JUDICIAL REVIEW OF THE LEGISLATIVE POWER IN THE ROBERTS COURT

AMANDA L. TYLER*

INTRODUCTION

The Supreme Court of late has been much focused on the legislative process. To that end, the Roberts Court has taken up a number of cases in multiple contexts in which it has engaged with how Congress carries out the legislative function and what role, if any, the administrative state should play in the calculus. Specifically, the Roberts Court has addressed, among other things, the so-called "major questions" doctrine, *Chevron* deference, the nondelegation doctrine, the use of non-Article III tribunals, and standing doctrine. By way of example, recent Terms have witnessed blockbuster decisions holding unlawful agency actions said to go beyond what Congress could have ever meant to delegate in terms of authority.[1] And just this past Term, the Court ushered in the demise of the judicial deference sometimes owed to administrative regulations under the now-interred *Chevron* doctrine.[2]

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* Thomas David & Judith Swope Clark Professor of Constitutional Law, University of California, Berkeley School of Law. Many thanks go to my fellow panelists at the 2024 Federalist Society Student Symposium at Harvard Law School and to Sarah Isgur for helpful conversation on these topics.

1. *See*, *e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("[The major questions doctrine] refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.").

2. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

Surveying the work of the Roberts Court, there are two different accounts one could offer to describe what is happening in these contexts. On one account, the Court is seeking to force Congress to decide important questions within the scope of their Article I powers rather than "pass the buck," so to speak, to the administrative state. A different, though complementary, account views these decisions as seeking to protect Congress's prerogatives from infringement by the executive branch, and possibly—though I will suggest one might come to question this proposition as we proceed—from the judiciary as well.

This essay will first discuss the cases exemplifying these trends that I have in mind. It then will raise some important questions about their implications. Finally, the essay will flag what I will call a "puzzlement" raised by these recent developments when studied alongside other areas of the Court's jurisprudence—most specifically, its standing jurisprudence.[3] Specifically, as one puts these different jurisprudential developments in conversation with one another, a disconnect appears to emerge. On the one hand, we see a Court that is increasingly protective of ensuring the legislative process detailed in Article I, Section 7, of the Constitution controls the setting of national policy. Thus, for example, the Court has said that Congress—not the administrative state—must make all decisions of "economic and political significance."[4] Yet, in several standing cases of late—in particular, *Spokeo, Inc. v. Robins*[5] and *TransUnion LLC v. Ramirez*[6]—the Court has disregarded congressional directives establishing national policy. Specifically, the Court has held that Congress may not create rights through the exercise of its Article I powers and concomitantly provide that they shall be judicially enforceable without a preexisting common law analogous

3. I use the term "puzzlement" as a tribute to my former professor, David Shapiro, who liked to use the term. *See, e.g.*, David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 28 (2004).

4. *West Virginia*, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

5. 578 U.S. 330 (2016).

6. 141 S. Ct. 2190 (2021).

cause of action.[7] In so doing, the Court has thrown up roadblocks to would-be litigants instead of permitting their access to the federal courts. Thus, while in one context the Court has been protecting the legislative process from executive incursions, it has in the standing context been more than willing to second-guess the legislative process itself. This essay concludes by asking whether this disconnect warrants a reassessment of the Court's modern standing jurisprudence to align instead with the simple idea, as recently expressed by one federal judge, that "an Article III 'Case' [and therefore standing] exists whenever the plaintiff has a cause of action";[8] that is, whenever Congress *says* the plaintiff has a cause of action.

In the end, readers may draw their own conclusions as to the correct approach to standing doctrine, though the essay will join camp with those who have argued that Congress should be able to provide for judicial enforcement of rights it creates within the valid scope of its Article I powers. But, if nothing else, this essay aims to show that there is great tension between the Court's treatment of these different areas of jurisprudence respecting the legislative power.

I.

Let us begin with an historic example that helps set the stage for some of the recent developments in the Roberts Court—specifically, the Court's decision in the famous 1952 "Steel Seizure Case," *Youngstown Sheet & Tube Co. v. Sawyer*.[9] In the lead up to the Court's decision, President Truman had seized the steel mills to keep them running at the height of the Korean War in reaction to a likely impending strike by steel workers or lockout by steel management.[10] The President declared that stopping the production of steel would have devastating consequences on the war effort and, more

7. *Spokeo*, 578 U.S. at 340; *TransUnion*, 141 S. Ct. at 2204.
8. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1126 (11th Cir. 2021).
9. 343 U.S. 579 (1952).
10. *See id.* at 582–83.

specifically, would directly endanger the lives of the thousands of American soldiers in harm's way in Korea.[11]

