Comparative Administrative Law

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Felix Uhlmann

University of Zurich

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I. Introduction (Lecture 1)

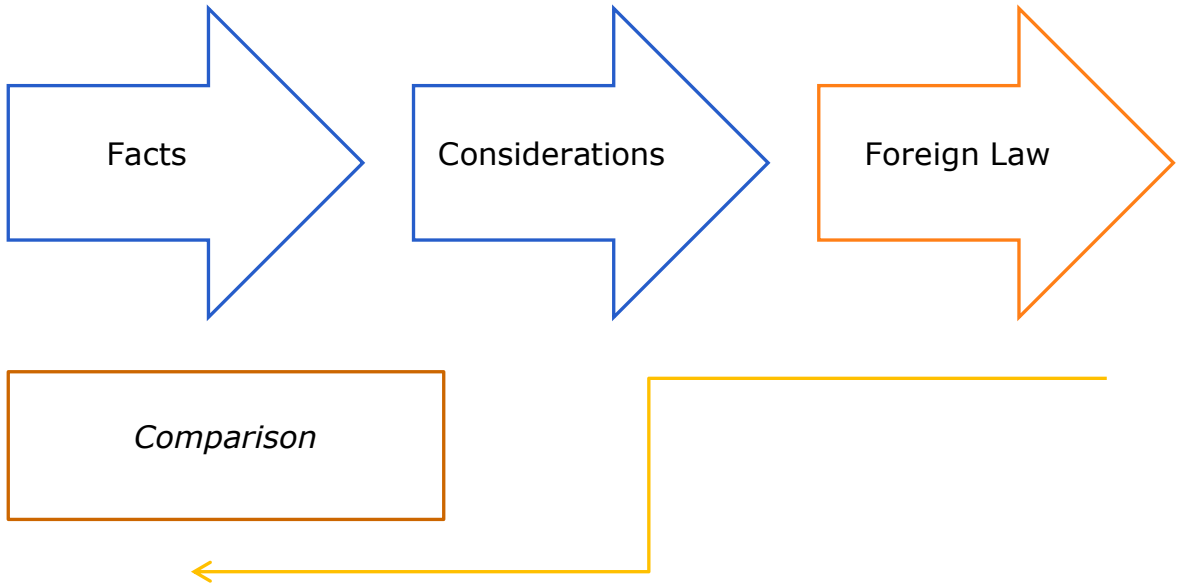
A. Key Questions

1. What are we looking for?

Many countries struggle with the amount of regulation that administrative authorities must implement. Although the subject areas of such regulation are quite diverse, the implementation is usually guided by some general rules, often unwritten. These rules form what is called "Administrative Law" (or "General Administrative Law").

2. What are we looking for?

- Institutions (e.g. regulatory agencies)
- Laws (e.g. administrative procedure)
- General Principles (e.g. rule of law)
- Cases (mostly)



3. How do we compare?

The course looks into these rules from a comparative perspective. Common problems that may arise in the administrative context are illustrated by cases and other materials. Students are asked to comment on these cases and compare them – if possible- to their own legal background.

4. Why do we compare?

- Knowledge of foreign jurisdictions
- New questions
- **Critical Assessment of one‘s own jurisdiction**
- "Best Practices" in Administrative Law?

II. Sources (Lecture 1)

A. Codification of General Administrative Law

It has hardly been researched which consequences arise from the different degree of codification of the general administrative law.

- Does codification increase orientation, predictability and legal certainty?
- Does the codification lead to a "petrification" of general administrative law?
- Does codification enhance the legitimacy of administrative law?
- To which degree does the constitution shape administrative law and will there be conflicts in case of codification?
- Can uniformity be achieved only by codification?
- Which areas of general administrative law are suitable for a codification, which are not, and why and why not?

B. NL: General Administrative Law Act

(Algemene wet bestuursrecht, accessible through https://wetten.overheid.nl/BWBR0005537/2025-01-01 (Dutch), translated version taken from https://legislationline.org/sites/default/files/documents/96/Netherlands_administrative_law_act_2010_en.pdf and (formally and linguistically) adjusted, in the current version as of February 2025)

1. Instruction

Below you will find an extract from a translation of the General Administrative Law Act (GALA) of the Netherlands. Read the extract and ask yourself whether it regulates the issues you consider typical "General Administrative Law". What is missing and what would you not consider “Administrative Law”?

2. Table of Contents

3. The legal text

GENERAL ADMINISTRATIVE LAW ACT

CHAPTER 1 INTRODUCTORY PROVISIONS

Title 1.1 Definitions and scope

Article 1:1

1. 'Administrative authority' means:
    (a) an organ of a legal entity which has been established under public law, or
    (b) another person or body which is invested with any public authority.
2. The following authorities, persons and bodies are not deemed to be administrative authorities:
    (a) the legislature;
    (b) the First and Second Chambers and the Joint Session of the States General;
    (c) independent authorities established by law and charged with the administration of justice;
    (d) the Council of State and its divisions;
    (e) the General Chamber of Audit;
    (f) the National Ombudsman and Deputy Ombudsmen;
    (g) the chairmen, members, registrars and secretaries of the authorities referred to at (b) to (f), the Procurator General, the Deputy Procurator General and the Advocates General to the Supreme Court, and committees composed of members of the authorities referred to at (b) to (f).
3. An authority, person or body excluded under subsection 2 is nonetheless deemed to be an administrative authority in so far as it makes orders or performs acts in relation to a public servant not appointed for life as referred to in 1 of the Central and Local Government Personnel Act, their surviving relatives or their successors in title.

Article 1:2

1. 'Interested party' means a person whose interest is directly affected by an order.
2. As regards administrative authorities, the interests entrusted to them are deemed to be their interests.

3. As regards legal entities, their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities.

Article 1:3

1. 'Order' means a written decision of an administrative authority constituting a public law act.
2. 'Administrative decision' means an order which is not of a general nature, including rejection of an application for such an order.
3. 'Application' means a request by an interested party for an order.
4. ‘Policy rule’ means an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of a power of an administrative authority.

Article 1:4

1. 'Administrative court' means an independent authority established by law charged with the administration of justice in administrative matters.
2. A court forming part of the judicature is deemed to be an administrative court in so far as Chapter 8, the Administrative Justice (Taxes) Act[1] or the Traffic Regulations (Administrative Enforcement) Act - Chapter VIII excluded - applies.

Article 1:5

1. 'Making an objection' means making use of a statutorily conferred power to seek redress against an order from the administrative authority which made the order.
2. 'Lodging an administrative appeal' means making use of a statutorily conferred power to seek redress against an order from an administrative authority other than the one which made the order.
3. 'Lodging an appeal' means lodging an administrative appeal or an appeal to an administrative court.

Article 1:6

This act does not apply to:

(a) the investigation and prosecution of criminal offences or the execution of criminal legal decisions;

(b) the execution of measures depriving persons of their liberty under the Aliens Act;

(c) the execution of other measures depriving persons of their liberty in an institution primarily dedicated to the execution of criminal law decisions;

(d) orders and acts implementing the Military Disciplinary Law Act.

Title 1.2 Implementation of binding decisions of authorities of the European Communities *(not contained below)*

[…]

CHAPTER 2 DEALINGS BETWEEN INDIVIDUALS AND ADMINISTRATIVE AUTHORITIES

Division 2.1 General provisions

Article 2:1

1. In looking after their interests in dealings with administrative authorities, anyone may be assisted or represented by a legal representative.
2. An administrative authority may require a legal representative to produce a written authorisation.

Article 2:2

1. An administrative authority may refuse to allow assistance or representation by a person against whom there are serious objections.
2. The interested party and the person referred to in subsection 1 shall be informed in writing of the refusal without delay.
3. Subsection 1 shall not apply to attorneys-at-law and procurators.

Article 2:3

1. An administrative authority shall send documents which manifestly come within the competence of another administrative authority to such authority without delay, while simultaneously informing the sender.
2. An administrative authority shall return to the sender as soon as possible documents which are not intended for it and are also not passed on to another administrative authority.

Article 2:4

1. An administrative authority shall perform its duties without prejudice.
2. An administrative authority shall ensure that persons belonging to it or working for it who have a personal interest in an order do not influence its decision-making on the matter.

Article 2:5

1. Anyone involved in the performance of the duties of an administrative authority who in the process gains access to information which they know, or should reasonably infer, to be of a confidential nature, and who is not already subject to a duty of secrecy by virtue of their office or profession or any statutory regulation, shall not disclose such information unless they are by statutory regulation obliged to do so or disclosure is necessary in consequence of their duties.
2. Subsection 1 shall also apply to institutions, and persons belonging to them or working for them, involved by an administrative authority in the performance of its duties, and to institutions and persons belonging to them or working for them performing a duty assigned to them by or pursuant to an Act of Parliament.

Division 2.2 Use of Languages in Dealings with Administrative Authorities (not contained below)

[…]

CHAPTER 3 GENERAL PROVISIONS CONCERNING ORDERS

Division 3.1 Introductory provisions

Article 3:1

1. Orders containing generally binding regulations:
    (a) shall only be subject to the provisions of division 3.2 in so far as they are not incompatible with the nature of the orders;
    (b) shall not be subject to the provisions of division 3.6.
2. Divisions 3.2 to 3.5 shall apply *mutatis mutandis* to acts of administrative authorities other than orders in so far as they are not incompatible with the nature of the acts.

