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Comparative Section

This Section of the Yearbook offers our readers an overview of the principal administrative, constitutional, legislative and jurisprudential developments of the past year across a selection of legal systems. For this issue, the survey extends to both the national level (France, Germany, Italy, Spain, the United Kingdom and the United States) and the European and global dimensions of administrative law.

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US

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The *New York Times*, summarizing the major Supreme Court opinions of 2024, many of which were issued in June of 2024, in the closing days of the Supreme Court's last term, opined that '[n]o Supreme Court term in recent memory has featured so many cases with potential to transform American society.'[2] While all of those cases are important, this report will focus on three cases that, in this reporter's judgment, make the most momentous changes in U.S. public law.

One of these decisions looms over all the others because of its importance for the whole U.S. political order, the decision on presidential immunity in *Trump v. United States*,[3] the first decision by the U.S. Supreme Court in American history to suggest a presidential immunity to criminal law charges for actions taken while in office. The other two decisions are *Securities and Exchange Commission v. Jarkesy*[4] and *Loper Bright Enterprises v. Raimondo.*[5] *Jarkesy* overturns apparently settled law that supported the system of adjudication and factfinding through agency tribunals instead of using the regular federal courts in cases brought by the agency to enforce the regulatory statutes the agency is charged with administering and the agency rules promulgated to supplement that regulation. *Loper Bright* overturns the so-called '*Chevron* deference' that for forty years has required federal courts to defer to agency interpretation of the law governing their areas of delegated policymaking discretion to the extent that the governing law left gaps or ambiguities the courts could not resolve using their powers of interpretation. Taken together, these cases continue the pattern the Court has set under Chief Justice Roberts of cutting back on the regulatory power of the administrative state while also concentrating greater power in the President.

Chief Justice Roberts writes the opinion for the Court in each of these three cases. The result in each case is supported by the five other right-leaning justices, Justices Thomas, Alioto, Gorsuch, Kavanaugh and Barrett. Some of them file concurring opinions in some of the cases. Justice Barrett's concurrence in the *Trump* case is notable because it makes it clear that she disagrees with major portions of Justice Roberts' opinion. The three left-leaning justices, Justices Sotomayor, Kagan, and Jackson, dissent in each case, except that Justice Jackson recused herself from the decision of one of the two cases combined for the appeal in *Loper Bright* because of her involvement in the case when it came before the court on which she served prior to being appointed to the Supreme Court. Despite the division of opinion revealed by the dissenting and concurring opinions, it is the opinion agreed to by at least five justices that counts as binding law under the rule of stare decisis in U.S. law. This report therefore concentrates mainly on the Roberts' opinions in these cases except to the extent that the concurrences and dissents help clarify the meaning of the Court's opinion.

The report is limited to these three cases because for several reasons this reporter has found that it takes a great deal of space and effort to explicate these opinions properly. First, Chief Justice Roberts seems to find it very difficult in these cases to admit when he is fundamentally changing the interpretation of a previous Supreme Court case or actually overruling it. Only in *Loper Bright* does he openly admit that he is overruling a ma-

2 Liptak, A., VanSickle, A. & Parlapiano, A., 'Major Supreme Court Cases of 2024', *N.Y. Times*, 26 June 2024. Available at: https://www.nytimes.com/interactive/2024/05/09/us/supreme-court-major-cases-2024.html.

3 603 U.S. 593 (2024), 144 S. Ct. 2312 (2024).

4 603 U.S. 109 (2024), 144 S. Ct. 2117 (2024).

5 603 U.S. 369 (2024), 144 S. Ct. 2244 (2024).

jor Supreme Court precedent, and in that case he could not avoid admitting that fact because that is the issue on which certiorari was granted. (The grant of certiorari signals that the Supreme Court will hear the appeal.) Second, the cases are difficult to understand because the reasoning in each of opinions for the Court is so problematic, especially in the *Trump* and *Jarkesy* cases. Finally, each case raises more questions than it resolves. This feature of the cases is partly the product of the questionable and unclear logic that Court uses in some of the cases, but also the product of the fact that the Court granted certiorari in each of these cases on a purely abstract legal issue, concluding its opinion in each case by remanding the case to the lower courts to apply the new legal rules the Court has decreed to the facts of the actual cases that raised those issues. The Court's opinion gives only sketchy guidance for that process. Finally, whenever a court radically changes the rules, even if the court applies the new rule to the facts of the case before it, a host of questions follow about how the new rules will affect other specific situations not specifically presented by the case. In these three cases, the Court has not shown much willingness to address those questions.

A Note on the Foundation Documents in This Area of Law

U.S. federal law in this area is dominated by two major documents, the federal Constitution and the federal Administrative Procedure Act (APA).[6] The Constitution is one of the oldest and shortest of national constitutions still in force in the modern world. It was adopted by a population that had little experience with and felt little need for powerful central governmental bureaucracies and even had an aversion to such forms of government as the threat from the native American population receded. But the exigencies of modern life have pushed all nations into giving their national governmental bureaucracies more powers in many areas, and the United States has been no exception. In the United States, court decisions have played a major role in the process by which the Constitution, adopted at the end of the eighteenth century and deliberately made difficult to amend, has been accommodated to the needs of a modern state, and the focus on court decisions as a source of law has been strengthened by the United States' common law culture, which views decisions by the highest courts as binding precedent functioning as a formal source of law.

The federal APA was adopted much more recently, in 1946, and while it reflects some aspects of preexisting law, it is usually looked to as the real beginning point of modern federal administrative law because it codified and to a considerable extent established the two major forms of administrative action with the effect of law, administrative adju-

6 The federal APA may have exercised some influence over the administrative law of the states, but the states are not bound by the federal APA. Each state therefore has its own version of an APA. Similarly, each state has its own constitution. Only selective portions of the federal Constitution purport to bind the states, notably, many of the human or fundamental rights in the Bill of Rights. The most important constitutional right affecting agency procedures is the Due Process clause of the Fifth and Fourteenth Amendments. Federal court decisions about what kinds of hearings government has to grant individuals before depriving them of 'life, liberty or property' are therefore binding on states as well as on the federal government. But doctrines like the separation of powers doctrine, which is found implicit in the federal Constitution though specific aspects of separation of powers are embodied in several clauses of the Constitution, are not binding on states because their constitutions may provide for quite different forms of separation of powers. This report does not attempt to cover state law developments.

dication and rulemaking. But it too was adopted before the great growth in the United States of powerful government bureaucracies. That growth may have been started by the New Deal and the demands of fighting World War II, all of which may have given some impetus to the adoption of the federal APA, but the American administrative state blossomed later, starting in the 1970s and 80s. The APA is only a statute and can be amended by new legislation. But it is difficult to get major legislative reforms through the U.S. system of legislation, which is limited by strong notions of separation of powers, such as the bicameralism requirement, the Senate's filibuster rule, the presidential veto that can be overridden only by a two-third majority in both houses, and judicial review. The legislative process can therefore be throttled at numerous choke points. That strong system of separation or diffusion of powers has prevented significant legislative reform in many areas, including that of the APA. As a result, with respect to legislation governing administrative law, the U.S. has had to rely mainly on court decisions to accommodate the APA to the modern world, and court decisions have played an outsized role in determining what the APA means today.

I. Presidential Immunity to Criminal Charges: *Trump v. United States*

Trump v. United States arose out of the attempt to prosecute former President and, after the fall 2024 election, President-Elect Donald Trump for his alleged actions leading and promoting the attempts to overturn the 2020 election results and nullify individual rights to vote by knowingly spreading false claims of election fraud to interfere with the process of collecting, counting, and certifying election results. Trump's efforts culminated in the incitement of the January 6, 2021 riot at the Capitol building for the purpose of keeping the Senate from confirming the election results in favor of Democrats Joseph Biden and Kamala Harris. Before the trial could begin in this case, Trump moved to dismiss the charges on the grounds that as President at the time the events with which he has been charged took place, he had full immunity. The federal district and appellate courts denied the motion, and the Supreme Court granted certiorari to decide '[w]hether and if so to what extent . . . a former President enjoy[s] presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.'[7]

It is not the only criminal trial President Trump faces.[8] These cases against Trump

7 144 S. Ct. at 2326. Only former Presidents will raise this issue. There is virtually no possibility of a prosecution of a sitting President. The Justice Department has long taken the position that 'the separation of powers precludes the criminal prosecution of a sitting President.' ibid, p 2332 n.2 (quoting Brief for the United States 9 (citing 24 Op. Office of Legal Counsel 222 (2000)). Moreover, the chief of the prosecution, the Attorney General, and all others serving in leadership roles within the Department of Justice serve at the pleasure of the President and he can dismiss them at will or they serve at the pleasure of the Attorney General, whom the President can dismiss if he will not use his power to dismiss any Department of Justice official who takes action against the President or his interests.

8 In addition to this case, Trump faces one other federal criminal case and two state criminal cases. The other federal case arises out of Trump's mishandling of classified documents he kept with him at his private home in Florida after his first term as President. Both federal cases were filed by Special Prosecutor Jack Smith. The criminal case in New York State courts was filed by Manhattan District Attorney Alvin Bragg under New York state criminal law. The case alleges that as a candidate in his first run for President he falsified business records to hide his payment of hush money to Stormy Daniels to keep the public from learning about his extramarital affair with her for fear it would prejudice his chances in

were the first ones in the history of the United States in which a former President has been subjected to a criminal trial. Once sworn in as President, he will be able to get both federal criminal cases and maybe even the state criminal cases as well, dismissed.[9] But dismissal of Trump's current criminal charges will not eliminate the dangerous implications of the decision in this case for the American legal system.

a) Summary of the Holdings of the Case

In a shocking opinion written by Chief Justice Roberts, a majority lays down three broad rules on immunity that turn on their heads, if discussed at all, prior holdings by the courts that have insisted on maintaining criminal liability even while granting immunity for civil claims for Presidents. The first two holdings in *Trump* are: (1) that the President has absolute immunity from criminal prosecution for official acts committed in exercising his core constitutional powers, defined as those areas in which the President has ''conclusive and preclusive' constitutional authority'[10] and (2) that he has 'at least a presumptive immunity' for all his official acts, defined as all acts undertaken within the outer perimeter of his official responsibilities.[11] The presumption of immunity might be overridden, the Court suggests, if 'the Government can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.''[12] The Court suggests in effect that it may decide later that the immunity for all official acts is not just presumptive, but absolute and therefore not subject to override at all. But as the dissent argues, it hardly matters which rule applies to all presidential acts because the Court lays down such a high standard for overriding the presumption. It will always be difficult, if not impossible, for a prosecutor to show that a criminal investigation involving a presidential action would not 'intrude' into the authority and functions of the Executive Branch.[13]

the election. The case under Georgia law, initiated by Fulton County District Attorney Fani T. Willis, results from Trump's efforts in Georgia to subvert the results of the 2020 election in that state and was brought against Trump and eighteen others under the Georgia State anti-racketeering law. The hush money case in New York has resulted in a full jury trial in which Trump was found guilty on all counts. He faces four years in prison for that verdict, but sentencing has been delayed. The classified documents case has been dismissed because the federal district court judge ruled that Jack Smith, the special prosecutor in both of the federal criminal prosecutions, was appointed in an illegal manner. That ruling is on appeal, and a decision against the prosecutor would eliminate both federal cases. In the Georgia criminal case, four of Trump's co-defendants have pleaded guilty and could testify for the prosecution if the case ever goes to trial, but the Justice Department under Trump will certainly argue that a state criminal prosecution or sentencing of a sitting President is impermissible for much the same reasons that a federal prosecution in the same situation is. For more details, see Smart, C. et al., 'Keeping Track of the Trump Criminal Cases', *N.Y. Times*, updated 6 Nov. 2024. Available at: https://www.nytimes.com/interactive/2024/us/trump-investigations-charges-indictments.html; Hawkins, D., 'Tracking the Trump criminal cases and where they stand', *Washington Post*, updated 12 Sept. 2024. Available at: https://www.washingtonpost.com/politics/interactive/2023/trump-investigations-indictments/.