The Court decided the case on an expedited basis with multiple opinions resulting. The Court members announced their decision in a series of statements totaling two and a half hours.[12] The lead opinion for the Court was written by Justice Black. His opinion flatly rejected Truman's assertion of unilateral power to seize the steel factories, along the way also specifically rejecting the President's argument that his authority to do so could be implied from the range of executive powers assigned to him by Article II of the Constitution.[13] Surveying the justices' opinions, one finds that it was important to some members of the Court that Congress had not declared war.[14] Of importance to all of the justices in the majority, Congress had not more specifically authorized the seizure, and indeed, some members of the Court understood Congress actually to have indicated its opposition to the action.[15]

The Court, as we all know, rejected Truman's actions as unconstitutional. Justice Black's lead opinion put it bluntly: "This is a job for the Nation's lawmakers, not for its military authorities."[16] For its part, Justice Jackson's famous concurring opinion declared, "Nothing in our Constitution is plainer than that declaration of war is entrusted only to Congress."[17] This, he continued, means that the compact "lays upon Congress primary responsibility for supplying the armed forces."[18]

Reduced to its essence, then, the Court's holding was predicated on the idea that Congress needed to decide the important issue at

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11. *See id.* at 590–91.

12. *See* Joseph A. Loftus, *Black Gives Ruling; President Cannot Make Law in Good or Bad Times, Majority Says*, N.Y. TIMES, June 3, 1952, at 1, 23.

13. *Youngstown*, 343 U.S. at 587–88.

14. *See, id.* at 613 (Frankfurter, J., concurring); *id.* at 642 (Jackson, J., concurring).

15. *See id.* at 586.

16. *Id.* at 587.

17. *Id.* at 642 (Jackson, J., concurring).

18. *Id.* at 634; *see also id.* at 634 (discussing the "enduring consequences upon the balanced power structure of our Republic").

stake, and the Constitution did not permit the President to get out ahead of Congress and order the seizure himself.

II.

Some of the Court's recent decisions appear to have been driven by similar separation of powers considerations. To begin, consider the rise of the major questions doctrine in recent Terms. To be sure, the doctrine has roots predating the Roberts Court,[19] but it seems to have garnered new traction of late.[20] Take the 2022 decision in *West Virginia v. EPA*.[21] Writing for the Court, Chief Justice Roberts held that the EPA did not have the requisite authority to adopt its Clean Power Plan, which by capping greenhouse gas emissions would aggressively force power plants to transition to cleaner methods to generate electricity.[22] The agency had claimed the authority to implement the plan under the Clean Air Act, which authorizes the agency "to regulate power plants by setting a 'standard of performance' for their emission of certain pollutants into the air."[23]

Studying the Clean Air Act for itself, the Court concluded that the agency had moved beyond any clear delegation of authority

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19. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155–56 (2000) (holding FDA could not regulate or ban tobacco products pursuant to its authority over "drugs" and "devices"); *id.* at 160 (deeming FDA's interpretation an "expansive construction of the statute" and observing that "Congress could not have intended to delegate" such authority "in so cryptic a fashion"); *cf.* Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001) (observing that Congress does not usually "hide elephants in mouseholes").

20. *See, e.g.*, King v. Burwell, 576 U.S. 473, 486 (2015) (positing that *Chevron* should not apply where the question before the court is one of "deep 'economic and political significance'" (quoting *Brown & Williamson*, 529 U.S. at 160)).

21. 142 S. Ct. 2587 (2022).

22. *Id.* at 2604, 2616.

23. *Id.* at 2599 (quoting 42 U.S.C. § 7411(a)(1)). As the Court described the agency's position,

"On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably 'exorbitant.'" *Id.* at 2612.

granted by Congress, particularly in light of the substantial policy implications wrought by the changes inherent in its Clean Power Plan. As the Chief Justice put it:

> [I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[24]

This is because, the Court wrote, "there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[25] For good measure, the Court emphasized that Congress had itself rejected such a policy course on more than one occasion.[26] In the end, the Court concluded, "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[27]

The Court reached a similar conclusion in a case involving claimed authority by the Centers for Disease Control and Prevention to impose eviction moratoria during the COVID-19 pandemic.[28] And likewise during the pandemic, the Court rejected the

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24. *Id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); *see also Utility Air*, 573 U.S. at 324 (observing that the Court "typically greet[s]" assertions of "extravagant statutory power over the national economy" with "skepticism").

25. *Id.* at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159–60).

26. *See id.* at 2614 ("we cannot ignore that [EPA's position] conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected'" multiple times." (quoting *Brown & Williamson*, 529 U.S. at 144).

27. *Id.* at 2616.

28. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486–90 (2021) (per curiam) (holding CDC did not have authority to impose nationwide eviction moratorium pursuant to statute's grant of authority to implement measures "necessary to prevent the . . . spread of" disease, emphasizing "the sheer scope of the CDC's

Occupational Safety and Health Administration's vaccination mandate that would have required "84 million Americans . . . either [to] obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense."[29] As the Court emphasized in *West Virginia v. EPA*, the basic idea animating each of these decisions was simple: "We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[30]

Justice Gorsuch has echoed similar themes in several of his separate opinions both invoking the major questions doctrine and the nondelegation doctrine. Take his dissent in the 2019 case of *Gundy v. United States*,[31] where he was joined by Chief Justice Roberts and Justice Thomas.[32] There, he wrote, "we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[33] A few years later, Justice Gorsuch suggested during the COVID-19 pandemic that vaccination policy was a major question that likely could not be delegated by Congress to an agency under any terms.[34] As he explained in that case, *National Federation of Independent Business v. Department of Labor*, the major

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claimed authority" and its "unprecedented" nature along with the fact that Congress declined to extend a moratorium).

29. Nat' Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam) (halting emergency regulations issued by OSHA applicable to most employers with 100 or more employees that would have required COVID-19 vaccination of covered employees or else weekly testing combined with mask-wearing in the workplace); *id.* at 666 (deeming it "telling that OSHA, in its half century of existence" had never done anything comparable).

30. 142 S. Ct. at 2609 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

31. 139 S. Ct. 2116 (2019).

32. *See id.* at 2131 (Gorsuch, J., dissenting).

33. *Id.* at 2142 (Gorsuch, J., dissenting).

34. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 668–70 (Gorsuch, J., concurring) (invoking both the major questions doctrine and the nondelegation doctrine and noting that both doctrines "protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands"). On the nondelegation front, Justice Gorsuch wrote that "if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority." *Id.* at 669.

questions doctrine "ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress."[35]

These cases exemplify a Court highly trained on the legislative process. They likewise provide fodder for the two possible accounts of what the Court is doing in these cases. On one account, the Court is prodding Congress to stop passing the buck to the administrative state and take responsibility for important decisions about national policy. On another account, what the Court is doing is protecting Congress's powers from slipping away—or, to put it slightly differently, being improperly appropriated by the administrative state.

On this latter point, one cannot help but recall here Justice Jackson's line in *Youngstown* that "[w]e may say the power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."[36] The Court, it seems, no longer believes that the responsibility of protecting the legislative prerogative is solely Congress's to bear.

III.

Another example of an area in which the Court has been stricter in policing the boundaries of the administrative state as they intersect with the legislative power is of course found in its recent revisitation of the *Chevron* doctrine.[37] As every law student who has taken administrative law knows, the *Chevron* doctrine provides that where a statute passed by Congress is ambiguous, courts should defer to an agency's interpretation of that statute so long as that

35. *Id.* at 668; see also *id.* at 669 (emphasizing the importance of ensuring that Congress does not "hand off all its legislative powers to unelected agency officials").

36. 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

37. The doctrine is so named for the case that launched it, *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

interpretation is reasonable.[38] More specifically, as the Court recently described it, *Chevron* involves two steps:

> After determining that a case satisfies the various preconditions we have set for *Chevron* to apply, a reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." If, and only if, congressional intent is "clear," that is the end of the inquiry. But if the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must, at Chevron's second step, defer to the agency's interpretation if it "is based on a permissible construction of the statute."[39]

This past Term, in two cases, *Loper Bright Enterprises v. Raimondo*,[40] consolidated with *Relentless v. Department of Commerce*, the Supreme Court took up the question whether *Chevron* should be overruled.

In a blockbuster decision, the Court held that indeed *Chevron* should be overruled as "fundamentally misguided."[41] The Chief Justice authored the majority opinion and opened by relying heavily on the Administrative Procedure Act (APA) of 1946,[42] positing that the APA requires courts to "decide all relevant questions of law"—including those normally falling within under *Chevron*'s sweep. He further questioned *Chevron*'s premise that statutory gaps and ambiguities should be treated as conscious delegations by Congress to agencies to carry on its legislative work.

Much of the Chief Justice's discussion of the separation of powers problems with the *Chevron* doctrine emphasized how it undermined the exercise of "independent judgment" by the courts

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38. Will administrative law courses now still teach *Chevron*, or will it only be taught in legal history courses?

39. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2254 (2024) (quoting *Chevron*, 467 U.S. at 842, 843).

40. 144 S. Ct. 2244 (2024).

41. *Id.* at 2270.

42. 5 U. S. C. § 551 *et seq.*; *see id.* § 706 (positing that in reviewing agency action "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action" and requiring courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law").

insofar as it calls on courts to defer to interpretations of statutory schemes rendered by agencies.[43] He further emphasized that the touchstone of any interpretive inquiry related to legislation is "to effectuate the will of Congress."[44] Thus, it is one thing if Congress expressly "delegates discretionary authority to an agency,"[45] but, the Chief Justice wrote, *Chevron*'s assumption that ambiguity equates with delegation was misguided.[46] Continuing, he observed,

> As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional.[47]

In the end, he concluded, "statutes . . . no matter how impenetrable, do—in fact, must—have a single, best meaning."[48]

But, the Chief Justice concluded, there are additional separation of powers problems with the *Chevron* doctrine—specifically, it permits agencies to usurp decisions that are the proper province of the legislature:

> Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistency" being "at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious." But statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary

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43. *Loper Bright*, 144 S. Ct. at 2273; *see also id.* at 2261 (citing *Marbury* for the proposition that "courts decide legal questions by applying their own judgment").