Division 3.2 The duty of care and the weighing of interests

Article 3:2

When preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed.

Article 3:3

An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred.

Article 3:4

1. When making an order the administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised.
2. The adverse consequences of an order for one or more interested parties may not be disproportionate to the purposes to be served by the order.

Division 3.3 Provision of advice (not contained below)

[…]

Division 3.4 Public preparatory procedure

Article 3:10

1. The procedure for the preparation of orders provided in this division shall be followed if this is required by statutory regulation or by order of the administrative authority.
2. The regulations of division 4.1.1 regarding administrative decisions shall also apply to other orders which are made on application and prepared in accordance with this division.

Article 3:11

1. The administrative authority shall deposit the application for the order, or the draft of an order to be made on its own initiative or on application, together with the documents relating thereto, for inspection for a period of at least four weeks by those persons who are to be given the opportunity under article 3:13 to state their views.

2. Article 10 of the Government Information (Public Access) Act shall apply *mutatis mutandis*. If certain documents are not deposited for inspection under this provision, communication shall be given thereof.
3. A copy of the documents deposited for inspection shall be provided at no more than cost price.
4. In so far as not provided otherwise by statutory regulation, the deposit for inspection shall in any event take place at the offices of the administrative authority.

Article 3:12

1. The communication of the application or the draft shall be given in one or more newspapers or free local papers, or in any other suitable way, prior to the deposit of the application for inspection. Only the substance of the order needs to be stated.
2. If the order is by an administrative authority forming part of central government the communication shall be placed in the Government Gazette, unless provided otherwise by statutory regulation.
3. The communication shall state where and when the documents are to be deposited for inspection, who is to be given the opportunity to state their views and how this can be done under article 3:13.

Article 3:13

1. Interested parties may state their views on the application or the draft either orally or in writing, at their discretion.
2. It may be provided by statutory regulation or by the administrative authority that other persons are also to be given the opportunity to state their views either orally or in writing, at their discretion.
3. The time limit for stating a view shall not end earlier than the last day of the inspection period.
4. In the case of an order made on application, the applicant shall if necessary be given the opportunity to respond to the views stated.
5. A record shall be kept of views stated orally under the above subsections.

Division 3.5 Extensive public preparatory procedures

Paragraph 3.5.1 Introduction

Article 3:14

The procedures for the preparation of orders provided in paragraphs 3.5.2 to 3.5.5 and shall be followed if this is required by statutory regulation or by order of the administrative authority.

Article 3:15

By or pursuant to the statutory regulation referred to in article 3:14 or the order referred to therein administrative authorities may be designated which:

(a) must be given the opportunity to deliver an opinion on the making of an order, or

(b) must be involved in the preparatory procedures in some other way.

Paragraph 3.5.2 Filing of the application; admissibility

Article 3:16

The provisions of division 4.1.1 regarding administrative decisions shall also apply to other orders which are made on application and prepared in accordance with this division.

Article 3:17

1. The administrative authority shall note without delay the date of receipt on the application.
2. It shall send without delay the applicant an acknowledgement of receipt stating this date.
3. It shall send without delay the other administrative authorities involved a copy of the application and of the accompanying documents, stating the date of receipt.

Article 3:18

1. The power regulated in article 4:5 not to process an application on the grounds that it is incomplete may be exercised only if the applicant has been given the opportunity to amplify the application within eight weeks of the application being received.
2. The other administrative authorities involved shall be informed of requests to amplify an application and orders not to process an application.
3. If an administrative authority processes an application despite its being incomplete, it shall make a note of this on the application. If the applicant has been given the opportunity to amplify the application, the administrative authority shall state in such note the time limit set for this under article 4:5.

Paragraph 3.5.3. The draft order

Article 3:19

1. The administrative authority shall prepare a draft order as soon as possible. Unless article 3:29 has been applied, the administrative authority shall send the draft to the applicant and the other administrative authorities involved within twelve weeks of receiving the application.
2. No later than two weeks after the sending of the draft as referred to in subsection 1, information of the draft shall simultaneously be given by:
    (a) deposit for inspection;
    (b) a communication in one or more newspapers or free local papers such that the intended object is achieved as far as possible;
    (c) a communication in the Government Gazette, in cases where an authority of the central or provincial government is the administrative authority.

Article 3:20

1. In the communications referred to in Article 3:19, Subsection 2, the administrative authority shall state at least:
    (a) the substance of the application and the purport of the draft order;
    (b) where and when the documents may be inspected;
    (c) who has been given the opportunity to submit reservations concerning the draft, and how and within what time limit this may be done;
    (d) that a person who submits reservations in writing may request that his personal particulars are not stated.
2. The administrative authority shall also inform the applicant and the other administrative authorities involved of this information.

[…]

Paragraph 3.5.4 Opinions and reservations

Article 3:23

1. The administrative authorities acting as advisers shall send their opinion to the administrative authority within four weeks of the date on which the draft is deposited for inspection.

2. The administrative authority shall send a copy of each opinion to the applicant and the other administrative authorities acting as advisers as soon as possible.

Article 3:24

1. Anyone may submit written reservations to the administrative authority within four weeks of the date on which the draft is deposited for inspection.
2. The date of receipt shall be noted on the document.
3. The administrative authority shall send a copy of each reservation submitted to the applicant and the other administrative authorities acting as advisers as soon as possible.
4. The personal particulars of a person who has submitted written reservations shall not be disclosed if he so requests. The request shall be made in writing to the administrative authority, stating the particulars referred to in the first sentence.

[…]

Paragraph 3.5.5 Decision on the application

Article 3:28

The administrative authority shall make its order on the application as soon as possible, but at the latest within six months of receiving the application unless Article 3:29 has been applied.

Article 3:29

1. If the application concerns a very complicated or controversial subject, the administrative authority may, within eight weeks of receiving the application, extend the periods referred to in Article 3:19, Subsection 1, Second Sentence, and Article 3:28 for a reasonable period to be determined by the administrative authority in each case. Before taking such a decision, it shall give the applicant the opportunity to state their views on this.
2. The other administrative authorities involved shall be informed of an extending order at the time of its notification.
3. The administrative authority shall give communication of the extending order and of the filed application within, at the latest, ten weeks of receiving the application, Article 3:19, Subsection 2, Article 3:20, Subsection 1, (a) and (b), and Subsection 2 and Articles 3:21 and 3:22 applying *mutatis mutandis*.

Paragraph 3.5.6 Altering or repealing orders and other orders made by the administrative authority on its own initiative

[…]

Article 3:32

1. Anyone may submit written reservations concerning a draft order to the administrative authority within two weeks of the communication referred to in article 3:30, subsection 1. Article 3:24, Subsections 2 and 4 and Article 3:26 shall apply *mutatis mutandis*.
2. The administrative authority shall send a copy of every reservation submitted to the administrative authorities acting as advisers as soon as possible and, in the case of an altering or repealing order, to the one to whom the order to be altered or repealed was addressed.

Article 3:33

1. The administrative authority shall make an altering or repealing order, or an order not to alter or repeal, as soon as possible, but at the latest within sixteen weeks of the date on which it gave the communication referred to in Article 3:30, subsection 2 to the one to whom the order to be altered or repealed was addressed.
2. Notwithstanding the provisions of Subsection 1, an order that is not preceded by a communication as referred to in Article 3:30, Subsection 2 shall be made within eight weeks of the communication referred to in Subsection 1 of that Article.

Division 3.6 Notification and communication

Article 3:40

An order shall not take effect until it has been notified.

Article 3:41

1. Orders which are addressed to one or more interested parties shall be notified by being sent or issued to these, including the applicant.
2. If an order cannot be notified in the manner provided in Subsection 1, it shall be notified in any other suitable way.

Article 3:42

1. Orders which are not addressed to one or more interested parties shall be notified by means of a notice of the order, or the substance thereof, placed in an official government publication, newspaper or free local paper, or in any other suitable way.
2. If notice is given only of the substance, the order shall at the same time be deposited for inspection. The notice shall state where and when the order will be deposited for inspection.

[…]

Division 3.7 Reasons for orders

Article 3:46

An order shall be based on proper reasons.

Article 3:47

1. The reasons shall be stated when the order is notified.
2. If possible, the statutory regulation on which the order is based shall be stated at that same time.
3. If, in the interests of speed, the reasons cannot be stated immediately when the order is published, the administrative authority shall give communication of them as soon as possible thereafter.
4. In such a case, Articles 3:41 to 3:43 inclusive shall apply *mutatis mutandis*.

Article 3:48

1. The reasons need not be stated if it can reasonably be assumed that there is no need for this.
2. If, however, an interested party asks within a reasonable period to be informed of the reasons, they shall be communicated to them as quickly as possible.

Article 3:49

To state the reasons of an order or part of an order, it is sufficient to refer to an opinion drawn up in this connection if the opinion itself contains the reasons and communication of the opinion has been or is given.

Article 3:50

If the administrative authority makes an order which derogates from an opinion drawn up for this purpose pursuant to a statutory regulation, this fact and the reasons for it shall be stated in the reasons for the order.

CHAPTER 4 SPECIAL PROVISIONS CONCERNING ORDERS

Title 4.1 Administrative decisions

Division 4.1.1 The application

Article 4:1

Unless provided otherwise by statutory regulation, an application for an administrative decision shall be lodged in writing with the administrative authority which is competent to decide on the application.