9 Tillman, Z., 'Trump Still Faces Civil Lawsuits Even If Criminal Cases Go Away', *U.S. Law Week*, 22 Nov. 2024. Available at: https://news.bloomberglaw.com/us-law-week/trump-still-faces-civil-law-even-if-criminal-cases-go-away.

10 144 S. Ct. at 2328.

11 ibid, p 2231; see also ibid, p 2347.

12 ibid, pp 2331-32 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

13 See *Trump v. U.S.*, 144 S. Ct. at 2362 (Sotomajor,J., dissenting).

The Court's first two holdings expand presidential immunity well beyond prior decisions, which had never before involved a criminal prosecution of a former President and therefore mostly had considered immunity only in the case of claims based on non-criminal, that is, civil law. The Court does reject former President Trump's arguments (1) that he has immunity for all acts during his time in office, whether official or unofficial, and (2) that he may be tried for crimes only after he is first impeached. The first of those points is not a serious loss for President Trump because the definition the Court sets out for official acts is so broad that there is only a small group of presidential actions that may not be official.

Section III.C. of the majority opinion contains the Court's third holding. In rejecting assertions the Government made in its brief that in a trial for unofficial acts not entitled to immunity, the evidence of the President's immune acts within his official responsibilities could be offered to the jury to prove, for example, 'knowledge or notice of the falsity of his election-fraud claims,'[14] the majority holds that allowing such evidence 'threatens to eviscerate the immunity we have recognized.'[15] This section of the Court's opinion thus operates as a third holding that appears to expand the presidential immunities to create in effect a kind of exclusionary rule for evidence and argument at trial concerning acts covered by an immunity.

The Court is not very clear about exactly what this extended aspect of immunity covers. Justice Barrett says she wrote her concurring opinion to register her disagreement with Section III.C. of the majority opinion. Specifically, she was troubled by the concern that this holding would make it impossible to try a former President for the crime of soliciting or accepting a bribe to perform an official act, so she joined Justice Sotomayor's dissent on this point. In responding to Justice Barrett's concerns, Roberts' opinion for the Court includes a footnote saying,

> *the prosecutor may point to the public record to show the fact that the President performed the official act. And the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced in the performance of the act. . . . What the prosecutor may not do, however, is admit testimony or private records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety.*[16]

According to this footnote, the prosecutor thus may point to the immune act, but only with evidence from the public record, if there is a public record of the act or its result, and the Court also says that the prosecutor may introduce evidence of what the President allegedly demanded or agreed to receive, but the broader formulations in this footnote seem to undercut that concession. Evidence of what the President demanded or received for performing the official would seem to 'invite the jury to inspect the President's motivations and second-guess their propriety.' It is thus not clear whether Roberts really

14 ibid, p 2340 (opinion for the Court).
15 ibid.
16 ibid, p 2341 n.3.

means to allow evidence of what the President demanded and/or received for his official act, and without such evidence, it would seem impossible to prosecute a case of presidential bribery.

The prohibition in the Court's footnote concerns evidence described as 'testimony or private records of the President or his advisers,' so perhaps that is the focus. This kind of evidence is already covered by a series of overlapping privileges (the executive and deliberative privileges at common law), but those privileges to protect the privacy of discussions between or among the President and his advisers and aides have in the past had to yield to criminal investigations.[17] Perhaps this passage should be understood as simply clarifying that criminal law is not henceforth to be treated as an exception to these evidentiary privileges, but there is no further discussion of this point.

Other contradictory passages in the opinion increase the confusion. In Section III.C., Roberts starts his discussion by suggesting a narrower immunity. Roberts writes that in assessing the sufficiency of an indictment for criminal conduct, the court 'must ensure that sufficient allegations support the indictment's charges without [counting] such conduct [as part of the supportive allegations].'[18] This statement would suggest that the exclusionary rule the Court is laying down in this section is essentially a rule about the sufficiency of an indictment that charges the President with a criminal plan that includes some of his official acts. Those official acts that are within the exclusive power of the President, the argument goes, may not be charged as criminal acts in and of themselves. If that is all it is, the rule would not prevent a bribery prosecution from introducing evidence to show that the President made, for example, an appointment of an ambassador or judge in order to receive a bribe. But the Court's first holding had already included a broad prohibition on adjudication of 'a criminal prosecution that examines [immune] Presidential actions,'[19] so the function of Section III.C. appears to be to extend the presumptive immunity for the President's shared powers in the same way because 'such inspection would be 'highly intrusive' and would 'seriously cripple' the President's exercise of his official duties.'[20] Roberts third holding thus appears, despite the disclaimers in Roberts' footnote 3, to reinforce the broad force of the immunities set out in the first two holdings by cloaking the President with an immunity that would prevent a prosecutor from arguing that the President took any official action for a criminal purpose.

The three liberal-leaning justices, Sotomayor, Kagan, and Jackson, join in a powerful dissent written by Justice Sotomayor, and Justice Jackson adds her own dissenting opinion in addition to show how the majority opinion alters fundamentally the paradigm of presidential accountability. Justice Barrett starts her concurring opinion by saying that Part III.C. is the only part of the majority opinion she does not join. As to the issues raised in that part, she joins the dissenting opinion of Justice Sotomayor. Justice Barrett's concurrence does much more, however. It makes it clear that the only part of Roberts' opinion she is actually joining is the first holding on the President's exclusive powers. In ad-

17 See, eg, *United States v. Nixon*, 418 U.S. 683 (1974) (finding a privilege protecting communications between high government officials and those who advise them but also requiring the production of documents and tape recordings of conversations with aides and advisers in response to a subpoena issued in a criminal prosecution of some of the aides and advisers).

18 *Trump v. U.S.*, 144 S. C. at 2340.

19 ibid, p 2328.

20 ibid, p 2341 n.3 (citations omitted).

dition to Part III.C., she explains in her concurrence that she objects to the whole second holding giving the President presumptive immunity for exercise of power that he shares with Congress and thus potentially for any official conduct outside of his exclusive powers. She writes, 'Congress has concurrent authority over many Government functions, and it may sometimes use that authority to regulate the President's official conduct, including by criminal statute. Article II [of the Constitution on the powers of the President] poses no barrier to prosecution in such cases.'[21] She also disagrees, as will be discussed at the end of the report on this case, with the majority's failure to draw any clear lines between official conduct that may be immune and non-immune private conduct.

Justice Thomas joins in the majority opinion but writes a concurrence to state his concerns about the legality of the appointment of the special prosecutor who brought the case against Trump, but that was not an issue on which the Court had granted certiorari and no other justice joins his opinion.

b) Analysis of the Limitations of the Logic the Court Adopts

For such a momentous and startling opinion, the reasoning of Chief Justice Roberts' majority opinion is surprisingly weak. It is true that he is working with a document that provides a textual basis that is itself quite skimpy, but such evidence as the Constitution does provide seems more supportive of a finding of no immunity for the President than the opposite conclusion. The Constitution, for example, provides a limited immunity for members of Congress in the Speech and Debate clause,[22] but it says nothing about any immunity for the President.[23] Perhaps more significant is the Impeachment Judgment Clause of the Constitution which states that after impeachment, which can result in nothing more than 'removal from Office, and disqualification to hold any Office of honor, Trust, or Profit under the United States,' the impeached person may be subject to 'Indictment, Trial, Judgment, and Punishment, according to Law.'[24] That clause clearly says that a former President who has been impeached may be subject to criminal trial, and one might argue that since the clause does not limit its statement about post-impeachment criminal liability, the assumption at that time was that a former President would be fully subject to the criminal law for all his actions as President. It has been argued to the contrary that the clause is equally compatible with an understanding that the post-impeachment criminal trials that are meant are solely those concerning crimes as to which the

21 ibid, p 2352 (Barrett, J., concurring).

22 U.S. Const. Art. I, Section 6, cl. [1] ('[F]or any Speech or Debate in either House, they shall not be questioned in any other Place.')

23 It could be argued that the Constitution's omission of any immunity for the President decides the matter. By the interpretive maxim of *inclusio unius exclusio alter est* the provision of immunity for one set of actors in the constitutional landscape suggests that the omission with respect to another actor was intentional. But the force of *inclusio unius* is weak because, in the absence of confirmatory evidence one way or the other, it is just as logical to conclude that the silence of the document with respect to the second set of actors is the product of simple oversight or confidence that it was not necessary to state the same rule for the second set of actors because it was so obvious that the same rule should apply. For an argument that the Constitution's silence with respect to any immunities for the President should not be taken to refute all claims of presidential immunity, see Grewal, A.S., 'The President's Criminal Immunity', *SMU Law Review Forum* 2024, vol. 77, p 81, at 95-96.

24 U.S. Const. art. I, § 3, cl. 7.

President has no immunity, such as his actions before he became President.[25] These aspects of the Constitution may not clearly refute the Supreme Court's ruling, but they do not provide positive support for it, either.