44. *Id.* at 2263.

45. *Id.*

46. *See id.* at 2265–66 (citing Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989)); *see also id.* at 2269 ("'[e]xtraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]"'") (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

47. *Id.* at 2265–66 (citing *Chevron*, 467 U.S. at 865).

48. *Id.* at 2266.

> authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so.[49]

Concurring in *Loper Bright*, Justice Thomas was even more direct on this score. In his view, not only does the *Chevron* doctrine result in judges giving up their constitutional power to exercise independent judgment in interpreting legislative directives, it "permits the Executive Branch to exercise powers not given to it."[50] As he described things, *Chevron* permits agencies to usurp the judicial interpretive power and alternatively the legislative power. Specifically, he wrote, if defended as permitting agencies to fashion policy, *Chevron* would thereby permit agencies to "unconstitutionally exercise 'legislative powers' vested in Congress." [51] In short, "[b]y 'giv[ing] the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent,' *Chevron* 'permit[s] a body other than Congress to perform a function that requires an exercise of legislative power.'"[52]

In both opinions, one finds evidence that the Court's decision to discard *Chevron* was driven by a deep concern over ensuring the formulation of national policy occurs in the legislative arena. And, once again we find support for both accounts sketched above: first, the Court may have been driven by the belief that Congress should

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49. *Id.* at 2272 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)). All this being said, the Court did suggest that Congress could still delegate some decisions—it just must be clear when it is doing so. For this and other reasons, Justice Kagan has suggested the impact of *Loper Bright* may be more limited that some alarmists are making it out to be. *See* Comments of Justice Kagan, Ninth Circuit Conference (July 25, 2024), https://www.c-span.org/video/?537234-1/justice-elena-kagan-speaks-us-court-appeals-ninth-circuit-conference (calling *Loper Bright* "a statutory decision, not a constitutional one"). Dissenting in *Loper Bright*, she accused the Court majority of embodying a "hubris squared" mentality by assuming that courts are better situated to fill in policy gaps left by Congress. *See* 144 S. Ct. at 2295 (Kagan, J., dissenting).

50. *Id.* at 2274 (Thomas, J., concurring) ("*Chevron* deference compromises th[e] separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits.").

51. *Id.* (citations omitted).

52. *Id.* (quoting Michigan v. EPA, 576 U.S. 743, 762 (2015) (opinion of Thomas, J.)).

take greater responsibility in deciding important aspects of its legislative directives rather than leaving the formation of national policy to unelected bureaucrats; in addition or in the alternative, the Court may have been influenced by a belief that the Court should protect the legislative power from usurpation by the administrative state. Whichever account is correct, there is no denying that the Roberts Court is much more active in policing and protecting Congress's lawmaking role than we have seen in some time (although to be sure, as *Youngstown* shows, the idea is not altogether new).

IV.

These developments all lead to a number of important questions that will need to be worked out going forward. Are there other areas that warrant the Court's attention to the role of Congress in the separation of powers? For example, as Justice Gorsuch has urged, should the Court revisit the nondelegation doctrine?[53] And, within the above areas where the Court has taken up scrutiny of the legislative process, there are numerous follow-on issues to tackle. For example, what is a major question and what is a minor question? How will the Court distinguish the two? Going forward, will all major questions require clear congressional directives on point? Further, in the *Chevron* context, how will courts distinguish between when statutory text is clear and when it is ambiguous? At least one prominent judge has said that he has never seen an ambiguous statute, and yet the *Chevron* doctrine was alive and well in the lower courts before *Loper Bright* (even if the doctrine hadn't expressly been invoked by the Court in sixteen years).[54] More

53. *See, e.g.*, *supra* text accompanying notes 31–34.