Article 4:2

1. The application shall be signed and shall contain at least:
    (a) the name and the address of the applicant;
    (b) the date;
    (c) a description of the administrative decision applied for.
2. The applicant shall also supply such information and documents as required for a decision on the application as it is reasonable to expect him to be able to obtain.

Article 4:3

1. The applicant may refuse to supply information and documents in so far as their importance to the decision of the administrative authority is outweighed by the importance of protecting privacy, including the results of medical and psychological examinations, or by the importance of protecting business and manufacturing data.
2. Subsection 1 shall not apply to information and documents designated by statutory regulation as having to be supplied.

Article 4:4

The administrative authority which is competent to decide on the application may specify a form to be used when lodging applications and supplying information, in so far as this is not provided by statutory regulation.

Article 4:5

1. If the applicant has not complied with any requirement made by statutory regulation for the application to be dealt with, or if the information and documents supplied are insufficient to allow the application to be assessed or the administrative decision to be prepared, the administrative authority may decide not to deal with the application, provided the applicant has been given the opportunity to amplify the application within such time limit as set by the administrative authority.
2. If the application, or any of the information or documents pertaining to it, is in a foreign language, and a translation is necessary for the application to be assessed or the administrative decision to be prepared, the administrative authority may decide not to deal with the application, provided the applicant has been given the opportunity to amplify the application by means of a translation within such time limit as set by the administrative authority.
3. If the application, or any of the information or documents pertaining to it, is sizeable or complicated, and a summary is necessary for the application to be assessed or the administrative decision to be prepared, the administrative authority may decide not to deal with the application, provided the applicant has been given the opportunity to amplify the application by means of a summary within such time limit as set by the administrative authority.
4. An order not to process the application shall be notified to the applicant within four weeks of the application being amplified or the time limit set for this purpose expiring without being used.

Article 4:6

1. If a new application is made after an administrative decision has been made rejecting all or part of an application, the applicant shall state any new facts that have emerged or circumstances that have altered.

2. If no new facts or altered circumstances are stated, the administrative authority may, without applying Article 4:5, reject the application by referring to its administrative decision rejecting the previous application.

Division 4.1.2 Preparation

Article 4:7

1. Before an administrative authority rejects all or part of an application for an administrative decision, it shall give the applicant the opportunity to state their views, if:
    (a) the rejection is based on information about facts and interests relating to the applicant, and
    (b) this information differs from information supplied by the applicant themselves in the matter.
2. Subsection 1 shall not apply if the difference from the application can be of only minor importance to the applicant.

Article 4:8

1. Before making an administrative decision about which an interested party who has not applied for the administrative decision may be expected to have reservations, an administrative authority shall give that interested party the opportunity to state their views, if:
    (a) the administrative decision is based on information about facts and interests relating to the interested party, and
    (b) this information was not supplied in the matter by the interested party themself.
2. Subsection 1 shall not apply if the interested party has not complied with a statutory obligation to supply information.

[…]

Division 4.1.3 Time limit for decisions

Article 4:13

1. An administrative decision shall be made within the time limit prescribed by statutory regulation, or, in the absence of such time limit, within a reasonable period after receiving the application.

2. The reasonable period referred to in subsection 1 shall in any event be deemed to have expired if the administrative authority has not made an administrative decision or given communication as referred to in Article 4:14 within eight weeks of receiving the application.

Article 4:14

If, in the absence of a time limit prescribed by statutory regulation, an administrative decision cannot be made within eight weeks, the administrative authority shall inform the applicant, stating a reasonable time limit for the administrative decision to be made.

Article 4:15

The time limit for making an administrative decision shall be suspended with effect from the day on which the administrative authority requests the applicant to amplify the application pursuant to Article 4:5 until the day on which the application has been amplified or the time limit set for this purpose expires without being used.

Title 4.2 Subsidies *(not contained below)*

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CHAPTER 5 ENFORCEMENT

Division 5.1 Introductory provisions (not contained below)

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Division 5.2 Supervision of observance

Article 5:11

'Supervisor' means a person who by or pursuant to statutory regulation has been charged with supervising the observance of the provisions made by or pursuant to any statutory regulation.

Article 5:12

1. When performing their duties a supervisor shall carry an identification card issued by the administrative authority under whose responsibility the supervisor works.
2. A supervisor shall immediately produce their identification card on request.

3. The identification card shall contain a photograph of the supervisor and shall in any event state their name and position. The model of the identification card shall be fixed by the Minister of Justice in a regulation.

Article 5:13

A supervisor shall exercise their powers only in so far as this can reasonably be assumed to be necessary for the performance of their duties.

Article 5:14

The powers to which the supervisor is entitled may be limited by statutory regulation or by order of the administrative authority which designates the supervisor as such.

Article 5:15

1. A supervisor, taking with them the requisite equipment, shall be entitled to enter every place, except for a dwelling without the consent of the occupant.
2. If necessary, they may gain entry with the assistance of the police.
3. They shall be entitled to take with them people designated by them for this purpose.

Article 5:16

A supervisor shall be entitled to require the provision of information.

Article 5:17

1. A supervisor shall be entitled to require inspection of business information and documents.
2. They shall be entitled to make copies of the information and documents.
3. If the copies cannot be made on the spot, they shall be entitled to take the information and documents away for this purpose for a short time in exchange for a written receipt issued by them.

Article 5:18

1. A supervisor shall be entitled to inspect and measure goods and take samples of them.
2. They shall be entitled to open packages for this purpose.
3. At the request of the interested party, the supervisor shall, if possible, take a second sample, unless provided otherwise by or pursuant to statutory regulation.

4. If the objects cannot be inspected, measured or sampled on the spot, they shall be entitled to take the objects away for this purpose for a short time in exchange for a written receipt issued by them.
5. Wherever possible the samples taken shall be returned.
6. The interested party shall, at their request, be informed as quickly as possible of the results of the inspection, measuring or sampling.

[…]

Division 5.3 Enforcement action (partially contained below)

Article 5:21

'Enforcement action' means physical acts taken by or on behalf of an administrative authority against what has been or is being done, kept or omitted in breach of obligations laid down by or pursuant to any statutory regulations.

Article 5:22

The power to take enforcement action exists only if it has been granted by or pursuant to an Act of Parliament.

Article 5:23

This division does not apply if action is taken for the immediate enforcement of public order.

Article 5:24

1. A decision that enforcement action is to be taken shall be made in writing. The written decision constitutes an administrative decision.
2. The administrative decision shall state what regulation has been or is being infringed upon.
3. It shall be notified to the offender, to the persons entitled to the use of the object in respect of which enforcement action will be taken and to the applicant.
4. The administrative decision shall contain a time limit within which the interested parties may prevent such action by taking measures themselves. The administrative authority shall specify the measures to be taken.
5. No time limit need be granted if swiftness is of the essence.

6. If the situation is so urgent that the administrative authority cannot put the decision to take enforcement action in writing beforehand, it shall arrange for it to be recorded in writing and notified as quickly as possible thereafter.

Article 5:25

1. An offender shall owe the costs incurred in connection with the taking of enforcement action unless it would not be reasonable for these costs or all of these costs to be borne by them.
2. The administrative decision shall state that the enforcement action is taken at the expense of the offender.
3. If, however, all or part of the costs will not be charged to the offender this shall be stated in the administrative decision.
4. The costs referred to in Subsection 1 shall include the costs connected with the preparation of enforcement action, in so far as these costs are incurred after the date on which the time limit referred to in Article 5:24, Subsection 4, expires.
5. The costs shall also be owed if the enforcement action is not taken or not taken in its entirety owing to the termination of the illegal state.
6. The costs referred to in Subsection 1 shall also include the costs resulting from the compensation for damage pursuant to Article 5:27, Subsection 6.

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Division 5.4 Penalty payment (not contained below)

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CHAPTER 6 GENERAL PROVISIONS CONCERNING OBJECTIONS AND APPEALS

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CHAPTER 7 SPECIAL PROVISIONS CONCERNING OBJECTIONS AND ADMINISTRATIVE APPEALS *(see IV.B)*

CHAPTER 8 SPECIAL PROVISIONS CONCERNING APPEALS TO THE DISTRICT COURT *(see IV.B)*

PART 10 PROVISIONS ON ADMINISTRATIVE AUTHORITIES

Title 10.1 Mandate and Delegation

Division 10.1.1 Mandate (partially contained below)

Article 10:1

'Mandate' means the power to make orders in the name of an administrative authority.

Article 10:2

An order made by a mandatary within the limits of their power is deemed to be an order of the mandator.

Article 10:3

1. An administrative authority may grant a mandate unless provided otherwise by statutory regulation or unless the nature of the power is incompatible with the granting of a mandate.
2. A mandate may in any event not be granted if it concerns a power:
    (a) to adopt generally binding regulations, unless provision for the granting of a mandate was made when the power was conferred;
    (b) to make an order which must be made by a qualified majority or by means of a prescribed procedure which is otherwise incompatible with the granting of a mandate;
    (c) to decide on a notice of appeal;
    (d) to annul or refrain from approving an order made by another administrative authority.
3. A mandate to rule on an objection shall not be granted to the person who has made the order, pursuant to a mandate, against which the objection is brought.

