptions*, 48 LITIG. 56 (No. 2, Winter 2022) ("It's not satisfactory to say that, if it wants to, Congress can amend the statute to undo the Court's handiwork. Such congressional action takes effort, hearings, investigations, research, debate, coalition building, and compromise. It's unrealistic to expect that Congress can so easily react to and undo what a court can so easily create. It would instead be better for courts simply to identify the purported statutory flaw and defer to Congress to fix it.").

175. *See* John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 198 (2007).

176. *See* Steven J. Menashi & Daniel Z. Epstein, *Congressional Incentives and the Administrative State*, 17 NYU J.L. & LIBERTY 172, 176–77 (2024).

Congress's quick response to *West Virginia v. EPA*—in the form of the Inflation Reduction Act—"should not be mistaken as a sign of a new congressional quick response capability," given that the Act "was an exception, enacted using the reconciliation process that allows one budgetary bill per year to pass the U.S. Senate on a simple majority rather than 60 votes."[177] But even this statement presupposes the necessity of a legislative response to the decision.

It may well be the case that Congress does not need, or desire, to fix a statutory interpretation decision with which some disagree on policy grounds. Congress could decide that the decisions in *Corner Post* and *Cargill*, for example, are just fine. The choice not to legislate deserves respect, too.[178] Moreover, short-term concerns about congressional capacity cannot justify a long-term erosion of the separation of powers, which plays a central, defining role in our constitutional structure.

Still, the Court's opinions—both from OT23 and from other recent terms—have created the conditions for Congress to act.[179] Justice Alito's *Cargill* concurrence suggests that Congress's failure to act in recent years, at least on bump stocks, may be the result of administrative agency interference with the legislative process.[180] But even as the Court kicks issues to Congress, it has articulated clear constitutional guardrails.[181] In applying canons of interpretation like the major questions doctrine, the Court has deferred constitutional conflict over such issues as nondelegation. A reckoning on such issues may be forthcoming—and if it does, no one who has followed the Court can say that he was caught off guard by it. But at least in OT23, statutory interpretation took a central role in

177. David D. Doniger, West Virginia v. EPA, *the Inflation Reduction Act, and the Future of Climate Policy*, 53 ENV'T L. REP. 10553, 10554 (2023).

178. *See* Manning, *supra* note 175, at 198.

179. *See* Chad Squitieri, *A* Loper Bright *Future for Statutory Interpretation*, L. & LIBERTY (July 3, 2024), https://lawliberty.org/a-loper-bright-future-for-statutory-interpretation/ [https://perma.cc/9NNS-4FP7].

180. *See* Garland v. Cargill, 144 S. Ct. 1613, 1627 (2024) (Alito, J., concurring).

181. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see also* Gundy v. United States, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting) (laying out a test for nondelegation).

administrative law, and the Court's opinions reflected both cautiousness in adjudication and an appreciation of legislative primacy in the arena of lawmaking.

CONCLUSION

October Term 2023 was a blockbuster for administrative law. But the Supreme Court did not meet this moment by reaching for constitutional rulings. Instead, the Court resolved many of the Term's leading administrative law cases on statutory grounds. The Court's decisions have left space for Congress to act. If Congress disagrees with the Court's rulings, it can change the law—a feature of statutory interpretation decisions. This back and forth between Congress and the Court is a longstanding part of the American legal tradition, and its next chapter is already on display: Congress is currently considering bills that respond to the Court's OT23 administrative law opinions. Although the Court has preserved the possibility of issuing bold constitutional rulings in the years to come, its OT23 cases largely reflected a close focus on statutory interpretation.