The only other source of textual authority for the claim of presidential immunity must lie in the grants themselves of power to the President. Roberts' argument for immunity starts with the powers that the Constitution confers solely on the President and on no other branch or part of government. Roberts labels such powers 'conclusive and preclusive,' a term which presumes the point for which he is arguing, but sometimes refers to them by the simpler term 'exclusive,' which this report will use. The Constitution does not use any of these terms. Roberts argues that Congress may not legislate in ways that limit or control the discretion the President has been given by the Constitution through exclusive powers and that similarly courts may not hold that the President's exercise of an exclusive power is illegal. If Congress could do so, it could nullify or take back by a simple statute the power the Constitution conferred on the President. Hence, any statute criminalizing the exercise of exclusive presidential power would itself violate the Constitution. Professor Amandeep Grewal makes this argument more explicitly than the Court does and calls it the 'indefeasibility principle.'[26]

The argument has a certain formalist appeal because it is based on a category created by the words in the Constitution, that is, by the Constitution's grants of exclusive power. But even if one grants the premise that the President may make any use he wishes of his exclusive powers, even for criminal and corrupt purposes, the argument would justify only a portion of Roberts' holdings. The clearest case would be presented by a statute that makes it a crime for the President to exercise one or more of his exclusive powers or a court case that interprets the criminal law to the same effect. If that were permitted, the argument goes, then the legislative and judicial branches could take away entirely and revoke grants of power made to the President in the Constitution. But the indefeasibility logic is premised on an exclusive grant of power to the President. If the power is non-exclusive, then it is shared with either or both of the other two branches of government, and it cannot be expected that these other holders of the same power will not exercise their power in a way that limits the President's power. The indefeasibility argument thus cannot provide justification for any of the Court's holdings that have to do with non-exclusive powers. Thus it provides no support for the second holding, which is only about shared powers, or for the third holding to the extent it applies to shared powers.[27]

Indefeasibility logic also arguably provides no support for the Court's expansion of its first holding about exclusive powers to prevent prosecution of the President under a statute of general applicability, yet the Court extends its first holding in that way.[28] Consider

25 Grewal, A.S. (2024), 'The President's Criminal Immunity', op. cit., pp 96-97.

26 ibid, p 83. Roberts does not use the term, but he appears to suggest the same argument. Professor Grewal's article, which was published before *Trump v. U.S.* was decided by the Supreme Court, does not address the second and third holdings in the case. It is not clear that he was thinking of the extensions that Roberts makes in his first holding, but Professor Grewal does not think that his version of the President's immunity would prohibit a prosecution for bribery, ibid, pp 110-12, and he does not appear to think that the Constitution authorizes the President to use his exclusive powers to violate the criminal law. ibid, pp 112-15 and especially nn.259-60.

27 Chief Justice Roberts recognizes this limitation. 144 S. Ct. at 2328.

28 Roberts holds that 'an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power.' 144 S. Ct. at 2328.

a prosecution of a former President on the grounds that he solicited and received a bribe to induce him to appoint a particular person as an ambassador. His power of appointment of ambassadors is exclusive even though the appointment has to be confirmed by the Senate before it is effective. No one other than the President can appoint a person for that position, and the Senate cannot confirm a person unless appointed first. The bribery statute is a statute of general applicability.[29] So this hypothetical fits the general pattern to which the indefeasibility argument applies.

But prosecution and conviction of the President in this situation would not necessarily result in defeasance of his exclusive power. Whether the validity of the appointment (and the validity of the person's taking office if confirmed) would be affected by a criminal conviction of a former President for appointing that person as ambassador in return for a bribe may well depend on whether the appointee took part in the bribery scheme. If as part of the scheme, the President used his exclusive powers to dismiss high government officials to dismiss the person previously serving as ambassador, that dismissal would certainly not be affected by the subsequent conviction of the President after he left office. So, the trial of the President under a statute of general applicability does not have to take back or annul or even make illegal per se the President's exercise of his exclusive powers. The same is true of any other kind of prosecution that might examine the exercise of exclusive presidential powers. As long as the examination does not result in a ruling that the exercise of such powers is per se illegal, the courthouse examination of the exercise of those powers, even if resulting in a finding that the powers were exercised as part of an illegal plan, does not result in taking back or annulling the exercise of the power. That particular exercise of the power would continue to be valid even if the President is ultimately convicted for the criminal plan of which his exercise was a part.

Proponents of the indefeasibility theory might argue at this point that even though conviction would not invalidate the actual exercise of the President's power, it is only realistic to think that a conviction in a case that involved proof that the President misused his power as part of a criminal plan sends a message to all subsequent Presidents that they had better be cautious about exercising their powers, even their exclusive ones, because they could be prosecuted by the administration that follows theirs, especially if led by people from the opposing party. The fear induced by prosecutions of former President's for actions taken while in office can be argued to undercut the grant of powers to the President, taking back or annulling that power as a practical matter, even if not literally. This is not an argument that depends primarily on the logic of indefeasibility, however. Rather, it relies on the vastly over-broad argument that the President needs a strong and wide immunity to preserve each President's 'maximum ability to deal fearlessly and impartially with the duties of his office.'[30] And this broader argument is the only reason Roberts gives to support the rest of his holdings that (a) extend the immunity from criminal prosecution for the exercise of the President's exclusive powers to the presumptive immunity for the exercise of all the rest of his powers and (b) reinforce that immunity with a rule prohibiting criminal trials that might subject the President's motivations for his official acts to judicial scrutiny.

29 A crime is committed when a public official 'demands, seeks, receives, accepts, or agrees to receive anything of value' for an official act. 18 U.S.C. § 201(c)(1)(B).

30 *Trump v. U.S.*, 144 S. Ct. at 2329 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 752 (1982)).

c) *The Strongest Counterargument: The Rule of Law*

There is, however, a strong counterargument against any presidential immunities from criminal prosecution—and thus against all the holdings in the case beyond the uncontroversial one that neither Congress nor the courts may criminalize the mere exercise of a President's exclusive powers. This counterargument is rooted in the rule of law and notions of equality of all persons. At the heart of the due process and equal treatment clauses[31] in the Constitution is the principle that the criminal law at least should apply equally to all persons. In civil law, the Court has been willing to recognize certain immunities for the President, but at least with regard to criminal law, U.S. courts have not been willing to abrogate the fundamental principle that the criminal law applies to all persons, with no exception for anyone, certainly not for specially powerful people like the President. For that reason, prior to this case, the Supreme Court has been very careful to avoid creating immunities that would extend to criminal prosecutions. It has always before drawn a line between criminal and civil law in considering the issue of immunity of high government officials, including the President. This line between civil and criminal liability is a red line that runs through U.S. case law until this decision in *Trump v. U.S.*

The most recent key case before this one is *Nixon v. Fitzgerald.* It is true that in that case, because of concerns about maintaining the President's ability to discharge his duties with the requisite energy and boldness, the Supreme Court accorded the President an absolute immunity from 'damages liability for acts within the 'outer perimeter' of his official responsibility.'[32] *Fitzgerald* was a civil suit in which a terminated Air Force employee sued former President Nixon for damages alleging that Nixon had wrongfully approved an Air Force reorganization that led to *Fitzgerald*'s firing. *Fitzgerald* recognized an 'absolute' immunity from civil suit in that case by applying a balancing test with these words:

> *[O]ur cases . . . have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. . . . When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but . . . to vindicate the public interest in an ongoing criminal prosecution—the exercise of [court] jurisdiction has been held warranted. In the case of this merely private suit for damages based on the President's official acts, we hold it is not.*[33]

The President was accorded an 'absolute' immunity against *Fitzgerald*'s tort suit because of the weaker public interests raised by *Fitzgerald*'s civil action against the President, but the Court made it clear that a criminal prosecution would be a different case. A tort action is primarily of interest only to the victim of the tort. But the Court clearly recog-

31 Only the Fourteenth Amendment, which applies to State governments, literally mentions both 'due process' and 'equal protection of the laws,' but the Fifth Amendment, which applies to the federal government, guarantees 'due process of law,' and that concept has been held to include the idea that people should be treated equally under the law.

32 *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

33 ibid, p 754 (emphasis added).

nized that the far greater public interest in a criminal prosecution would lead to the opposite conclusion.[34]

In *Trump v. U.S.*, Roberts recognizes the *Fitzgerald* balancing test and borrows its language about the potential a criminal prosecution poses for serious intrusion into and disruption of the functioning of the executive branch at the highest levels. As mentioned above, it is language from the *Fitzgerald* opinion that Roberts quotes for his argument that the President needs a strong and wide immunity to preserve each President's 'maximum ability to deal fearlessly and impartially with the duties of his office.'[35] But Roberts' opinion gives little weight or discussion to the public interest side of the balance, and he never mentions the sharp distinction the case draws between civil and criminal prosecutions. Instead, Roberts' opinion focuses on the threat a criminal prosecution poses to the Executive Branch as an 'intrusion on the authority and functions of the Executive Branch' which would, he argues, chill the President 'from taking the kind of 'bold and unhesitating action' required of an independent Executive.'[36]

Roberts thus turns *Fitzgerald* on its head without admitting that he is doing so. While *Fitzgerald* approved an immunity for the President in a tort suit by one plaintiff claiming damages for one decision the President made while in office, the Court stated in that case that the much greater public interest raised by a criminal prosecution would be a strong argument against immunity under criminal law. In *Trump v. U.S.*, by contrast, Roberts finds that the balance more strongly favors immunity in the case of criminal prosecution than in a tort suit because '[p]otential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages,'[37] exactly opposite to the way the *Fitzgerald* Court assessed the relative weights. The *Trump* Court looks only at concerns that might affect a President and after paying lip-service to the balancing test, gives no weight to the public interest. Roberts' opinion never acknowledges these profound differences between the case he is deciding and the *Fitzgerald* decision, so of course, his opinion fails utterly to explain why he sees fit to depart so dramatically from the prior decision.

Fitzgerald was not the first Supreme Court decision to honor the red line between civil and criminal cases. Roberts' opinion even mentions two decisions by Chief Justice John Marshall in cases about the enforcement of a subpoena issued by the prosecutor in the treason trial of Vice President Aaron Burr after he had left office.[38] Roberts also cites *United States v. Nixon*,[39] a case that concerning document requests to President Nixon that arose out of the prosecution of some of President Nixon's aides. The document request ultimately forced President Nixon to turn over to the prosecutor incriminating tape recordings Nixon had made of his own conversations with aides and advisors about how to hide his participation in the illegal scheme to break into the Democratic Party office in

34 See also ibid, p 754 n.37 ('The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions.')

35 144 S. Ct. at 2329 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 752 (1982)).

36 144 S. Ct. at 2330-31 (quoting *Fitzgerald*, 457 U.S. at 745).