Article 10:4

1. If the mandatary does not operate under the responsibility of the mandator, the granting of the mandate shall require the consent of the mandatary and, in appropriate cases, the person under whose responsibility they work.
2. Subsection 1 shall not apply if the power to grant the mandate has been conferred by statutory regulation.

Article 10:5

1. An administrative authority may grant a general mandate or a mandate for a specific case.
2. A general mandate shall be granted in writing**.** A mandate for a specific case shall in any event be granted in writing if the mandatary does not work under the responsibility of the mandator.

Article 10:6

1. The mandator may issue directions regarding the exercise of the mandated power either on a case-by-case basis or generally.
2. The mandatary shall provide the mandator at their request with information about the exercise of the power.

[…]

Division 10.1.2 Delegation

Article 10:13

'Delegation' means the transfer by an administrative authority of its power to make orders to another one, who assumes responsibility for the exercise of this power.

Article 10:14

Delegation shall not occur to subordinates.

Article 10:15

Delegation may occur only if the power to delegate has been conferred by statutory regulation.

Article 10:16

1. An administrative authority may issue only policy rules concerning the exercise of a delegated power.
2. The one to whom the power has been delegated shall provide the administrative authority at its request with information about the exercise of the power.

Article 10:17

An administrative authority may no longer exercise a delegated power itself.

Article 10:18

An administrative authority may repeal the delegation of a power at any time.

Article 10:19

An order made pursuant to a delegated power shall cite the delegation order and its source.

Article 10:20

1. This division, apart from Article 10:16, shall apply *mutatis mutandis* to the transfer by an administrative authority to a third party of the power of another administrative authority to make orders.
2. It may be provided by statutory regulation or by the order for transfer that the administrative authority whose power is transferred may issue policy rules concerning the exercise of the power.
3. The one to whom the power is transferred shall, at their request, provide the transferor and the administrative authority originally empowered, with information about the exercise of their power.

Title 10.2 Supervision of administrative authorities

Division 10.2.1 Approval (partially contained below)

Article 10:25

In this act 'approval' means the consent of another administrative authority required for the entry into force of an order of an administrative authority.

Article 10:26

Orders may be made subject to approval only in the cases specified by or pursuant to an Act of Parliament.

Article 10:27

Approval may be withheld only on account of conflict with the law or on another ground contained in an Act of Parliament in or pursuant to which the requirement of approval is prescribed.

Article 10:28

Approval of an order on which a district court has given judgment, or which implements the final judgment of a district court may not be withheld on legal grounds that conflict with those on which the judgment was based or partly based.

Article 10:29

1. An order may be partially approved only if partial entry into force is compatible with the nature and substance of the order.
2. Approval may not be granted for a determinate period or conditionally, nor may it be repealed.

[…]

Division 10.2.2 Annulment

Article 10:33

This division shall apply if an administrative authority is competent to annul an order of another administrative authority other than during an administrative appeal.

Article 10:34

The power to annul may only be granted by an Act of Parliament.

Article 10:35

An order may only be annulled on account of conflict with the law or the public interest.

Article 10:36

An order may only be annulled partially if its partial continuation in force would be consistent with the nature and substance of the order.

Article 10:37

An order which forms the subject of a district court judgment or implements the final judgment of a district court may not be annulled on legal grounds that conflict with those on which the judgment was based or partly based.

Article 10:38

1. An order which still requires approval may not be annulled.
2. An order against which an objection may be made, or an appeal may be lodged or is pending, may not be annulled.

Article 10:39

1. An order for the performance of a legal act under civil law may not be annulled if thirteen weeks have passed since it has been notified.
2. If a stay has been granted in accordance with Article 10:43 within the time limit referred to in Subsection 1, the order may still be annulled within the period of the stay.
3. If an order as referred to in Subsection 1 is subject to approval, the period referred to in Subsection 1 shall start after the approval order has been notified. Subsections 1 and 2 shall apply *mutatis mutandis* to the approval order.

Article 10:40

An order which has been stayed in accordance with Article 10:43 may no longer be annulled after the stay has ended.

Article 10:41

1. An order shall not be annulled until after the administrative authority which made the order has been given the opportunity for consultation.
2. The reasons for the annulling order shall refer to what has been dealt with in the consultations.

Article 10:42

1. The annulling of an order shall extend to all the legal consequences intended by the order.
2. The annulling order may provide that all or part of the legal consequences of the annulled order will continue to have effect.

3. If an order for the conclusion of an agreement is annulled, the agreement shall, if it has already been entered into and in so far as the annulling order does not provide otherwise, not be executed or continue to be executed, without prejudice to the other party's right to compensation.

Division 10.2.3 Stay

Article 10:43

Pending the investigation whether there are reasons to annul an order, the order may be stayed by the administrative authority competent to annul it.

Article 10:44

1. A staying order shall determine the duration of the stay.
2. The stay of an order may be extended once.
3. The stay may not exceed a year, even after extension.
4. If an objection is made or an appeal is lodged against a stayed order, the stay shall nonetheless continue until thirteen weeks after the final decision on the objection or appeal.
5. The stay may be lifted.

Article 10:45

Articles 10:36, 10:37, 10:38, Subsection 1, 10:39, Subsections 1 and 3, and 10:42, Subsection 3, shall apply *mutatis mutandis* to a staying order.

CHAPTER 11 FINAL PROVISIONS *(not contained below)*

[…]

SCHEDULE TO THE GENERAL ADMINISTRATIVE LAW ACT *(not contained below)*

[…]

4. Questions on the act

1. Does the Dutch General Administrative Law Act (GALA) cover the topics you consider as (General) Administrative Law? What is missing? Which parts of the GALA would you not consider Administrative Law?
2. Which rules are codified in your country?
3. If not codified: what is the source (Constitution, Court practice etc.)?
4. What are the consequences of codification? / What are the consequences of having Administrative Law in other forms?
5. What differences do you see in substance compared to your country?

III. Public – Private (Lecture 2)

A. General Questions

1. **What do we qualify** (legal sources, governmental entities, activities, contracts etc.)?
2. **What are the criteria for qualification** (legal basis, public interest or mandate, ownership and control, special powers, interests of the parties etc.)?
3. **What are the consequences of a qualification** (procedure and legal remedies, application of administrative or private law, state liability, constitutional restraints etc.)?
4. To what extent may government act through private entities, by private law contracts etc.?

B. U.S.: Department of Transportation et al v Association of American Railroads

(Department of Transportation, et al., Petitioners v. Association of American Railroads (575 U.S. 43 (2015)), accessible through https://supreme.justia.com/cases/federal/us/575/13-1080/case.pdf)

1. Instruction

Read the extract from the decision below and consider what criteria the Supreme Court uses to assess whether Amtrak is private or public. Do you agree with the criteria they used? Would you use other criteria in your country? Further, consider how the separation of powers relates to the assessment of the Supreme Court of whether Amtrak is private or public. Do you agree?

2. Summary of the facts

In 2008, Congress gave Amtrak (National Railroad Passenger Corporation) and the Federal Railroad Administration (FRA) the authority to issue "metrics and standards". The Association of American Railroads (AAR) argued that allowing a private entity, like Amtrak, to exercise joint authority in the issuance violated the constitution.

3. Reasoning and Finding

[…]

In 1970, Congress created the National Railroad Passenger Corporation, most often known as Amtrak. Later, Congress granted Amtrak and the Federal Railroad Administration (FRA) joint authority to issue "metrics and standards" that address the performance and scheduling of passenger railroad services. Alleging that the metrics and standards have substantial and adverse effects upon its members' freight services, respondent—the Association of American Railroads—filed this suit to challenge their validity. The defendants below, petitioners here, are the Department of Transportation, the FRA, and two individuals sued in their official capacity.

Respondent alleges the metrics and standards must be invalidated on the ground that Amtrak is a private entity and it was therefore unconstitutional for Congress to allow and direct it to exercise joint authority in their issuance. This argument rests on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected both of respondent's claims. The Court of Appeals for the District of Columbia Circuit reversed, finding that, for purposes of this dispute, Amtrak is a private entity and that Congress violated nondelegation principles in its grant of joint authority to Amtrak and the FRA. On that premise the Court of Appeals invalidated the metrics and standards.

Having granted the petition for writ of certiorari, 573 U. S. ___ (2014), this Court now holds that, for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Although Amtrak's actions here were governmental, substantial questions respecting the lawfulness of the metrics and standards— including questions implicating the Constitution's structural separation of powers and the Appointments Clause, U. S. Const., Art. II, §2, cl. 2—may still remain in the case. As those matters have not yet been passed upon by the Court of Appeals, this case is remanded.

I

A

Amtrak is a corporation established and authorized by a detailed federal statute enacted by Congress for no less a purpose than to preserve passenger services and routes on our Nation's railroads. See *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 383–384 (1995); *National Railroad Passenger Corporation* v. *Atchison, T. & S. F. R. Co.*, 470 U. S. 451, 453–457 (1985); see also Rail Passenger Service Act of 1970, 84 Stat. 1328. Congress recognized that Amtrak, of necessity, must rely for most of its operations on track systems owned by the freight railroads.