54. *See* Raymond M. Kethledge, *Ambiguities and the Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017). For a general assessment of *Chevron* in the lower courts leading up to *Loper Bright*, *see* TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON, ANNE JOSEPH O'CONNELL, & ELOISE PASACHOFF, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1205 (13th ed. 2023) (noting that as of 2023, "the Court has not overruled *Chevron*. Thus, litigants continue to invoke it, and lower courts continue to rely on it, although *Chevron* has come under heavy fire from some lower court judges, including ones who have since become Justices on the Supreme Court").

importantly post-*Loper Bright*, what is the appropriate course of action once a statute is deemed ambiguous? Will courts give it a more limited reading to prod Congress to revisit the issue and provide greater clarity (a là the major questions doctrine)?[55]

Consider the context with which this essay started—war and emergency powers. A broad definition of major questions and/or a revival of the nondelegation doctrine could have significant bite with respect to such matters. Take the War Powers Act, which, among other things, lets the President commit troops for sixty days without Congress deciding whether we should go to war.[56] Of course, the Constitution assigns Congress the decision whether to wage war,[57] establishing a framework that the Founding generation believed was the right one—even if clunky—because having lived through war, that generation did not want the new Republic to venture into similar terrain lightly.[58] If the Court of late is concerned about the executive trampling on the legislative power and ensuring Congress decides "major questions" within its assigned legislative powers, what would it say about the War Powers Act regime?[59]

Consider as well the fact that over one hundred provisions give the President emergency powers of various stripes once the

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55. *Cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544, 544–51 (1983) (contending that courts should always read ambiguous statutory language to achieve as little change as possible: "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process"); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) (arguing that when faced with ambiguous statutory language and unable to determine prevailing legislative preferences, the judiciary should adopt a construction aimed at eliciting a legislative reaction—namely, aim to spur the legislature to take up and resolve the otherwise indeterminate statutory question).

56. 50 U.S.C. § 1541 *et seq.*

57. U.S. CONST. art I, § 8, cl. 11.

58. For discussion, see JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–11 (1993).

59. This question has particular bite in light of court decisions suggesting it is hard if not impossible for Congress to claw back the War Powers regime delegations within the framework it created in that statute. *See* Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000); *see id.* at 25 (Silberman, J., concurring) (arguing that the problem presents a classic political question).

President declares a state of national emergency.[60] Under the framework of the National Emergencies Act, Congress can only override and end the invocation of such emergency powers by passing veto-proof legislation rebuking the President.[61] And although the law says Congress should meet every six months to debate whether an emergency should continue, during the forty years we have lived within this framework, Congress has for the most part eschewed its responsibility to debate whether to end ongoing national emergency declarations.

In light of the Court's recent decisions, will we see renewed attention given to this approach to warmaking and emergencies? After all, a whole lot of what traditionally we understood to be legislative power is being exercised by the executive under these frameworks. Time will tell.

V.

This brings us at long last to the puzzle raised by the Court's recent attention to the legislative process.

I am intrigued by what follows if we put the Court's major questions doctrine and related cases in conversation with the Court's public and private rights caselaw (more specifically, its jurisprudence on non-Article III tribunals) as well as its most recent standing jurisprudence.

Let us start with the Court's approach to the matter of when Congress may assign enforcement of claims and rights to non-Article III tribunals.

To be sure, calling the Court's jurisprudence in this area unclear is a bit like saying Pelé was a decent soccer player. The Court's decisions are a mess. That being said, the Court's inquiry has long turned on the oft-invoked distinction between public and private

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60. *See* Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, THE ATLANTIC (Jan./Feb. 2019). If you want to frighten your teenage children, point out that among other powers, the President might arguably claim the emergency authority to take over the internet. *See id.*

61. *See* 50 U.S.C. § 1601 *et seq.*

rights.[62] And over the last few decades, the Court has often held that if Congress creates a right, it gets to decide the venue in which it will be enforced. Take the 1978 decision in *Santa Clara Pueblo v. Martinez*.[63] In that case, the Court upheld a scheme by which newly-created rights under the Indian Civil Rights Act could only be advanced in tribal courts, and not Article III courts.[64]

Or consider the Court's later holding in *CFTC v. Schor*.[65] There is a lot going on in that case, to be sure, but it bears emphasizing that there were two claims at issue in the case being advanced by the plaintiff before the non-Article III Commodities Futures Trading Commission: one grounded in the Commodities Exchange Act and one grounded in the common law.[66] Although the Justices divided closely over whether the Commission could adjudicate the common law claim, all nine agreed it could adjudicate the claim under the Commodities Exchange Act that Congress had created between a client and broker.[67]

Conversely and increasingly, the Court has said that limits on Congress's power to assign the adjudication of rights outside the Article III courts turns largely on the source of the right—or at least that was the thrust of Chief Justice Roberts's opinion for the Court in *Stern v. Marshall* as I read it.[68] In *Stern*, the Court declined to allow a bankruptcy court staffed with non-life tenured Article III judges to resolve what it deemed to be a common law claim outside the

62. *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932).

63. 436 U.S. 49 (1978).

64. *See id.*

65. 478 U.S. 833 (1986).