37 144 S. Ct. at 2331.

38 *United States v. Burr*, 25 F. Cas. 187 (No. 14,694) (C.C. D. Va. 1807); *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (C.C. D. Va.1807).

39 418 U.S. 683 (1974).

the Watergate. Roberts uses the same technique with these cases as he used to deal with *Fitzgerald*. Instead of honoring the red line separating civil from criminal cases, he argues that a criminal prosecution of the President would be more of an intrusion on the President than a mere request for documents, so that greater, not lesser, protection of the President is required.[40] He simply ignores the parts of prior decisions of the Court that had refused to extend the privileges and immunities in civil law matters of the President and his close advisers to criminal prosecutions on the grounds of the much greater public interest in criminal prosecutions of high government officials. Unlike the concerns to maintain the President's firmness of purpose in exercising his powers, the concerns to assure the application of the generally applicable criminal law to all persons is based on the centrality to the doctrine of the rule of law of the principle that the criminal law applies equally to all persons. Roberts never acknowledges the rule of law interests, so he never explains why he is willing to sacrifice those interests in this case.

This red line also refutes the indefeasibility argument for the President's exclusive powers because inherent in that argument is the assumption that the Constitution delegates exclusive powers to the President for any and all purposes, fair or foul. But in light of American history, it is much more reasonable to interpret any constitutional or statutory delegation of power as a delegation subject to the proviso that the delegated power not be exercised to violate the generally applicable criminal law. Having just fought a rebellion and revolution against an English monarch claiming absolute power over the Colonies—a rebellion that was justified by a long list in the Declaration of Independence of King George's crimes against the Colonists—the citizens of the newly formed United States cannot be understood to have wanted to create a king with similar immunities from the most basic forms of legal restraint found in the generally applicable criminal law. And the invariant observance by courts of the red line between immunity for civil liability and for criminal liability since the founding of the American Republic until this decision shows just how strongly held that conditional understanding of constitutional grants of power has been prior to this opinion.

It is surprising that there is no discussion in this case of the parallel situation involving federal judges. The rules concerning the immunities of federal judges show that because of values at the heart of the rule of law, it is not logically inconsistent to grant absolute immunity for purposes of civil law while insisting on full criminal liability. Federal judges enjoy an exclusive constitutional grant of power under Article III of the Constitution to exercise the judicial power of the United States, and both indefeasibility and separation of powers notions prohibit either the President or Congress from dictating to a judge how to decide in a specific case. Moreover, judges have long enjoyed absolute immunity at common law from suit for civil damages for acts committed within their judicial capacity, but that rule has not prevented prosecution of judges, even while still in office, for violation of the criminal law,[41] and the prosecution can examine how the judge exercised his or her judicial powers.[42] As the Supreme Court said in *O'Shea v. Littleton*,[43] a case which dealt with allegations that judges and other court officials in the county surrounding Cai-

40 *Trump v. U.S.*, 144 S. Ct. at 2331.

41 Haley, J.O., 'The Civil, Criminal and Disciplinary Liability of Judges', *American Journal of Comparative Law* 2006, vol. 54 (Supp.), p 281.

42 *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); see also *U.S. v. Hastings*, 681 F.2d 706, 710-11 and n.17 (11th Cir. 1982).

43 414 U.S. 488 (1974).

ro, Illinois, had engaged in a pattern of racial discrimination by applying the criminal law with discriminatory severity to blacks: '[W]e have never held that the performance of the duties of *judicial, legislative, or executive* officers, requires or contemplates the immunization of otherwise criminal deprivation of constitutional rights.'[44] As the Eleventh Circuit explained in citing *O'Shea* and other authority for the proposition that judges have absolute immunity against civil, but not against criminal liability:

> *This immunity is premised upon a calculation that the public benefit derived from the judicial independence created by the immunity outweighs the sacrifice suffered by aggrieved individuals who are deprived of their civil remedies. . . . This calculation does not operate to create absolute immunity for judges from criminal prosecution. . . . A criminal proceeding, unlike a civil action, is not brought to vindicate an individual interest, but rather the public interest in law enforcement. The rule of absolute immunity from criminal prosecution of active federal judges for acts committed in their official capacities poses too great a threat to the public interest in the rule of law to be adopted by this court.*[45]

As the court recognized in that case, extending an immunity under civil law to criminal law poses a serious 'threat to the public interest in the rule of law.' It seems unquestionable that the complex of values comprehended by the rule of law is part of the foundation of U.S. law, and that a major component of the rule of law is the idea that every person is subject to the general strictures of the criminal law. Exempting anyone, and especially someone as powerful as the President of the country, poses 'too great a threat to the public interest in the rule of law.'

d) The Damage Inflicted by this Opinion on American Public Law

Under the conventions of the U.S. legal system, Roberts' majority opinion, even the parts supported by only five justices, has the force of law. It is therefore no longer clear that we have a robust system of the rule of law since the most powerful person in the land, the President, is elevated above the generally applicable criminal law by his cloak of immunity.

The damage is intensified by the many parts of the opinion that are not very clear or that leave open huge questions. This report has already discussed the difficulties of understanding what evidence is excluded and what criminal charges are foreclosed by an expansion of the President's immunity by what this report refers to as the 'third holding' in Section III.C. of the opinion. The opinion is also not very clear about which of the President's powers are within his exclusive power and therefore have absolute criminal law immunity. The opinion mentions a number of the President's powers it regards as exclusive but it does not give a full catalogue.[46] Nor does it give much guidance in de-

44 ibid, p 503 (emphasis added, citations omitted).

45 *U.S. v. Hastings*, 681 F.2d 706, 711 n.17 (11th Cir. 1982).

46 The opinion mentions the power to grant reprieves and pardons, the power to remove government officials at the highest levels (a power which is not mentioned in the Constitution but which the Supreme Court ruled to be implicit in the express constitutional power to appoint government officials, at least at the highest level), and the power to control

termining what the boundaries are on the President's official acts. In fact it does the opposite. It adopts the most expansionary language one can imagine to describe the presidential actions that qualify for immunity ('the immunity we have recognized extends to the 'outer perimeter' of the President's official responsibilities covering actions so long as they are 'not manifestly or palpably beyond [his] authority'[47]) and says that '[d]istinguishing the President's official actions from his unofficial ones can be difficult.'[48] For example, with regard to the allegations in the indictment that Trump used Tweets and a public address on January 6 to foment disorder at the Capitol Building to stop the Vice President and Congress from certifying the election results showing that he had lost, Roberts says only that such statements could be official acts eligible for immunity in view of the President's constitutional power under the Take Care Clause to make sure that election laws were complied with, or they could be regarded as private statements as a candidate or party leader, to which no immunity would attach. 'The analysis,' Roberts says, '. . . may prove to be challenging.'[49]

Justice Barrett's concurrence makes it clear that she objects to at least some of this failure by the majority opinion to draw any clear lines around the President's immune powers. One example she gives is the allegation that Trump 'asked the Arizona House Speaker to call the legislature into session to hold a hearing about election fraud claims.'[50] She writes, 'The President has no authority over state legislatures or their leadership, so it is hard to see how prosecuting him for crimes committed when dealing with the Arizona House Speaker would unconstitutionally intrude on executive power.'[51] The majority did not think they could draw any lines in this area without further factfinding by a lower court.[52] That reaction by the majority appears intended to apply equally to the allegation in the indictment that the President attempted to organize alternative slates of electors in several states, but Justice Barrett writes with respect to that allegation, 'in my view, that conduct is private and therefore not entitled to protection. . . . The President has no legal authority—and thus no official capacity—to influence how the States appoint their electors. I see no plausible argument for barring prosecution of that alleged conduct.'[53]

The majority opinion thus wraps the President in a broad cloak of immunity to criminal charges, with rules that provide a former President with the basis for an arguable assertion of immunity to cover almost any act the President is charged with for actions taken while in office. The arguable basis means that any criminal indictment of the President will be met by motions to dismiss the indictment on the basis of presidential immunity, and that issue will have to be litigated all the way to the Supreme Court before a

recognition determinations for foreign countries. 144 S. Ct. at 2327-28. Professor Grewal provides a clear list. Grewal, A.S. (2024), 'The President's Criminal Immunity', op. cit., p 81 (listing the veto power, the pardon power, the power to remove principal officers, and the foreign affairs power, which would presumably include the power to make recognition determinations of foreign governments, though Professor Grewal does not discuss this point).

47 *Trump v. U.S.*, 144 S. Ct. at 2333 (citations omitted).

48 ibid.

49 ibid, p 2340.

50 ibid, p 2353 (J. Barrett, concurring, citation to record omitted).

51 ibid.

52 ibid, p 2339 (Roberts, C.J., writing the Court) ('The necessary analysis is instead fact specific, requiring assessment of numerous alleged interactions with a wide variety of state officials and private persons.')

53 ibid, p 2353 n.2 (Barrett, J., concurring).

trial can begin. The delay makes it very unlikely that there could ever be a day of reckoning in court with respect to any criminal charges against a former President, even if they are in fact not covered by immunity.

Chief Justice Roberts several times protests that his opinion is not written to favor any particular person or candidate, but this opinion is exactly what Donald Trump wanted. He is the only person in American history who as President in his first term and again as candidate for reelection made clear his intent to misuse the powers of government to punish his enemies, including harassing them with Internal Revenue Service tax audits and withholding from uncooperative States the federal aid allocated by Congress for disaster relief for those States.[54] In his whole life but especially in his first term as President, he has made clear his scorn for law and for courts. In his resistance to accepting his electoral loss in 2020, he made it clear that he was not going to be bound by facts or law. And now he has a cloak of immunity to shield him from any consequences under criminal law, one that is described in such general and vague terms that, should he ever face prosecution again, his lawyers will find copious grounds to raise arguments for immunity even if some of the actions he might be charged with are not actually immune under this opinion. Nor does the opinion address the possible expansion of people entitled to immunity. Presidents are not able to act alone. They have to use aides and advisers. The opinion does not address whether these people will also be covered by the presidential immunity, but that has been the pattern with the executive privilege against document production. If the same pattern applies to presidential immunity, the hole in the rule of law principle will be very large indeed.