So, as a condition of relief from their common carrier duties, Congress required freight railroads to allow Amtrak to use their tracks and facilities at rates agreed to by the parties—or in the event of disagreement to be set by the Interstate Commerce Commission (ICC). See 45 U. S. C. §§561, 562 (1970 ed.). The Surface Transportation Board (STB) now occupies the dispute-resolution role originally assigned to the ICC. See 49 U. S. C. §24308(a) (2012 ed.). Since 1973, Amtrak has received a statutory preference over freight transportation in using rail lines, junctions, and crossings. See §24308(c).

The metrics and standards at issue here are the result of a further and more recent enactment. Concerned by poor service, unreliability, and delays resulting from freight traffic congestion, Congress passed the Passenger Rail Investment and Improvement Act (PRIIA) in 2008. See 122 Stat. 4907. Section 207(a) of the PRIIA provides for the creation of the metrics and standards:

"Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services." *Id.,* at 4916.

Section 207(d) of the PRIIA further provides:

"If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.,* at 4917.

The PRIIA specifies that the metrics and standards created under §207(a) are to be used for a variety of purposes. Section 207(b) requires the FRA to "publish a quarterly report on the

performance and service quality of intercity passenger train operations" addressing the specific elements to be measured by the metrics and standards. *Id.,* at 4916–4917. Section 207(c) provides that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements." *Id.,* at 4917. And §222(a) obliges Amtrak, within one year after the metrics and standards are established, to "develop and implement a plan to improve on-board service pursuant to the metrics and standards for such service developed under [§207(a)]." *Id.,* at 4932.

Under §213(a) of the PRIIA, the metrics and standards also may play a role in prompting investigations by the STB and in subsequent enforcement actions. For instance, "[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters," the STB may initiate an investigation "to determine whether and to what extent delays . . . are due to causes that could reasonably be addressed . . . by Amtrak or other intercity passenger rail operators." *Id.,* at 4925–4926. While conducting an investigation under §213(a), the STB "has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays" and shall "obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." *Id.,* at 4926. Following an investigation, the STB may award damages if it "determines that delays or failures to achieve minimum standards . . . are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation." *Ibid.* The STB is further empowered to "order the host rail carrier to remit" damages "to Amtrak or to an entity for which Amtrak operates intercity passenger rail service." *Ibid.*

B

In March 2009, Amtrak and the FRA published a notice in the Federal Register inviting comments on a draft version of the metrics and standards. App. 75–76. The final version of the metrics and standards was issued jointly by Amtrak and the FRA in May 2010. *Id.,* at 129– 144. The metrics and standards address, among other matters, Amtrak's financial performance, its scores on consumer satisfaction surveys, and the percentage of passenger-trips to and from underserved communities. Of most importance for this case, the metrics and standards also address Amtrak's on-time performance and train delays caused by host railroads. The standards associated with the on-time performance metrics require on-time performance by Amtrak trains at least 80% to 95% of the time for each route, depending on the route and year. *Id.,* at 133–135. With respect to "host-responsible delays"— that is to say, delays attributed to the railroads

along which Amtrak trains travel—the metrics and standards provide that "[d]elays must not be more than 900 minutes per 10,000 Train-Miles." *Id.,* at 138. Amtrak conductors determine responsibility for particular delays. *Ibid.,* n. 23. In the District Court for the District of Columbia, respondent alleged injury to its members from being required to modify their rail operations, which mostly involve freight traffic, to satisfy the metrics and standards. Respondent claimed that §207 "violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity [Amtrak] that participates in the very industry it is supposed to regulate." *Id.,* at 176–177, Complaint ¶51.

Respondent also asserted that §207 violates the Fifth Amendment Due Process Clause by "[v]esting the coercive power of the government" in Amtrak, an "interested private part[y]." […]. In its prayer for relief respondent sought, among other remedies, a declaration of §207's unconstitutionality and invalidation of the metrics and standards. *Id.,* at 177.

The District Court granted summary judgment to petitioners on both claims. See 865 F. Supp. 2d 22 (DC 2012). Without deciding whether Amtrak must be deemed private or governmental, it rejected respondent's nondelegation argument on the ground that the FRA, the STB, and the political branches exercised sufficient control over promulgation and enforcement of the metrics and standards so that §207 is constitutional. See *id.,* at 35. The Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court as to the nondelegation and separation of powers claim, reasoning in central part that because "Amtrak is a private corporation with respect to Congress's power to delegate . . . authority," it cannot constitutionally be granted the "regulatory power prescribed in §207." 721 F. 3d 666, 677 (2013). The Court of Appeals did not reach respondent's due process claim. See *ibid.*

II

In holding that Congress may not delegate to Amtrak the joint authority to issue the metrics and standards— authority it described as "regulatory power," *ibid.*—the Court of Appeals concluded Amtrak is a private entity for purposes of determining its status when considering the constitutionality of its actions in the instant dispute. That court's analysis treated as controlling Congress' statutory command that Amtrak "[…]is not a department, agency, or instrumentality of the United States Government.[…]" *Id.,* at 675 (quoting 49 U. S. C. §24301(a)(3)). The Court of Appeals also relied on Congress' pronouncement that Amtrak "[…]shall be operated and managed as a for-profit corporation.[…]" 721 F. 3d, at 675 (quoting §24301(a)(2)); see also *id.,* at 677 ("Though the federal government's involvement in Amtrak is considerable, Congress

has both designated it a private corporation and instructed that it be managed so as to maximize profit. In deciding Amtrak's status for purposes of congressional delegations, these declarations are dispositive"). Proceeding from this premise, the Court of Appeals concluded it was impermissible for Congress to "delegate regulatory authority to a private entity." *Id.,* at 670; see also *ibid.* (holding *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), prohibits any such delegation of authority).

That premise, however, was erroneous. Congressional pronouncements, though instructive as to matters within Congress' authority to address, see, *e.g., United States ex rel. Totten* v. *Bombardier Corp.*, 380 F. 3d 488, 491–492 (CADC 2004) (Roberts, J.), are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis under the Constitution. And an independent inquiry into Amtrak's status under the Constitution reveals the Court of Appeals' premise was flawed.

It is appropriate to begin the analysis with Amtrak's ownership and corporate structure. The Secretary of Transportation holds all of Amtrak's preferred stock and most of its common stock. Amtrak's Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. 49 U. S. C. §24302(a)(1). These eight Board members, in turn, select Amtrak's president. §24302(a)(1)(B); §24303(a). Amtrak's Board members are subject to salary limits set by Congress, §24303(b); and the Executive Branch has concluded that all appointed Board members are removable by the President without cause, see 27 Op. Atty. Gen. 163 (2003).
Under further statutory provisions, Amtrak's Board members must possess certain qualifications. Congress has directed that the President make appointments based on an individual's prior experience in the transportation industry, §24302(a)(1)(C), and has provided that not more than five of the seven appointed Board members be from the same political party, §24302(a)(3). In selecting Amtrak's Board members, moreover, the President must consult with leaders of both parties in both Houses of Congress in order to "provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak." §24302(a)(2).

In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. Amtrak must submit numerous annual reports to Congress and the President, detailing such information

as route-specific ridership and on-time performance. §24315. The Freedom of Information Act applies to Amtrak in any year in which it receives a federal subsidy, 5 U. S. C. §552, which thus far has been every year of its existence. Pursuant to its status under the Inspector General Act of 1978 as a "[…] designated Federal entity, […]" 5 U. S. C. App. §8G(a)(2), p. 521, Amtrak must maintain an inspector general, much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange Commission. Furthermore, Congress conducts frequent oversight hearings into Amtrak's budget, routes, and prices. See, *e.g.,* Hearing on Reviewing Alternatives to Amtrak's Annual Losses in Food and Beverage Service before the Subcommittee on Government Operations of the House Committee on Oversight and Government Reform, 113th Cong., 1st Sess., 5 (2013) (statement of Thomas J. Hall, chief of customer service, Amtrak); Hearing on Amtrak's Fiscal Year 2014 Budget: The Starting Point for Reauthorization before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Committee on Transportation and Infrastructure, 113th Cong., 1st Sess., p. 6 (2013) (statement of Joseph H. Boardman, president and chief executive officer, Amtrak). It is significant that, rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute. To take a few examples: Amtrak must "provide efficient and effective intercity passenger rail mobility," 49 U. S. C. §24101(b); "minimize Government subsidies," §24101(d); provide reduced fares to the disabled and elderly, §24307(a); and ensure mobility in times of national disaster, §24101(c)(9).

In addition to directing Amtrak to serve these broad public objectives, Congress has mandated certain aspects of Amtrak's day-to-day operations. Amtrak must maintain a route between Louisiana and Florida. §24101(c)(6). When making improvements to the Northeast corridor, Amtrak must apply seven considerations in a specified order of priority. §24902(b). And when Amtrak purchases materials worth more than $1 million, these materials must be mined or produced in the United States, or manufactured substantially from components that are mined, produced, or manufactured in the United States, unless the Secretary of Transportation grants an exemption. §24305(f).

Finally, Amtrak is also dependent on federal financial support. In its first 43 years of operation, Amtrak has received more than $41 billion in federal subsidies. In recent years these subsidies have exceeded $1 billion annually. See Brief for Petitioners 5, and n. 2, 46.

Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers.