66. *See id.*

67. *See id.*

68. 564 U.S. 462, 490, 493 (2011) (distinguishing between "public rights" created by Congress and "private" or common law rights and observing that the former embody "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority" and distinguishing as the latter "claim is instead one under state common law between two private parties" that "does not 'depend[-] upon the will of congress'"). To be sure, this distinction was assigned much significance by the *Schor* majority, which allowed the common law claim in that case to proceed before the Commission, albeit at least in part based on the proposition that a party can waive one's right to an Article III tribunal.

core of the relevant bankruptcy proceedings; at the same time, the Court did not call into question the bankruptcy court's ability to resolve core bankruptcy claims.

Even well before *Stern*, as Justice Brennan articulated in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[69] the proposition that has often controlled posits that:

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress's power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation.[70]

In other words, the source of the right is super important. If Congress acts within the scope of its Article I powers and creates a right—subject to limited caveats: most especially, as recently emphasized by the Court, the Seventh Amendment[71]—it gets to decide how that right is enforced. To this end, Chief Justice Roberts in *Stern* relied on *Thomas v. Union Carbide Agricultural Products Company*,[72] in which the Court upheld a data-sharing scheme created by federal statute that sent disputes over compensation between private companies to arbitration, emphasizing that "[a]ny right to compensation" under the scheme in question "results from [the statute] and does not depend on or replace a right to such compensation under

69. 458 U.S. 50 (1982).

70. *Id.* at 83–84 (Brennan, J., delivering the judgment of the Court).

71. *See SEC v. Jarkesy*, 144 S. Ct. 2117, 2136 (2024) (holding the Seventh Amendment violated where the SEC sought to impose administrative fines for securities fraud without providing an Article III judge and jury to defendant); *see id.* at 2131 (opining that the claim at issue bore relation to common law fraud and observing that "[u]nder th[e public rights] exception, Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment. But this case does not fall within the exception, so Congress may not avoid a jury trial by preventing the case from being heard before an Article III tribunal").

72. 473 U.S. 568 (1985).

state law."[73] The key point is this: Although the outer limits of this power are still very much contested and uncertain in light of the Court's most recent decisions in this area,[74] there exists a substantial body of precedent recognizing broad authority on the part of Congress to assign adjudication of rights it creates to non-Article III tribunals, which in turns suggests a recognition of the breadth of the legislative power to create rights and dictate the terms of their enforcement.

All of this underscores a puzzle that arises when one studies the Court's standing jurisprudence against the backdrop of each of these separate areas of Court decisions. Put most simply, if Congress gets broad latitude to define how a right it creates is enforced, and can even at least in some contexts send adjudication of that right to an agency subject only to limited Article III review,[75] *and* if the Court increasingly is "encouraging" Congress to take the primary role in legislating down to the gritty details (see, *e.g.*, the major questions doctrine and the demise of *Chevron*), what explains the Roberts Court's standing doctrine in recent cases like *Spokeo, Inc. v. Robins*[76] and *TransUnion LLC v. Ramirez*,[77] which can be said to undermine Congress's efforts when it does in fact set national policy in great detail?

Put another way, in *Spokeo* and *TransUnion*, why does the Court call into question Congress's power to create a right, declare an infringement of that right equates with legal injury, and provide an

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73. *Stern*, 564 U.S. at 491 (quoting *Union Carbide*, 473 U.S. at 584); *see also* 473 U.S. at 589 (observing that "Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication. It also has the power to condition issuance of registrations or licenses on compliance with agency procedures").

74. *See, e.g.*, *Jarkesy*, 144 S. Ct. 2117.

75. *See* Crowell v. Benson, 285 U.S. 22 (1932) (setting forth the classic model of agency review by Article III courts whereby Article III review of questions of law and mixed questions of law and fact are *de novo* and factual determinations are reviewed under a deferential standard).

76. 578 U.S. 330 (2016).

77. 141 S. Ct. 2190 (2021).

enforcement scheme pursuant to which the rights-holder gets to pursue relief in an Article III Court?

Consider *TransUnion*. The case involved a class action advanced on behalf of 8,185 individuals against one of the three leading credit reporting agencies. The plaintiffs sued under the Fair Credit Reporting Act, claiming that TransUnion had violated the Act by failing to employ reasonable procedures necessary to ensure that the plaintiffs' credit files were accurate. Indeed, the plaintiffs alleged that some of their files erroneously labeled them to be on terrorist watch lists or as drug traffickers. Of those in the class, some 1,853 of the class members claimed that TransUnion had provided their erroneous credit reports to third parties. The other 6,332 members of the class could not show that their credit reports had been provided to third parties during the relevant period.