In short, this opinion overturns an anchoring principle of the American version of the rule of law that everyone is subject to the generally applicable criminal law unless covered by the very narrow immunity for legislators in the Speech and Debate Clause, and it does so on highly questionable logic and without an honest discussion of how far it departs from all prior decisions or a reason for doing so other than a highly exaggerated concern for protecting the President from concerns about criminal prosecution that might influence the way he exercises his power. In the opinion of the reporter and many other commentators, the decision saddles the American Republic with a king, and the baleful effects of this opinion will be felt for a long time in the United States. It is one of the worst decisions in the history of the Supreme Court, in a league with the decision in the Dred Scott case[55] in the way it has saddled the country with a poorly reasoned and politically and morally unwise rule by ignoring or misusing precedent. For those reasons, Justice Sotomayor concluded her dissent with the chilling but appropriate words, 'With fear for our democracy, I dissent.'[56]

54 See, eg, Editorial Board, 'Take Trump at His Word', *New York Times*, 27 Oct. 2024, Sunday Opinion Section, pp 4-5.

55 *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that African Americans could not be citizens of the United States and that the federal government had no power to forbid or abolish slavery in any of the territories). The decision is widely thought to be Chief Justice Taney's worst decision, poorly reasoned, ignoring precedent, and imposing a morally repugnant position on the whole country to the benefit of the southern slave holders. It also exacerbated the tensions leading to the Civil War by invalidating the Missouri Compromise. See generally Urofsky, M., 'Dred Scott decision: the Decision', *Encyclopaedia Britannica*, last updated 30 Nov. 2024. Available at: https://www.britannica.com/event/Dred-Scott-decision.

56 *Trump v. U.S.*, 144 U.S. at 2372 (Sotomayor, J., dissenting).

II. Administrative Adjudication and the Limits Imposed by the Seventh Amendment Jury Right – the *Jarkesy* Case

In *Securities and Exchange Commission v. Jarkesy*,[57] the Supreme Court adopts a new interpretation of the coverage of the Seventh Amendment to the Constitution, which guarantees a right to trial by jury '[i]n Suits at common law.' Whether the Supreme Court meant to have this effect or not, its new interpretation strongly advances the agenda of those who are opposed to government regulation because it is considerably less accommodating than prior interpretations had been for the system of agency adjudication widely used in federal administrative law. The reasoning of the opinion is surprisingly murky, and the case leaves a lot of related issues open, so there will certainly have to be further litigation before it is clear how extensive the damage will be, but at a minimum the case casts a pall of uncertainty over much of the administrative adjudication system, which has been serving the vital function of providing relief to the regular courts by taking a large volume of cases out of the federal court system. The case does not eliminate the system of administrative adjudication, but it may limit it substantially.

a) The System of Agency Adjudication

A system of administrative adjudication has long been used in the United States to resolve the most important disputes about the enforcement of many, if not most, agency rules under the civil (non-criminal) law. Enforcement through the federal criminal law may only be done by suit in the federal courts,[58] and many minor disputes are resolved through informal means by the agency, but federal legislation that authorizes an agency to regulate a particular area, sector of the economy, or specific problem (the 'authorizing legislation') typically provides for agency adjudication for what appeared to the proponents of the authorizing legislation to constitute the most important civil disputes, generally including the enforcement of civil monetary penalties and a variety of agency orders to do or not do certain actions, which are the typical enforcement tools for administrative regulation. Such legislation also typically provides that these disputes will be conducted pursuant to the rules of formal adjudication provided in the federal Administrative Procedure Act (APA).[59] These rules attempt to make the proceedings before the agency tribunal resemble trial court proceedings as much as practicable. They also show that the system of agency adjudication is a basic premise of the APA.

Under this system of agency adjudication, the agency tribunals with jurisdiction to resolve disputes about the regulatory law administered by that agency have been created organizationally within the same agency in the usual case, but the rules seek to shield the Administrative Law Judges (ALJs) who preside over these tribunals from the head or collective heads of the agencies (usually a board or commission) and from agency employees in other parts of the agency with responsibilities for investigation or prosecution to enforce the rules against the regulated public.[60] The net effect is that the ALJs can decide

57 603 U.S. 109 (2024), 144 S. Ct. 2117 (2024).

58 The Sixth Amendment guarantees a right to a jury in criminal cases, and only regular courts, not administrative tribunals, may empanel a jury.

59 See especially APA Sections 554, 556, and 557.

60 The shielding devices include many provisions to ensure the ALJs' impartiality and independence. Appointments

their cases with an independence that is 'virtually beyond agency control.'[61] Their decisions are, however, usually subject to appeal to the head or heads of the agency though sometimes governing law may have created an intermediate administrative tribunal to hear appeals first, but the final level of review within the agency is usually to the head or heads of the agency though the details may be modified by the relevant legislation or agency rules. The ALJ's decision is a recommended decision and it becomes the final decision of the agency only in the event that there is no appeal. In the event of an appeal within the agency, the head or heads of the agency retain full decisional authority on both facts and law,[62] but since the head or heads of agencies virtually never have time to take evidence from witnesses, the primary inferences the ALJ draws from their testimony is in effect binding on the agency.[63] Judicial review of the factfinding in the agency's final decision as well as the exercise of the policy discretion that Congress has delegated to the agency will be deferential.[64] For these reasons, ALJ decisions are quite important despite subsequent review by the head or heads of the agency because their review is limited in important ways, and while the decisions made by the agencies at the conclusion of the agency's adjudication process are subject to judicial review, the results of the agency adjudication system are also quite important because that review is limited, most importantly by the requirement for judicial deference in certain cases, as discussed in connection with the next case.

Agency adjudication has proven to be an important way to relieve the federal courts of a very significant caseload burden. If as a result of this decision, many of those cases will now have to be processed in regular federal courts, agency enforcement of the rules through litigation is likely to be greatly slowed down, not to mention the impact on the many non-administrative cases in the federal courts, unless and until Congress creates and funds many more positions at all levels within the lower federal courts. The likelihood of greater delays in the federal courts may discourage federal agencies from some enforcement efforts.

Moreover, despite the significant ways in which agency adjudication by ALJs is shielded from control by the head or heads of the agency, the leaders of agencies tend to like agency adjudication because that process gives them the opportunity to determine the law that is applied in each situation in a more granular way than rulemaking can give them. Of course, their lawmaking in the course of adjudication is subject to substantive

must be made on a competitive basis from a list of the top few names provided to the agency heads by the civil service authorities, ALJs' wages and assignments are not determined by the agency in which they serve, and in order to impose serious disciplinary measures on them, formal proceedings before the federal Merit Systems Protection Board are required. Strauss, P.L. et al., *Gellhorn and Byse's Administrative Law: Cases and Comments*, 12th edn, 2018, p 507.

61 ibid.

62 APA Section 557(a).

63 *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Primary inferences are the inferences the finder of fact makes based on the witness's manner of testifying, especially based on her demeanor, as to whether the witness is telling the truth or not and is otherwise a reliable witness upon whom the decider of facts for the case can rely.

64 Section 706(2)(A) and (E) require court deference in these situations. See the discussion below of *Loper Bright* for the effect of overruling *Chevron*. The result of *Loper Bright* is not to eliminate deference to agency policy decisions within the scope of their delegated authority but only to eliminate the *Chevron* presumption that ambiguity in the delegating statute was automatically to be treated as a delegation of policy-making discretion to the agency to interpret that ambiguity.

and procedural review by the courts, but within the boundaries of the limits imposed by the delegating statutes, the rules the agencies have promulgated through the rulemaking process, the ALJ's factfinding based on primary inferences from witness testimony, and the requirement to give reasons that the courts will review—with deference to be sure, but still in an effort to ensure a meaningful degree of rationality—the agencies have considerable freedom to make policy decisions in specific cases and to make sure that the agency personnel charged with enforcing the rules are doing so in a way that advances the leaders' policy prescriptions. For those reasons, true administrative courts in the French or German model have never been adopted in the U.S. federal law, and U.S. federal agencies are able to make law not only through their rulemaking power, but also through their adjudicative power.

One significant way that agency adjudication differs from civil litigation in federal courts is that it does not utilize the jury system, which is such a signal feature of the U.S. common law and is guaranteed for proceedings under the civil (that is, non-criminal) law by the Seventh Amendment to the Constitution. Agency tribunals may not empanel juries; only federal courts—that is, courts with judges appointed by the President and confirmed by the Senate in accordance with the procedures set forth in Article III of the Constitution[65] and having their independence guaranteed by lifetime tenure and the other guarantees of Article III of the Constitution[66]—may do so.

b) The Jarkesy Case

Jarkesy arose out of the SEC's use pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[67] of its administrative adjudication system to resolve disputes about its imposition of a civil penalty for significant violations of the 'antifraud provisions' governing trading in the securities markets.[68] and the regulations that the SEC has promulgated pursuant to those statutes. The SEC sought to enforce the penalties against an unregistered investment advisor by litigation. The investment advisor argued that the SEC's choice to use its agency adjudication system unconstitutionally deprived him of his jury right under the Seventh Amendment. The Court, in an opinion written by Chief Justice Roberts, gave a number of reasons to uphold the advisor's Seventh Amendment claim.

Roberts first establishes the wide scope of the Seventh Amendment. He starts by quoting Justice Story's view expressed in a decision from 1830 that

65 U.S. Const. art. II, sect. 2, cl. 2.

66 U.S. Const. art. III, sect. 1.

67 124 Stat. 1376 (2010). Prior to the Dodd-Frank Act, the SEC had to enforce regulatory penalties by suit in the federal courts unless the defendants were registered entities. But the Dodd-Frank Act specifically gave the SEC the option to use its agency adjudication system for the same purpose. See Dodd-Frank Act § 929P(a), 124 Stat. 1862-1864 (codified in relevant part as amended at 15 U.S.C. §§ 77h-1(g), 80b-3(i)(1)).

68 There are three overlapping and mutually reinforcing federal acts that govern securities trading, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940. See *SEC v. Jarkesy*, 144 S. Ct. at 2125. Together they make illegal misrepresentation or concealment of material facts in the registration and trading of securities or in the activities of investment advisers. The opinion in Jarkesy refers to these statutes collectively as the 'antifraud provisions' of securities law. ibid.