Respondent urges that Amtrak cannot be deemed a governmental entity in this respect. Like the Court of Appeals, it relies principally on the statutory directives that Amtrak "shall be operated and managed as a for profit corporation" and "is not a department, agency, or instrumentality of the United States Government." §§24301(a)(2)–(3). In light of that statutory language, respondent asserts, Amtrak cannot exercise the joint authority entrusted to it and the FRA by §207(a). On that point this Court's decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U. S. 374 (1995), provides necessary instruction. In *Lebron*, Amtrak prohibited an artist from installing a politically controversial display in New York City's Penn Station. The artist sued Amtrak, alleging a violation of his First Amendment rights. In response Amtrak asserted that it was not a governmental entity, explaining that "its charter's disclaimer of agency status prevent[ed] it from being considered a Government entity." *Id.,* at 392. The Court rejected this contention, holding "it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Ibid.* To hold otherwise would allow the Government "to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.,* at 397.

Noting that Amtrak "is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees," *id.,* at 398, and that the Government exerts its control over Amtrak "not as a creditor but as a policymaker," the Court held Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.,* at 394, 399.

Lebron teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status. *Lebron* involved a First Amendment question, while in this case the challenge is to Amtrak's joint authority to issue the metrics and standards. But "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond* v. *United States*, 564 U. S. ___, ___ (2011) (slip op., at 10). Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor. The political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Accordingly, the Court holds that Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case.

III

Because the Court of Appeals' decision was based on the flawed premise that Amtrak should be treated as a private entity, that opinion is now vacated. On remand, the Court of Appeals, after identifying the issues that are properly preserved and before it, will then have the instruction of the analysis set forth here. Respondent argues that the selection of Amtrak's president, who is appointed "not by the President . . . but by the other eight Board Members," "call[s] into question Amtrak's structure under the Appointments Clause," Brief for Respondent 42; that §207(d)'s arbitrator provision "is a plain violation of the nondelegation principle" and the Appointments Clause requiring invalidation of §207(a), *id.,* at 26; and that Congress violated the Due Process Clause by "giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry," *id.,* at 43. Petitioners, in turn, contend that "the metrics and standards do not reflect the exercise of 'rulemaking' authority or permit Amtrak to 'regulate other private entities,'" and thus do not raise nondelegation concerns. Reply Brief 5 (internal citation omitted). Because "[o]urs is a court of final review and not first view," *Zivotofsky* v. *Clinton*, 566 U. S. ___, ___ (2012) (slip op., at 12) (internal quotation marks omitted), those issues—to the extent they are properly before the Court of Appeals—should be addressed in the first instance on remand.

The judgment of the Court of Appeals for the District of Columbia Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion. […]

JUSTICE ALITO, concurring. […]

I

This case, on its face, may seem to involve technical issues, but in discussing trains, tracks, metrics, and standards, a vital constitutional principle must not be forgotten: Liberty requires accountability.

When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress "sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 390 (1995).

Recognition that Amtrak is part of the Federal Government raises a host of constitutional questions. […]

III

I turn next to the Passenger Rail Investment and Improvement Act of 2008's (PRIIA) arbitration provision. 122 Stat. 4907. Section 207(a) of the PRIIA provides that "the Federal Railroad Administration [(FRA)] and Amtrak shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." *Id.,* at 4916. In addition, §207(c) commands that "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate [those] metrics and standards . . . into their access and service agreements." Under §213(a) of the PRIIA, moreover, "the metrics and standards also may play a role in prompting investigations by the [Surface Transportation Board (STB)] and in subsequent enforcement actions." *Ante*, at 4.

This scheme is obviously regulatory. Section 207 provides that Amtrak and the FRA "shall jointly" create new standards, cf. *e.g.,* 12 U. S. C. §1831m(g)(4)(B) ("The appropriate Federal banking agencies shall jointly issue rules of practice to implement this paragraph"), and that Amtrak and *private rail carriers* "shall incorporate" those standards into their agreements whenever "practicable," cf. *e.g., BP America Production Co.* v. *Burton*, 549 U. S. 84, 88 (2006) (characterizing a command to "'audit and reconcile, to the extent practicable, all current and past lease accounts'" as creating "duties" for the Secretary of the Interior (quoting 30 U. S. C. §1711(c)(1))). The fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory scheme.

"As is often the case in administrative law," moreover, "the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate." 721 F. 3d 666, 672 (CADC 2013). Here, though the nexus between regulation, statutory mandate, and penalty is not direct (for, as the Government explains, there is a pre-existing requirement that railroads give preference to Amtrak, see Brief for Petitioners 31–32 (citing 49 U. S. C. §§24308(c), (f)), the metrics and standards inherently have a "coercive effect," *Bennett* v. *Spear*, 520 U. S. 154, 169 (1997), on private conduct. Even the United States concedes, with understatement, that there is "perhaps some incentivizing effect associated with the metrics and standards." Brief for Petitioners 30. Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. See *Bennett*, *supra,* at 169–171. That is regulatory power.

The language from §207 quoted thus far should raise red flags. In one statute, Congress says Amtrak is not an "agency." 49 U. S. C. §24301(a)(3). But then Congress commands Amtrak to act like an agency, with effects on private rail carriers. No wonder the D. C. Circuit ruled as it did. […]

When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative Powers." Art. I, §1. Nor are they vested with the "executive Power," Art. II, §1, cl. 1, which belongs to the President. Indeed, it raises "[d]ifficult and fundamental questions" about "the delegation of Executive power" when Congress authorizes citizen suits. *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 197 (2000) (KENNEDY, J., concurring). A citizen suit to enforce existing law, however, is nothing compared to delegated power to create new law. By any measure, handing off regulatory power to a private entity is "legislative delegation in its most obnoxious form." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936).

For these reasons, it is hard to imagine how delegating "binding" tie-breaking authority to a private arbitrator to resolve a dispute between Amtrak and the FRA could be constitutional. No private arbitrator can promulgate binding metrics and standards for the railroad industry. Thus, if the term "arbitrator" refers to a private arbitrator, or even the *possibility* of a private arbitrator, the Constitution is violated. See 721 F. 3d, at 674 ("[T]hat the recipients of illicitly delegated authority opted not to make use of it is no antidote. It is *Congress's* decision to delegate that is unconstitutional" (citing *Whitman*, *supra,* at 473)). As I read the Government's briefing, it does not dispute any of this (other than my characterization of the PRIIA as regulatory, which it surely is). Rather than trying to defend a private arbitrator, the Government argues that the

Court, for reasons of constitutional avoidance, should read the word "arbitrator" to mean "public arbitrator." The Government's argument, however, lurches into a new problem: Constitutional avoidance works only if the statute is susceptible to an alternative reading and that such an alternative reading would itself be constitutional.

Here, the Government's argument that the word "arbitrator" does not mean "private arbitrator" is in some tension with the ordinary meaning of the word. Although Government arbitrators are not unheard of, we usually think of arbitration as a form of "private dispute resolution." See, *e.g., Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 685 (2010).
Likewise, the appointment of a public arbitrator here would raise serious questions under the Appointments Clause. Unless an "inferior Office[r]" is at issue, Article II of the Constitution demands that the President appoint all "Officers of the United States" with the Senate's advice and consent. Art. II, §2, cl. 2. This provision ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people. See *Free Enterprise Fund*, 561 U. S., at 497–498 (citing The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton)).

The Court has held that someone "who exercis[es] significant authority pursuant to the laws of the United States" is an "Officer," *Buckley* v. *Valeo*, 424 U. S. 1, 126 (1976) (*per curiam*), and further that an officer who acts without supervision must be a principal officer, see *Edmond* v. *United States*, 520 U. S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"). While some officers may be principal even if they have a supervisor, it is common ground that an officer without a supervisor must be principal. See *id.,* at 667 (Souter, J., concurring in part and concurring in judgment).

Here, even under the Government's public-arbitrator theory, it looks like the arbitrator would be making law without supervision—again, it is "binding arbitration." Nothing suggests that those words mean anything other than what they say. This means that an arbitrator could set the metrics and standards that "shall" become part of a private railroad's contracts with Amtrak whenever "practicable." As to that "binding" decision, who is the supervisor? Inferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential

appointee has at least signed off on it. See 75 Fed. Reg. 26839 (2010) (placing the metrics and standards in the Federal Register); *Edmond*, *supra*, at 665. […]

In sum, while I entirely agree with the Court that Amtrak must be regarded as a federal actor for constitutional purposes, it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution. The constitutional issues that I have outlined (and perhaps others) all flow from the fact that no matter what Congress may call Amtrak, the Constitution cannot be disregarded. […]

JUSTICE THOMAS, concurring in the judgment. […]

A

Until the case arrived in this Court, the parties proceeded on the assumption that Amtrak is a private entity, albeit one subject to an unusual degree of governmental control. The Court of Appeals agreed. 721 F. 3d 666, 674–677 (CADC 2013). Because it also concluded that Congress delegated regulatory power to Amtrak, *id.,* at 670–674, and because this Court has held that delegations of regulatory power to private parties are impermissible, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936), it held the delegation to be unconstitutional, 721 F. 3d, at 677. Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called "private nondelegation doctrine" flows logically from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the "private nondelegation doctrine" is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.