Writing for the majority, Justice Kavanaugh concluded that only those plaintiffs in the first category may proceed in federal court to advance their claims created by the Fair Credit Reporting Act.[78] Specifically, the majority held that Article III courts may not adjudicate rights created in the Act, despite Congress's directive that plaintiffs be able to do so, where the relevant claims do not have a common law analogue.[79] So, in the case, the Court held that for those plaintiffs whose erroneous credit reports were circulated to third parties, because their claims looked like the traditional tort of reputational harm, it followed that they had standing to advance said claims in federal court.[80] By contrast, the majority held, for those whose credit reports erroneously said they were on a terrorist

78. *See TransUnion*, 141 S. Ct. at 2209; *see also* 15 U.S.C. § 1681 *et seq.* As the Court said in *Spokeo*, the Fair Credit Reporting Act "imposes a host of requirements concerning the creation and use of consumer reports." 578 U.S. at 335. These include procedural requirements aimed at ensuring accuracy of reports, an obligation to provide reports to individuals, and an obligation to provide a summary of their rights to consumers.

79. *See TransUnion*, 141 S. Ct. at 2200 (positing that the inquiry asks "whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including (as relevant here) reputational harm") (citing *Spokeo*, 578 U.S. at 340–41).

80. *Id.* at 2208–09.

watch list—even though Congress declared that to be a legal injury and provided for a right of action to seek damages in federal court—that was insufficient because the claim did not mirror any traditional common law claim. The short answer for those plaintiffs: no standing.[81]

In all of this, the Court declined to defer to Congress's determination in the Fair Credit Reporting Act that violations of the Act caused harm to consumers along with its parallel directive that in such cases consumers could proceed in federal court for damages, the latter being an important component to the entire regulatory scheme Congress had created to encourage accurate credit reporting.[82] Specifically, the Act provides: "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for actual damages or for statutory damages ranging from $100 to $1,000, as well as, where relevant, punitive damages and attorney's fees.[83] The majority emphasized, however, that what mattered was the state of traditional tort causes of action, not what Congress said in creating the statutory scheme while acting well within its Article I legislative powers.

Thus, in distinguishing the two categories of plaintiffs, the Court built on what it had said in *Spokeo* and held that to be deemed a "concrete" injury sufficient to come into an Article III court, the

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81. *See id.* at 2210.

82. Specifically, in *Spokeo*, the Court rejected the idea that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right," holding instead that "Article III standing requires a concrete injury even in the context of a statutory violation." 578 U.S. at 341. The Court reaffirmed this idea in *TransUnion*:

> For standing purposes, therefore, an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court.

141 S. Ct. at 2205.

83. 15 U.S.C. § 1681n(a).

"plaintiffs [must] identif[y] a close historical or common-law analogue for their asserted injury."[84] And even though "Congress's views" should be afforded "due respect," Justice Kavanaugh wrote in *TransUnion*, Congress "may not simply enact an injury into existence."[85] It follows that a statutory violation is alone insufficient under this test.

Justice Thomas concurred in part and dissented in relevant part, saying in effect that this is (just about) all wrong. In particular, he wrote (with a caveat noted in the footnote) that legal injury—for example, Congress saying in a law that you are injured—is enough to warrant standing.[86] End of story.

For Justice Thomas, then, the inquiry was actually quite simple: "courts for centuries held that injury in law to a private right was enough to create a case or controversy."[87] "Legal injury," he wrote, created within the scope of Congress's Article I powers, equals access to federal court under 28 U.S.C. § 1331.[88] He concluded, "this

84. 141 S. Ct. at 2204.

85. *Id.* at 2205.

86. Justice Thomas defined the rights at stake in *TransUnion* as "private rights." He contrasted these with "public rights," which in his view "refers to duties owed collectively to the community." *Id.* at 2217 n.2 (Thomas, J., dissenting). Justice Thomas gave as an example the fact that "Congress owes a duty to all Americans to legislate within its constitutional confines." "But," he wrote, "not every single American can sue over Congress' failure to do so. Only individuals who, at a minimum, establish harm beyond the mere violation of that constitutional duty can sue." *Id.* Space limitations require leaving for another day discussion of this distinction between the two categories of rights for standing purposes.

87. *Id.* at 2218.

88. *Id.* at 2222. Justice Thomas supported his position with some pretty powerful historical precedents, including the fact that "[t]he First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder 'could not show monetary loss.'" *Id.* at 2217 (quoting Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting) (citing Act of May 31, 1790, § 2, 1 Stat. 124–25)). He also relied on Justice Story, who concluded while riding circuit: "'[W]here the law gives an action for a particular act, the doing of that act imports of itself a damage to the party' because '[e]very violation of a right imports some damage.'" *Id.* (quoting Whittemore v. Cutter, 29 F. Cas. 1120, 1121 (No. 17,600) (C.C. Mass. 1813)). In short, Justice Thomas argued, "[s]o long as a 'statute fixes a minimum of recovery . . . there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum

understanding accords proper respect for the power of Congress and other legislatures to define legal rights."[89]