> *the Framers used the term 'common law' in the [Seventh] Amendment 'in contradistinction to equity, and admiralty, and maritime jurisprudence.' . . .The Amendment therefore 'embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume.'*[69]

Roberts broadens that coverage by stating, '[W]e have noted that the right is not limited to the 'common-law forms of action recognized' when the Seventh Amendment was ratified.'[70] He also asserts another broad basis for Seventh Amendment coverage, arguing that all government claims for monetary penalties are covered by the Seventh Amendment. The remedy sought by the SEC in this case, he says, is 'all but dispositive.'[71] The SEC penalties are claims at common law, he argues, because they are claims for money[72] and because they are imposed to punish.[73] These introductory statements of the law might seem to be broad holdings eliminating virtually all agency adjudications of claims for regulatory penalties, but it becomes clear that they are only provisional statements about the coverage of the Seventh Amendment because, as discussed below, he eventually affirms that 'public rights' are not subject to the Seventh Amendment and cites with approval a number of cases and indeed whole areas of regulatory law in which agency adjudication has been used to enforce regulatory penalties meant to punish violations of regulations.

c) The Close Relationship Test

Before, however, discussing the public rights doctrine, Roberts announces a much narrower reason for finding that the SEC penalties in this case are subject to the Seventh Amendment, namely, the 'close relationship between the causes of action in this case and common law fraud [which he says] confirms [the] conclusion.'[74] Roberts argues, for example, that both the antifraud statutes that regulate fraud in securities and the common law of fraud target the same basic behavior, misrepresenting or concealing material facts.

69 ibid (quoting *Parsons v. Bedford*,]3 Pet. 433, 446-47 (1830)).

70 ibid, p 2128 (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974)). But he also confusingly states later in the opinion, 'A hallmark that we have looked to in determining if a suit concerns private rights is whether it 'is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'"

ibid, p 2132 (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting in turn *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment). This statement suggests that the private rights safeguarded by the Seventh Amendment may be limited by their profile in 1789, but this view seems to contradict Roberts' statemen, quoted in the text above, that the rights subject to the jury right at not limited to their extent at the time the Amendment was adopted.

71 144 S. Ct. at 2129.

72 ibid, p 2129 ('money damages are the prototypical common law remedy.')

73 ibid (quoting *Tull v. U.S.*, 481 U.S. 412, 422 (1987)) ('only courts of law issued monetary penalties "to punish culpable individuals."')

74 144 S. Ct. at 2130.

Congress incorporated prohibitions from common law fraud into federal securities law, and so did the SEC in promulgating rules, and both forms of regulatory law use the word 'fraud' and other terms of art from the common law of fraud. This method of basing federal securities law on common law fraud, Roberts argues, creates a bond between federal securities fraud and the common law predecessor. Roberts picks up a vague metaphor from an earlier case by saying that 'when Congress transplants a common-law term, the old soil comes with it.'[75] As a maxim for interpreting words in statutes that are also used in common law claims, the statement makes sense if there is no evidence in the statute or its legislative history that Congress meant for the term to be understood in a meaning different from its common law meaning. In the context of an argument that a statutory cause of action by the government is really a 'common law claim that is subject to the Seventh Amendment' it is not clear what 'common law soil' is. It seems to be a very general and vague metaphor for a close relationship between the substantive aspects of the relevant common law causes of action and the regulatory ones.

In fact, at common law, the government would have had no claim for a penalty and no claim for the statutory violations for which the SEC sued.[76] Looked at as a cause of action, there thus does not appear to be any 'common law soil' in the statutory cause of action to enforce a penalty payable to the United States. But Roberts argues that the remedy of a penalty is more important than the cause of action, and he seems to underline this part of the opinion as the main holding of the case. The close relationship between common law claims for fraud and the statutory claims in this case, he writes, 'confirms that this action is 'legal in nature.''[77] In summarizing the holding at the end of his opinion, Roberts further puts the emphasis on his argument that the regulatory claim in this case was essentially the same as a common law claim for fraud: 'A defendant facing a fraud suit,' he writes, 'has the right to be tried by a jury of his peers before a neutral adjudicator.'[78] The close-connection argument thus appears to be the major holding of the case.

But if this argument is so central to decision of the case, then the argument does not just provide confirmation that the SEC claims in this case are claims at common law. Rather, it appears to be the central basis for application of the Seventh Amendment, and neither Justice Story's broad statement about the coverage of the Seventh Amendment nor Roberts' statement that all monetary penalties are covered by the Seventh Amendment are actual holdings of the Court. If they were, there would be no need to make the argument about the close relationship between the securities fraud statutes and regulations and the common law of fraud. The opinion is confusing in this regard, but it is submitted that these first two arguments are better understood as first approximations or provisional statements of Seventh Amendment coverage, subject to the close relationship argument and the public rights doctrine.

75 ibid (quoting *U.S. v. Hansen*, 599 U.S. 762 (2023).

76 Fraud is a crime under state law, but the federal government has no general powers to criminalize fraud in general; it's criminal law in this regard is limited to frauds perpetrated against the government, especially in government contracting. For civil law fraud, at most the Attorney General might have been able to sue on behalf of victims of the securities advisor's fraud, but that suit would be for some measure of the victims' damages, not a penalty.

77 144 S. Ct. at 2131 (quoting *Granfinanciera*, 492 U.S. at 53); see also ibid, p 2130.

78 144 S. Ct. at 2139. As in this case, Roberts almost always summarizes the key holding in or around the penultimate paragraph of his opinion.

d) *Changes to Prior Law—Reinterpreting the Public Rights Doctrine*

When Roberts does finally get to the public rights doctrine, it becomes clear that the holdings in *Jarkesy* are intended to upend settled law. Although *Jarkesy* holds that the Seventh Amendment does apply in this case, there is a string of Supreme Court cases holding that the Seventh Amendment right does not apply to agency adjudication of regulatory penalties stretching back at least to the New Deal.[79] The leading case prior to *Jarkesy* was *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*,[80] in which a unanimous Court (one justice not participating) held that:

> *At least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.*[81]

Civil penalties for violation of public rights were exempt from the jury right when asserted in agency adjudication, the Court ruled, 'even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency.'[82] In addition to limiting jury-triable cases to those assigned by Congress to Article III courts, the quotation above shows that *Atlas Roofing* addressed the dispute over the definition of public rights by holding that public rights were rights created by regulatory statutes authorizing the federal government to impose civil penalties to enforce regulatory obligations of private parties. Since the decision in *Atlas Roofing*, there have been a number of decisions loosening up the definition of 'public rights' by incorporating into that concept certain claims between individuals based on the same regulatory scheme,[83] but no case had questioned the basic holding of

79 See, eg, *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1 (1937); *Curtis v. Loether*, 415 U.S. 189 (1974).

80 430 U.S. 442 (1977).

81 ibid, p 450.

82 ibid, p 455.

83 E,g., *Thomas v. Union Carbide Agricult. Prods. Co.*, 473 U.S. 568 (1985); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). *Schor* was the high-water mark for this development. The parties did not even contest the power of Congress to establish an administrative forum for a private party's statutory claim for damages for injury caused to them by a broker who violated provisions of the statute or regulations promulgated by the CFTC pursuant to the statute that created the CFTC, and the Court held that a broker who faced such a claim in the CFTC's administrative tribunal could assert in the same administrative proceeding his common law counterclaim against the customer for the customer's failure to pay the broker's contractual commissions. In *Schor* and in *Granfinanciera*, the focus of argument was on whether Article III of the Constitution, which establishes the federal court power, permits Congress to delegate adjudicatory powers to administrative agencies. But the Court held in *Granfinanciera* that the question whether the Seventh Amendment requires a jury for trial of issues arising out of the application of statutes and regulations to regulated parties 'require[es] the same answer as the question whether Article III allows Congress to assign adjudication of that action to a non-Article III tribunal [that is, to some form of administrative adjudication].' 492 U.S. at 53.

Atlas Roofing that government suits 'in the government's sovereign capacity to enforce . . . rights created by Congress within its power to enact' are public rights outside the scope of the Seventh Amendment.

Roberts' opinion in *Jarkesy* confirms that public rights are exempt from application of the Seventh Amendment, but he narrows the definition of public rights substantially. Gone is the simple definition as rights asserted by the government on behalf of the public against private parties under statutes that Congress had the power to create, thus supplanting the common law. Under Roberts' view, public rights concern only matters that 'historically could have been determined exclusively by [the executive and legislative] branches.'[84]

His historical method seems unclear, and history seems to disappear from the method. The earliest case recognizing the public rights exception to the Seventh Amendment, he says, approved summary proceedings by the executive branch to compel a federal customs collector to turn over to the government funds he had collected for the government because 'there was an unbroken tradition—long predating the founding—of using these kinds of proceedings to 'enforce payment of balances due from receivers of the revenue.''[85] But the rest of the examples he cites of the public rights doctrine do not involve historical traditions that predate the founding. So most of his examples of public rights cannot be based on some kind of originalism. He cites with approval a 1909 decision approving the imposition of monetary penalties, without jury trial, on a steamship company that had violated regulations prohibiting the immigration of aliens with certain diseases[86] and a 1929 case involving the imposition of tariffs on goods imported by unfair methods of competition.[87]

Beyond those cases, he asserts that certain other 'historic categories' fall within the public rights exception such as the administration of public lands and the granting of public benefits, pensions, and patent rights[88] although in a dissent in an earlier case involving the Seventh Amendment and patent rights,[89] Chief Justice Roberts had joined a dissent by Justice Gorsuch, who had argued strongly that patent rights at the founding were litigated in common law courts. And while the Court is critical of the decision in *Atlas Roofing*, it does not overrule it but only tries to distinguish it from cases about securities fraud. *Atlas Roofing* was not a case about fraud, Roberts argues, and the regulations in that case were not mere copies of an area of the common law but more like a 'detailed building code.'[90] Since *Atlas Roofing* was decided 1977, it seems that 'history' has continued close to the present day to recognize public rights exceptions to the coverage of the Seventh Amendment jury right.

e) Effects and Implications of the Case

84 144 S. Ct. at 2132 (citation omitted).

85 ibid (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 278 (1856)).

86 *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

87 *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

88 144 S. Ct. at 2133.

89 *Oil States Energy Servs. LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018) (permitting 'inter partes challenges'—that is, challenges that one party can make to the validity of another party's patent rights—in administrative tribunals because the decision whether or not to grant a patent is a matter of public rights, not private rights).

90 *SEC v. Jarkesy*, 144 S. Ct. at 2137.

Atlas Roofing had announced a simple, permissive test for determining whether the jury right applies to regulatory causes of action that depended entirely on whether Congress assigned such litigation to a federal court or an agency adjudication system. It seems clear that Roberts' opinion is meant to overrule that aspect of the case, but it might be a bit difficult to see this point clearly since Roberts does not even acknowledge the permissive language of *Atlas Roofing*.[91] As a result, following the *Jarkesy* case, the analysis of whether a regulatory cause of action has to be litigated in federal court or may be processed through the relevant agency adjudication system has to follow a somewhat more complex pattern: First is the question whether the claim is either an equitable one or one from maritime law. If from either of those bodies of law, it is not covered by the Seventh Amendment. If the claim does not come from those bodies of law, then it is subject to the Seventh Amendment jury right and not a candidate for agency adjudication unless it is the kind of right that was 'historically' subject to determination by agency adjudicative processes (a public right under the 'historical' test). The category of public rights would also appear to include all claims, even ones quite recently created by legislation within the power of Congress to enact, that an agency may assert against a private party on causes of action that do not take their legal substance and terminology in significant part from common law claims, but it is possible that the Court may prefer to think of this as an additional category, distinct from the category of public rights. In any case, it is an important category of claims that appears from the Court's repeated insistence in the *Jarkesy* opinion on the importance of the close-relationship argument.