For this reason, a conclusion that Amtrak is private – that is, not part of the Government at all – would necessarily mean that it cannot exercise these three categories of governmental power. But the converse is not true: A determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so. An entity that "was created by the Government, is controlled by the Government, and operates for the Government's benefit," ante, at 10 (majority opinion), but that is not properly constituted to exercise a power under one of the Vesting Clauses, is no better

qualified to be a delegatee of that power than is a purely private one. To its credit, the majority does not hold otherwise. It merely refutes the Court of Appeals' premise that Amtrak is private. But this answer could be read to suggest, wrongly, that our conclusion about Amtrak's status has some constitutional significance for "delegation" purposes. […]

In this case, Congress has permitted a corporation subject only to limited control by the President to create legally binding rules. These rules give content to private railroads' statutory duty to share their private infrastructure with Amtrak. This arrangement raises serious constitutional Questions on which the majority's holding that Amtrak is a governmental entity is all but a non sequitur. These concerns merit close consideration by the courts below and by this Court if the case reaches us again. We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.

4. Questions on the decision

1. Which criteria did the Supreme Court use to assess whether Amtrak is private or public?
2. Do you agree with the criteria they used?
3. What other criteria could also have been used? Would you use other criteria in your country?
4. How does the separation of powers relate to the assessment of the Supreme Court of whether Amtrak is private or public?
5. Do you know of other constitutional principles that have different consequences depending on whether something is of private or public legal nature?

C. AU: Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail

(Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail [2015] HCA 11; 256 CLR 171, accessible through https://jade.io/article/388016)

1. *Instruction*

Read the extract from the decision and ask yourself what was decisive for the Supreme Court to qualify Queensland Rail. What significance did the court attach to the asserted "intention of the Parliament" or the labelling "is not a body corporate"? Do you agree with the arguments? What role did profit play in the assessment?

2. *Summary of the facts*

In 2013, the Queensland Rail Transit Authority Act 2013 (Qld) established that Queensland Rail Ltd is not bound by the Fair Work Act (as was previously the case) but rather by the Industrial Relations Act 1999 on the basis that Queensland Rail wasn't a "body corporate". The unions with which Queensland Rail had concluded industrial relations agreements argued that it was in fact a constitutional corporation and that their relations should still be regulated by the Fair Work Act.

3. *Reasoning and Finding*

[…]

1 The *Queensland Rail Transit Authority Act* 2013 (Q) ("the QRTA Act") established[1] the Queensland Rail Transit Authority ("the Authority"). The Authority is now called[2] Queensland Rail. The Authority can create and be made subject to legal rights and duties, which are its rights and its duties[3]. It can sue and be sued in its name[4]. It can own property[5].

2 The QRTA Act provides[6] that the Authority "is not a body corporate". The QRTA Act provides[7] that the Authority does not represent the State, and it follows from this provision, coupled with the provisions which give the Authority separate legal personality, that the Authority is not, and is not a part of, the body politic which is the State of Queensland[8].

1 s 6(1).
2 s 63.
3 s 7.
4 s 7(4).
5 s 7(1)(b).
6 s 6(2).
7 s 6(3).
8 No party or intervener, other than the Attorney-General for Victoria, submitted that the Authority is part of the body politic which is the State of Queensland.

3 The Authority operates as a labour hire company, providing labour used by Queensland Rail Limited ("QRL") to operate railway services in Queensland. QRL is a company governed by the *Corporations Act* 2001 (Cth). Pursuant to s 67 of the QRTA Act, the Authority holds all the shares in QRL.

4 Is the Authority a "trading or financial corporation formed within the limits of the Commonwealth" within the meaning of s 51(xx) of the Constitution? If it is, the relations between the Authority and its employees are governed by federal industrial relations legislation. If it is not, State industrial relations legislation applies.

5 The Authority accepts that it is an artificial legal entity formed within the limits of the Commonwealth. It submits that it is not a trading or financial corporation. Rather, it submits, it is an entity which is not a "corporation" and which is not a "trading or financial" corporation. These submissions should be rejected. The Authority is a trading or financial corporation within the meaning of s 51(xx).

The litigation

6 The plaintiffs are all associations or organisations of employees. Some are registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth); some are registered under the *Industrial Relations Act* 1999 (Q) ("the Queensland Industrial Relations Act"). Members of the State organisations are also members of the federal associations.

7 In a proceeding brought in the original jurisdiction of this Court, the plaintiffs allege that the Authority is a trading corporation within the meaning of s 51(xx) of the Constitution. They allege that it follows that the Authority is a "constitutional corporation" as defined in s 12 of the *Fair Work Act* 2009 (Cth)[9], and a "national system employer"[10] for the purposes of that Act. The plaintiffs allege that provisions of the QRTA Act[11] (which apply the Queensland Industrial Relations Act to the Authority's employees and treat some federal enterprise agreements as certified under the Queensland Industrial Relations Act) are inconsistent with the *Fair Work Act* 2009 and invalid to the extent of that inconsistency by operation of s 109 of the Constitution. The plaintiffs also allege that ss 691A-691D of the Queensland Industrial Relations Act

9 "[A] corporation to which paragraph 51(xx) of the Constitution applies".
10 s 14(1)(a).
11 ss 69, 72 and 73.

(which apply to certain industrial instruments applying to "the employment of persons in a government entity"[12]) are inconsistent with the *Fair Work Act* 2009, and thus invalid by operation of s 109 of the Constitution so far as they purport to apply to the Authority, its employees or two identified industrial instruments[13].

8 The second defendant to the proceeding (the Queensland Industrial Relations Commission) filed a submitting appearance.

9 The plaintiffs and the Authority (as the active defendant in the proceeding) agreed in stating questions of law for the opinion of the Full Court in the form of a special case based upon certain agreed facts. The first two questions ask whether the Authority is a "corporation" within the meaning of s 51(xx) and, if so, whether it is a "trading corporation". Question 3 asks whether the *Fair Work Act* 2009 applies to the Authority and its employees to the exclusion of the QRTA Act or the Queensland Industrial Relations Act or both. Questions 4 and 5 relate to relief and costs.

Section 51(xx)

10 The questions stated by the parties assume that it is useful to direct separate attention to what is a "corporation" and what is a "trading corporation" within the meaning of s 51(xx). The validity of the assumption was not directly challenged by any party or intervener and it is convenient to proceed without examining that issue. But this must not obscure the obvious importance of recognising that the subject matter of s 51(xx) is not "corporations"; it is "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". And neither the word "corporations", where twice appearing, nor the collocation "trading or financial corporations formed within the limits of the Commonwealth" is to be construed without regard to the context within which the expression appears.

The competing submissions

11 The chief point of difference between the plaintiffs and the Authority was whether the Authority is a "corporation" within the meaning of the second limb of s 51(xx). The plaintiffs submitted that "an entity established under law with its own name, and with separate legal

12 s 691B(1).

13 QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011.

personality and perpetual succession, is a corporation within the meaning of s 51(xx)". The Attorney-General of the Commonwealth, intervening, proffered a generally similar description of what is a corporation: "any juristic entity with distinct, continuing legal personality (evidenced by, for example, perpetual succession, the right to hold property and the right to sue and be sued) that is not a body politic reflected or recognised in the Constitution".

12 By contrast, the Authority (with the support of the Attorneys-General for New South Wales and Victoria) submitted that not all artificial entities having separate legal personality are corporations. The Authority submitted that "the intention of Parliament is the defining feature of whether an artificial juristic entity is created as a corporation, and that intention is manifested either by express words or by necessary implication". Hence, so the Authority submitted, the express provision, by s 6(2) of the QRTA Act, that the Authority "is not a body corporate" is especially significant because it reveals the intention of the Parliament and requires the conclusion that the Authority is not a "corporation".

13 The Attorney-General for Victoria submitted that a State has broad scope to create bodies which have a separate legal existence as right and duty bearing entities but which are, or are not, corporations. The submission proffered no criterion for identifying the characteristics that are necessary or sufficient to identify the entity as a "corporation", other than to submit that "[i]f Parliament intended to establish a corporation, it may be expected in a modern statute that express terms of incorporation would be used". Hence, the submission appeared to go no further than the Authority's submission that it is the "intention" of the enacting Parliament which is determinative.

14 The Authority further submitted that, even if it is a "corporation", it is not a "trading or financial corporation". No party or intervener suggested that the Authority is a financial corporation and that aspect of the second limb of s 51(xx) may be left aside from further examination. The Authority accepted that, apart from the case where a corporation is dormant or has barely begun to trade, an "activities" test[14] determines whether it is a "trading corporation". But it submitted that its activities do not warrant it being classed as a trading corporation because its only activity is to provide employees to a company not at arm's length (QRL) for an amount which yields no profit for the Authority.

[14] cf *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; [1979] HCA 6.

A "corporation"?

15 For the purposes of deciding this case, it is not necessary to attempt to state exhaustively the defining characteristics of a corporation (whether a "foreign corporation" or a "trading or financial corporation"). Whether the Authority is a trading corporation can be answered without attempting that task.

16 The QRTA Act creates the Authority as a distinct entity. The Authority can have rights and duties. It is, therefore, a separate legal entity: one of those "basic units" of the legal system which "possess the capacity of being parties to the claim-duty and power-liability relationships"[15].

17 At the time of federation[16], and for centuries before that time[17], the only artificial persons in English law were corporations, and corporations were either aggregate or sole. The development of the trust in English law had permitted the establishment and maintenance of arrangements about property and its use without the interposition or creation of any separate artificial legal entity. And in this respect English law differed markedly from systems of law such as that provided by the German Civil Code[18] under which "the advantage of corporateness could be acquired by societies of divers sorts and kinds"[19].