Notably, this approach sketched out by Justice Thomas bears much in common with the approach to standing advocated by Judge Fletcher years ago. It likewise sounds an awful lot like the approach to standing now being promoted by Judge Newsom on the Eleventh Circuit. As then-Professor and now-Judge Fletcher wrote in his 1988 seminal article *The Structure of Standing*: "If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it."[90] If anything, Judge Newsom has simplified the inquiry even more. In his words, "an Article III 'Case' exists whenever the plaintiff has a cause of action."[91] He could have added, "Period." The inquiry focuses singularly on whether the plaintiff has a cause of action created by Congress. (Justice Thomas's *TransUnion* opinion actually quoted Judge Newsom.[92]) The problem with the Court's approach to standing today is the same as Judge Fletcher highlighted decades ago—the Court is "superimposing an 'injury in fact' test upon an inquiry into the meaning of a statute" as "a way for the Court to enlarge its powers at the expense of Congress."[93]

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sum without any specific showing of loss.'" *Id.* at 2218 (quoting THOMAS M. COOLEY, LAW OF TORTS *271 (Chicago, Callaghan & Co. 1879)).

89. *Id.* at 2218. Justice Thomas added, "never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots." *Id.* at 2221.

90. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988). He added, "If a duty is constitutional, the constitutional clause should be seen not only as the source of the duty, but also as the primary description of those entitled to enforce it." *Id.* at 224.

91. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring).

92. *See* 141 S. Ct. at 2219 (Thomas, J., dissenting).

93. Fletcher, *supra* note 90, at 233. Judge Fletcher continued to suggest that the Court's "injury in fact" test may actually be a form of substantive due process. He added: "For the Court to limit the power of Congress to create statutory rights enforceable by certain groups of people—to limit, in other words, the power of Congress to create standing—

This has long struck me as a right approach to standing. It is straightforward,[94] easy to apply, and acknowledges what everyone knows but won't say out loud: namely, that standing is all about the merits—*as it should be*.[95] But regardless of whether one joins camp on this score, my larger point is this: It is hard to understand why this approach does not control in the standing jurisprudence in light of the major questions doctrine, the demise of the *Chevron* doctrine, and the Court's approach to public and private rights and non-Article III tribunals.

The puzzle raised by putting these different lines of jurisprudence into conversation with one another reduces to this point: If the Court purports to be protecting Congress's prerogatives and/or wanting to force Congress to do its job, all while developing a body of law that defers extensively to Congress as to how rights it creates should be enforced, there is a powerful argument to be made that the Court should respect Congress's decisions when it is clear in establishing federal rights and how they are to be enforced. Take *TransUnion*. Congress determined that every American should have a right to fair credit reporting by the private for-profit

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is to limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against." *Id.*

94. One certainly cannot describe existing standing doctrine this way. Indeed, it's hard to improve, even decades later, on Judge Fletcher's reference in 1988 to the "apparent lawlessness of many standing cases" and their "wildly vacillating results." Fletcher, *supra* note 90, at 223.

95. *See* Fletcher, *supra* note 90, at 223 ("I propose that we abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of 'injury in fact.' Instead, standing should simply be a question on the merits of plaintiff's claim."). For a powerful descriptive account of how connected standing doctrine is to the merits as well as a critique of its regrettable current state, *see* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015) (surveying a host of areas in which standing appears to turn on the subject matter). For a classic example of how such an approach to standing can and should work, see *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J., concurring) (arguing that standing was appropriate in that case challenging government spending in support of religion under the Establishment Clause because of the underlying protections afforded by the Clause and its intended broad coverage: "Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution").

companies that control the market, and acting well within its Article I powers, Congress legislated a scheme to incentivize those companies to exercise their important responsibilities with care. As part of that scheme—again, a scheme created well within its Article I powers—Congress further legislated that one key means of enforcing its directives would be for individuals whose sensitive financial information is mishandled by said companies to be able to sue for damages in federal court. How does the Court respect Congress's role in the separation of powers by saying that this is insufficient to warrant the exercise of federal court jurisdiction?[96]

If, as would seem to be the case given the rise of the major questions doctrine along with the demise of *Chevron*, the Court wants Congress to take greater responsibility over the legislative process and legislate more clearly, then when Congress actually does so within the proper scope of its Article I powers—as it did in passing the Fair Credit Reporting Act—due respect for the separation of powers seems to warrant honoring those legislative directives as they are set out. In other words, beyond the powerful "common sense" argument Justice Thomas advanced in his *TransUnion* opinion,[97] if Congress creates a right not be called a terrorist in your credit report and provides for a cause of action to enforce that right, that should be enough to open the federal courthouse door. The Court disrespects the legislative prerogative by saying otherwise.

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96. I will borrow again here from Judge Fletcher's earlier work: "So long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them." Fletcher, *supra* note 90, at 251.

97. *See* 141 S. Ct. at 2223 (Thomas, J., dissenting) (underscoring what any person on the street would conclude: "one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful. All the more so when the information comes in the context of a credit report, the entire purpose of which is to demonstrate that a person can be trusted").