The most immediate effect of the *Jarkesy* opinion has been to cause the SEC to stop trying to use its system of agency adjudication to enforce administrative penalties for securities fraud. But the decision is likely to induce many agencies to rely solely on enforcement by suit in the federal courts for fear of having their system of agency adjudication invalidated by another case extending the effects of *Jarkesy*. The multiple holding-like pronouncements in the opinion cast a cloud of uncertainty on many uses of agency adjudication. In particular, agencies will fear to rely on their agency adjudication system to enforce regulatory penalties of any kind. The Court also claims that the whole area of the public law exemption from the Seventh Amendment is an 'area of frequently arcane distinctions and confusing precedents,'[92] and says somewhat defiantly that the 'Court 'has not definitively explained the distinction between public and private rights,' and we do not claim to do so today.'[93] The combination of the uncertainty created by the majority's multiple holdings about the scope of the claims subject to the Seventh Amendment and the imprecise redefinition of public rights as a list within the Court's control seems likely to deter most usage of agency adjudication for any use that Court has not already specifically blessed.

Despite the opinion in *Jarkesy*, it nevertheless appears that agencies may continue to use agency adjudication with respect to some forms of agency action. The strongest arguments for continued use of agency adjudication concern actions by the agency that correspond to what would be classified as equitable powers were they exercised by a

91 Justice Gorsuch's concurrence (joined only by Justice Thomas) is somewhat more honest in its intent to overrule that part of the case, but he also cannot bring himself to quote the quote the clear language of Atlas Roofing that serves as the basis for that view. See ibid, pp 2148-50 (Gorsuch, J., concurring),

92 ibid, p 2133 (quoting *Thomas v. Union Carbide Agricult. Prods. Co.*, 473 U.S. 568, 583 (1985)).

93 144 S. Ct. at 2133 (quoting Oil States Energy Servs., LLC v. Greene's Energy Group, LLC, 584 U.S. 325 (2018),

court instead of an agency. Such powers would arguably include orders to regulated parties to do or not to do specific actions because such orders correspond to injunctions, which courts issue using their equitable powers.

In addition, Roberts' list of those agency powers recognized as involving public rights includes several major areas of administrative law where systems of agency adjudication are very important. Roberts mentions the granting of public benefits, and that category would include veterans benefits and the system of administrative tribunals for the Social Security Administration, which is said to comprise the largest court system in the world. Another major system of agency adjudication is the one created for the U.S. Patent Office. Despite his earlier agreement with Justice Gorsuch that prior to and around the time of the founding of the United States common law courts handled patent disputes,[94] he now puts that very important system on his list of 'historic categories of adjudications [that] fall within the [public rights] exception' to the Seventh Amendment jury right.[95] Justice Gorsuch agrees that the jury right applies to the SEC fraud claims in this case, but he does not discuss any of the ground covered by Roberts' opinion and he never says clearly that he joins in Roberts' opinion, only that he concurs, so we cannot tell whether he has similarly revised his view about the relevant history.

The opinions in *Jarkesy* do not discuss the boards and courts that collectively constitute another very important system of agency adjudication and one that handles a large volume of cases, namely, the federal government contracts system of agency adjudication. The system is complex, with a system of dual tribunals for each contracting agency, between which each contractor can choose. Appeal from all of those agency tribunals lies to a federal court, the Court of Appeals for the Federal Circuit, which is a true Article III court, but as in all the other cases of agency adjudication, recommended decisions that determine the facts are made by the agency tribunals where there is no jury. Government contracts account for a very significant portion of the national economy, so this system of agency adjudication is quite important.

It is very possible that the Court will decide that the bulk of the cases processed by this system are exempt from a jury right because the most prevalent contractor claim in the system is a claim for an 'equitable' adjustment in the contract price by reason of actual or constructive changes made by the government in the course of the contract work. The contractor is obligated to perform all changed work ordered by the government because under the standard changes clause, the contractor loses the normal contract power to refuse to perform work that goes beyond the original contract requirements on which the contractor bid, at least when the insistence on work beyond the contract requirements constitutes a material breach of contract. In return, the contractor receives the promise of an equitable adjustment as determined in litigation in the government contracts agency adjudication system. But not all contractor claims are claims for equitable adjustments. Contracts claims in any common law system are a complex mixture of legal and equitable claims because equitable concepts have permeated common law contracts doctrines. In government contracts, there are also so-called 'fundamental breach' claims which are claims that the changes made by the government are so great, much greater than a mere 'material breach,' that they justify the contractor in treating the changes as voiding the promise to perform all work as changed. Breach of contract claims are nor-

94 *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325 (2018).

95 144 S. Ct. at 2133.

mally regarded as common law claims subject to the civil jury right. The Supreme Court will have to determine how the *Jarkesy* holding applies to this very important agency adjudication system.

Lastly, there are the issues raised by the 'close relationship' test. This report argues that the central holding of *Jarkesy* is that the civil jury right attaches to the regulation in this case because of the close relationship between the content of the common law of fraud as it applies to securities fraud and the content of the anti-fraud law expressed in the statutes and regulations of the SEC. If this is a correct reading of the opinion, it raises the possibility that regulation that does not take so much content from common law but introduces new ideas in its regulatory rules has a strong claim to being considered exempt from the Seventh Amendment and outside the common law, whether as a type of public right or its own special category. Whether the Court accepts this argument with respect to any specific claim may depend on how close the Justices insist that the relationship be to trigger the jury right. *Atlas Roofing* offers one model. The common law probably did impose some duty on employers to provide employees with safe working environments, but it is not very specific and the regulatory law in that case did not make use of common law concepts because, unlike the situation in *Jarkesy*, the provisions of the regulatory law did not use common law terms of art to express the obligations the regulation was imposing on employers.

How will the close relationship test apply to environmental statutes? Regulations under the Clean Water Act or the Clean Air Act might be viewed at some abstract level of analysis as modeled on common law tort actions for nuisance, but proving a nuisance and associated damages is much messier than proving discharges of pollutants in excess of a water or air pollution discharge permits. Does the regulatory penalty for exceeding the allowable discharges somehow carries 'the soil' of the common law tort? If the 'close relationship' is easily found in any regulatory scheme that attempts to cover the same ground as common law causes of action, then virtually all regulatory penalties will have to be tried in regular courts so they can empanel juries if requested.

Finally, there are some regulatory schemes that create rights by some private parties against other private parties as part of the regulation. Both *Thomas v. Union Carbide Agricultural Products Co*[96]. and *CFTC v. Schor*[97] illustrate this pattern. *Thomas* provided a private party who was harmed by another party's violations of the relevant regulations a claim for compensation from that party that did not 'depend on or replace a right to such compensation under state law.'[98] *Schor* was arguably similar. The regulation in that case provided a customer of a commodities broker with a claim against that broker for reparations for violation of the duties the regulations imposed on brokers with respect to their customers. In both cases, the private party's reparation claim was tried in the agency adjudication system without objection. Would the Court approve this arrangement in light of the *Jarkesy* case on the grounds that the private parties' claims had no close relationship with the common law of fraud? The *Jarkesy* case does not discuss any of these types of claims, but it casts doubt on the validity of the use of the agency adjudication system for many of these claims.

96 473 U.S. 568 (1985).
97 478 U.S. 833 (1986).
98 473 U.S. at 584.

III. Judicial Review of Agency Exercise of Delegated Power to Formulate Policy: *Loper Bright* and the Overruling of *Chevron*

Loper Bright Enterprises v. Raimondo[99] marks the culmination of a long campaign by conservative critics of the administrative state to seek the overruling of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*,[100] which for forty years had been one of the most important and most cited decisions in U.S. American administrative law. In *Chevron*, the Supreme Court had used the following language to establish a rule that silence or ambiguity of a statute should, in the absence of any evidence to the contrary, be presumed to be a delegation of authority to the agency to make policy with the force of law to clarify the meaning of that gap or ambiguity of the statute:

> *When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.*[101]

This presumption that congressional silence operated as a delegation of authority to the agency was known in its operational form as the *Chevron* two-step test. Critics of the administrative state feared, not unreasonably, that this presumption encouraged federal courts to find in favor of agencies' expansive interpretations of their power, thereby expanding the powers of the administrative agencies beyond the dimensions intended by Congress because any moderately complex statute is likely to contain multiple statutory gaps and ambiguities. In *Loper Bright*, Chief Justice Roberts once again writes the opinion for the Court. His opinion resolves the debate over *Chevron* with following holding:

> *Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA*

99 144 S. Ct. 2244 (2024).

100 467 U.S. 837 (1984).

101 ibid, pp 842-43 (footnotes omitted). In a footnote appended to the end of this quotation, the Court clarified that '[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.' ibid, p 843 n.11.

> *may not defer to an agency interpretation of the law simply because a statute is ambiguous.*[102]

Roberts clearly overrules the *Chevron* presumption. Statutory ambiguity and gaps are no longer to be taken automatically as implying a delegation to the agency. But his opinion does not mandate the elimination of all judicial deference to agency interpretations of law. The courts may not defer to the agency's interpretation of law 'simply' because a statute is ambiguous, but the courts 'must respect' delegations to agencies consistent with constitutional limits. In multiple passages, Roberts acknowledges the traditional understanding of the role deference plays in a reviewing court's role. Section 706 of the APA, he writes, 'mandate[s] that judicial review of agency policymaking and factfinding be deferential.'[103] Once the reviewing court has determined that the statute

> *delegates discretionary authority to an agency, 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. The court fulfills that role by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,'. . . and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries.*[104]

This is clearly what Roberts means when he says that the reviewing courts 'must respect the delegation.'

Roberts uses the terms 'policymaking' and 'factfinding' to denote what the agency does in exercising its powers within the sphere of discretion that has been delegated to it and contrasts that activity to the interpretation of law which the reviewing court engages in when it determines whether the agency has acted within its delegated powers. This is reasonable terminology but it could lead to some confusion. First, because, at least in common law jurisdictions like the United States, legal interpretation freely incorporates arguments based on policy as part, often the main part, of legal argument. Courts reviewing agency action therefore have to be careful in interpreting the ways in which relevant legislation limits agency discretion not to rely on policy determinations that Congress really meant the agency to make. Second, policy formulation may be for the agency, not the courts, to decide, but in the process of policy formulation, the agency may have to interpret the applicable law, not merely to avoid transgressing the legal

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

103 ibid, p 2262 (citing APA §§ 706 (2)(A) and (E)). If a reviewing court cannot invalidate agency rules as a violation of the Constitution or federal statutes, including all legally required procedures, Section 706 (2) limits further review by the court to arbitrary and capricious review (Subsection A) and substantial evidence review (Subsection B) except in those unlikely and rare situations in which a relevant statute requires trial de novo by the reviewing court (Subsection F). Arbitrary and capricious review and substantial evidence review are explicitly deferential standards, requiring the reviewing court to affirm the agency (a) if it is not so unreasonable that it can be said to be 'arbitrary' or 'capricious' (Subsection A), or (2) if, in the case of agency fact-finding under the formal adjudication rules of APA §§ 554, 556, and 557, the agency's findings of fact are based on substantial evidence, even if, based on the evidence adduced in the formal proceedings, the reviewing court would not have made the same factual findings.

104 144 S. Ct. at 2263 (citations omitted).

limits on its discretion, but also in an effort to figure out what appears to the agency as the best way to exercise its policymaking discretion. So, from the agency's point of view, the process of policy formulation may appear to involve considerable legal interpretation. The reviewing court may not simply override all agency statutory interpretation. The reviewing court has to distinguish between agency interpretations of law that was not meant to set limits to the exercise of agency discretion and interpretations of law that was meant to set limits. The former interpretations have to be reviewed with deference to the agency's view, but the latter do not.

But that brings us to the real point of contention with respect to the subject of judicial review of agency action: How do we tell whether a given provision or section of the law sets a boundary to agency discretion or confers discretion on the agency to make policy? *Chevron* was a relatively mechanical rule that, whatever its defects, greatly simplified the debate about statutory interpretation where it applied. If ambiguous or vague terms or statutory gaps prevented the reviewing court from determining whether Congress intended the agency to have discretion to determine the contested point, *Chevron* commanded that the court simply presume that Congress meant to give the agency discretion to resolve the issue. But with *Chevron*'s perhaps overbroad simplification overruled, now each statutory scheme will have to be carefully analyzed based on its idiosyncratic subject matter, wording, purposes, and legislative history. There may be substantial consensus on the main maxims to be used in interpreting statutes, but little agreement on how to prioritize the use of different maxims when they lead to different results. Furthermore, because the Supreme Court granted certiorari in this case solely on the question of 'whether *Chevron* should be overruled or clarified,'[105] the Court does not actually decide the case. Having overruled *Chevron*, the Court remands to the lower courts to figure out how to interpret the language in this case.

The facts of *Loper Bright* present one fairly common conundrum in statutory interpretation cases. The statute in question, the Magnuson-Stevens Fishery Conservation and Management Act (MSA)[106] established eight regional fishery management councils on the two coasts of the United States and tasked them with establishing fishery management plans, which are to be promulgated as regulations and must include, among other things, a plan for determining annual catch limits to avoid overfishing in their regions. The plans may also require one or more observers to be carried on board each commercial fishing vessel to collect data necessary for the conservation and management of the fishery. The MSA specified three groups of commercial fishermen who must cover the costs of observers on their voyages, but none of those groups included the plaintiffs in this case. Beyond those three groups, the statute said nothing specific about whether fisherman applying to participate in the catch in a given fishery council could be required to bear the costs of the observers though the MSA did delegate general rulemaking authority to the agency 'to prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.' Could the National Marine Fisheries Service (NMFS), the agency that administers this system of fishery councils, enforce its regulation requiring the fisherman to pay for observers?

The *inclusio unius exclusio alterius est* maxim of statutory interpretation would support

105 ibid, p 2257.

106 See 90 Stat. 331 (1976) (codified as amended at 16 U.S.C. § 1891 et seq.)

the argument that because the statute shows that the drafters know how to provide express provisions to make the commercial users pay the costs of observers in certain cases, the omission of such a provision in the portions of the statute that applies to the case at bar was likely deliberate and should be read as prohibiting a regulation requiring such payment in the case at bar. But in the absence of specific reasons to think otherwise (such as legislative history), it is just as plausible that the general authorization of rulemaking was intended to have broad effect and that the statute therefore does not stand in the way of cost sharing rules needed to enable the use of observers, which the MSA authorizes 'for the purpose of collecting data necessary for the conservation and management of the fishery,' and which the NMFS had stopped funding. Why shouldn't the literal wording of the statute be given its full effect? In short, *inclusio unius* is a profoundly inconclusive doctrine. In the actual cases, both of which started because of peculiarities in the governing statute in a federal district court instead of following the usual pattern of starting directly in a federal court of appeals, the results show how perplexing the courts found this fact pattern. Most of them relied on the *Chevron* presumption to decide the cases for the government. In the case coming out of the First Circuit, however, the district court concluded that the MSA did authorize the rule requiring the fishermen to pay for the observers, though it also relied on the *Chevron* presumption to bolster its conclusion. In the case from the D.C. Circuit, the dissenting circuit court judge concluded that the statute unambiguously indicated that the agency did not have authority to make the fishermen pay.[107]

The overruling of *Chevron* creates a major change in the basic legal doctrine governing U.S. federal administrative law. For that reason alone, it is undoubtedly important, but it is also probably not as important as the recent election. The loss of the *Chevron* presumption may make reviewing judges' jobs more difficult. They will have to work much harder at statutory interpretation because there is no presumption to provide an easy way to resolve messy statutory interpretation questions. It may encourage more challenges to agency action because a wider range of statutory interpretation arguments are now available. *Chevron* may have encouraged some federal judges to rule for regulatory agencies, and the overruling of *Chevron* will likely have the opposite effect. But the overall effect is likely to be fairly muted. Judges who are skeptical of agency regulatory power were already more likely to find that the statute forbids the challenged agency action under the *Chevron* rule, and judges who favor regulation were inclined to read authorizing statutes more broadly to uphold agency power though the *Chevron* presumption relieved them of having to make the more complex statutory interpretation arguments. Most importantly, in the near term, the new Republican administration will emphasize securing the appointment of as many Republican loyalist judges as possible, and as in President Trump's first term, the administrative agencies will be largely under leadership that seeks to repeal or refuses to enforce regulation, not expand it.

For proponents of reasonable regulation, there are a couple of bright spots in the *Loper Bright* opinion. First, Roberts' opinion for the Court recognizes that Congress may delegate regulatory power to an agency expressly by giving the agency 'authority to give meaning to a statutory term,' by 'empower[ing] an agency to prescribe rules to 'fill up the details' of a statutory scheme,' or by granting the agency power 'to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' . . . such as 'ap-

107 144 S. Ct. at 2256-57.

propriate' or 'reasonable."[108] These passages indicate that there will still be plenty of possibilities to argue for deference to the agency's delegated policymaking discretion. Indeed, we may see the rediscovery of maxims based on the use of general standards and maybe even the resuscitation of that part of the *Chevron* presumption that was based on the use of vague or general terms. Roberts' opinion argues that this kind of deferential review was 'cabined to factbound determinations,'[109] but it is not plausible to interpret cases determining the reach of general terms like 'appropriate' or 'reasonable' or, as in *National Labor Relations Board v. Hearst,*[110] the word 'employee,' as factual determinations. These are policy determinations, but they may be the kind of policy determinations that we are most comfortable leaving to administrative agencies because of their relatively narrow span.

Second, while *Loper Bright* overrules *Chevron*, it reaffirms the role of *Skidmore v. Swift*.[111] '*Skidmore* deference,' as it has often been called, is something different from *Chevron* deference. While *Chevron* deference was based on the logic of delegation, even though it was in some cases a fictional delegation because it was the product of a presumption, not based on a finding that Congress had meant to delegate. *Skidmore* is based on the agency's expertise, but only if the agency can demonstrate that it has relevant expertise. A pattern of changing its mind about what that expertise shows tends to undermine an agency's claim to expertise by suggesting that it is subject to political pressures. Roberts emphasizes that expertise-based deference is different from expertise based on the logic of delegation.

> *[A]lthough an agency's interpretation of a statute [based on expertise] 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.' . . . Such expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'* [112]

The expertise that matters here is not confined to factual issues. In a proper case, it can serve as a basis upon which the reviewing court can rely to interpret statutory language. So *Skidmore* deference is very definitely another type of deference, and now that *Chevron* deference is gone, it can be expected to play a much larger role in judicial review.

Finally, it is worth mentioning that Justice Gorsuch filed a very interesting concurrence in this case. He was concerned to bolster the arguments about why it was permissible in this case for the Supreme Court to overrule its own decision in *Chevron*. It is always a bit of a challenge for the U.S. Supreme Court to justify overruling one of its cases. Stare decisis provides a strong argument against the overruling, and there is a standard litany of reasons that the Court has tended to use to justify overruling in specific cases. Chief Justice Roberts is becoming quite experienced in making these arguments. In the end, Justice Gorsuch simply amplifies the arguments that Roberts makes, but he starts

108 144 S. Ct. at 2263 (citations omitted).
109 ibid, p 2259.
110 322 U.S. 111 (1944). For Roberts' discussion of the case, see 144 S. Ct. at 2259.
111 323 U.S. 134 (1944), discussed at 144 S. Ct. 2259, 2267.
112 144 S. Ct. at 2267.

out on a different tack. He points out that precedent originally had a much weaker force in England. In the common law in England up through the colonial period in America and into the early years of the American Republic, precedent did not bind the judge in the absolute sense it does today. The opinion of the judge was not the same thing as the law, according to Blackstone. The judge's decision would bind the parties to the lawsuit, but not the whole country. Courts did not make law for the country; only the King and Parliament could do that. The force of precedent depended in large measure on its consistency with prior court decisions, and 'a consistent line of decisions representing the wisdom of many minds across many generations was generally considered stronger evidence of the law's meaning.'[113] It is probably not the point of Justice Gorsuch's concurrence, but in view of the profound reshaping of American public law wrought by the decisions profiled in this report, this history is worth studying to see whether we might be better served by returning to the original, weaker understanding of the force of judicial precedent.

113 144 S. Ct. at 2276 (Gorsuch, J., concurring). For Justice Gorsuch's whole discussion of the early history of the force of precedent, see ibid, pp 2276-79.