18 The Authority is neither a corporation sole nor a corporation aggregate of a kind that existed at the time of federation. It bears no resemblance to any of the ecclesiastical[20] or other forms[21] of corporation sole then known, and it has no corporators who join, or are joined,

15 Paton, *A Text-Book of Jurisprudence*, 3rd ed (1964) at 351-352.

16 See, for example, Maitland, "The Corporation Sole", (1900) 16 *Law Quarterly Review* 335 at 335.

17 Coke, *The First Part of the Institutes of the Lawes of England, or, A Commentarie upon Littleton*, (1628) at §1, 2a, §413, 250a.

18 Maitland, "Trust and Corporation", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911), vol 3, 321.

19 Maitland, "The Making of the German Civil Code", in Fisher (ed), *The Collected Papers of Frederic William Maitland*, (1911), vol 3, 474 at 482.

20 See Maitland, "The Corporation Sole", (1900) 16 *Law Quarterly Review* 335.

21 See, for example, *Fulwood's Case* (1591) 4 Co Rep 64b [76 ER 1031] (concerning the Chamberlain of the City of London as a corporation sole) and *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a [77 ER 960] (concerning the King as a corporation sole). See also *Financial Administration and Audit Act* 1977 (Q), s 43 and *Financial Accountability Act* 2009 (Q), s 53 (preserving, continuing and constituting the Treasurer of Queensland as a corporation sole for some purposes).

together to form the separate entity. (The QRTA Act provides[22] expressly that "the Authority is not constituted by the members of the board".)

19 But the Authority expressly disclaimed any argument that "corporation" as used in either limb of s 51(xx) should be read as restricted to corporations of a kind that were known to foreign law or to English or colonial law at the time of federation. And the Authority was right to do so. It is not to be supposed that the only kinds of "foreign corporations" and "trading or financial corporations" with respect to which s 51(xx) gives legislative power are bodies constituted and organised in the way in which corporations of those kinds were constituted and organised in 1900.

20 Foreign corporations are constituted and organised according to the law of another jurisdiction. That law may, and commonly will, differ from Australian law, sometimes markedly. Absent referral of power under s 51(xxxvii), the trading or financial corporations formed within the limits of the Commonwealth to which s 51(xx) refers will typically be constituted and organised according to the laws of a State. (No party or intervener challenged *New South Wales v The Commonwealth* (*The Incorporation Case*)[23].) Hence, often, the entities with which s 51(xx) deals are entities which owe their existence and form to a law other than a law of the federal Parliament.

21 Before and after federation, there were many radical changes to the legislation (both English and colonial) under which corporations could be constituted and were regulated. Relevant nineteenth century developments were described in *New South Wales v The Commonwealth* (*Work Choices Case*)[24] and need not be repeated here. It is enough to observe that issues about corporations and their regulation had been in "legislative and litigious ferment"[25] in the later years of the nineteenth century and, after initial hesitation, were seen as warranting the grant of national legislative power.

22 There is no reason to read s 51(xx) as granting power to deal only with classes of artificial legal entities having characteristics fixed at the time of federation. To read the provision in that way would hobble its operation. The course of events in the nineteenth century described in the

22 s 14(2).
23 (1990) 169 CLR 482; [1990] HCA 2.
24 (2006) 229 CLR 1 at 90-98 [96]-[124]; [2006] HCA 52.
25 *Work Choices Case* (2006) 229 CLR 1 at 95 [113].

Work Choices Case points firmly against reading the provision as so restricted. And there is no textual or contextual reason to conclude that the Parliament's power with respect to trading or financial corporations formed within the limits of the Commonwealth should be frozen in time by limiting the power to entities of a kind that existed at federation. Nor is there any textual or contextual reason to conclude that the Parliament should have legislative power with respect only to those entities constituted and organised under the laws of foreign states which are entities of a kind generally similar to those that existed or could be formed under foreign law as it stood in all its various forms in 1900.

23 Accepting, then, that the Authority was right to disclaim an argument that a "corporation" must be an entity of a kind known in 1900, what is it that marks an artificially created legal entity as a "trading or financial corporation formed within the limits of the Commonwealth"? As has been noted, the Authority sought to answer this question by reference only to whether the Parliament providing for the creation of the entity "intended" to create a "corporation". But this answer gave no fixed content to what is a "corporation". The Authority's submissions proffered no description, let alone definition, of what it means to say that the entity created is or is not a "corporation". Hence the "intention" to which the Authority referred, and upon which it relied as providing the sole criterion for determining what is or is not within the legislative power of the Commonwealth, was an intention of no fixed content. Rather, it was an intention to apply, or in this case not to apply, a particular label. A labelling intention of this kind provides no satisfactory criterion for determining the content of federal legislative power.

Section 6(2)

24 The Authority's submissions about "intention" were closely related to, even dependent upon, s 6(2) of the QRTA Act and its provision that the Authority is not a "body corporate". But how is s 6(2) to be construed, and what is the work that it does?

25 The Authority's submissions treated "body corporate" (in s 6(2)) as synonymous with "corporation" (in the phrase "trading or financial corporations"). But treating the two different expressions in that way assumed rather than demonstrated that a statutorily created artificial legal entity (that is not a body politic) may be a form of right and duty bearing entity which is distinct from entities called (interchangeably) either "corporations" or "bodies corporate". That is, the submissions took as their premise that there is a class of artificial right and duty bearing

entities (other than bodies politic) called either "corporations" or "bodies corporate" and a class of those entities which are not, and cannot be, described by either expression.

26 The assumed division of artificial legal entities that are not bodies politic between "corporations" or "bodies corporate" on the one hand, and "other artificial legal entities" on the other, cannot be made. No criteria which would differentiate between the two supposed classes of entities were identified. Neither s 6(2) itself, nor the QRTA Act more generally, supports a division of that kind. The premise for the Authority's submissions is not established.

27 If s 6(2) does not support (or make) a division of artificial legal entities between "corporations" or "bodies corporate" and "other artificial legal entities", what is the purpose or effect of its provision?

28 Taken as a whole, the QRTA Act makes plain that it proceeds on the footing that the Authority's relations with its employees are not governed by the *Fair Work Act* 2009. It may be accepted, therefore, that one purpose of the QRTA Act was to create an entity which would provide labour to QRL in circumstances where the relations between employer and employee would be governed by State industrial relations law. If s 6(2) were to be understood as intended to do no more than take the Authority outside the federal industrial relations law, by taking the Authority outside the reach of s 51(xx), it would be necessary to observe that a State Parliament cannot determine the limits of federal legislative power. More particularly, it would be necessary to observe that whether an entity is a corporation of a kind referred to in s 51(xx) presents an issue of substance, not mere form or label. But s 6(2) has a larger purpose than simply attaching a label designed to avoid the application of an otherwise applicable federal law.

29 Providing that the Authority "is not a body corporate" engages other Queensland statutory provisions. In particular, although the Authority is what the *Government Owned Corporations Act* 1993 (Q) ("the GOC Act") calls a "government entity"[26], the Authority is not a government entity that is "established as a body corporate under an Act or the Corporations Act"[27]. Because that is so, the Authority cannot be declared[28] by regulation to be a "government owned corporation" for the purposes of the GOC Act. In addition, it may be that the provision that the Authority is not a body corporate could be said to deny the application of s 46 of the *Acts*

[26] s 4(b).
[27] s 5(a).
[28] s 5(b).

Interpretation Act 1954 (Q). Section 46 provides that a provision of an Act relating to offences punishable on indictment or summary conviction "applies to bodies corporate as well as individuals". Whether s 6(2) of the QRTA Act does have the effect of denying the operation of s 46 of the *Acts Interpretation Act* need not be decided.

30 The exclusion of the application of the GOC Act by s 6(2) of the QRTA Act providing that the Authority is not a body corporate means that the provision is more than mere labelling. Section 6(2) takes its place, and is to be given its meaning and application, in the context provided by the Queensland statute book generally and the GOC Act in particular. Understood in that context, s 6(2) provides that the entity which the QRTA Act creates is one with which other provisions of Queensland law engage in a particular way. Section 6(2) is not to be understood as providing that the entity created is one of a genus of artificial legal entities distinct from what s 51(xx) refers to as "corporations".

The decided cases

31 Reference was made in argument to a number of decisions which it was suggested throw light on whether the Authority is a "corporation". Particular emphasis was given to this Court's decisions in *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd*[29] and *Williams v Hursey*[30], as well as some of the cases about the status of trade unions in the United Kingdom[31]. But neither of the cases in this Court decided any issue about the reach of the legislative power conferred by s 51(xx) and, of course, the British trade union cases were even further removed from the issues which must be decided in this case. Not only are the British trade union cases about issues far removed from the issues in this case, they are decisions which were very much the product of their times and the legislation which then governed the organisation of labour and liability for trade disputes. They offer no useful guidance to the resolution of the present issues. It is, however, necessary to say something about each of the decisions of this Court and the decision of the Supreme Court of the United States in *Liverpool Insurance Company v Massachusetts*[32], which was referred[33] to in *Chaff and Hay Acquisition Committee*.

29 (1947) 74 CLR 375; [1947] HCA 20.
30 (1959) 103 CLR 30; [1959] HCA 51.
31 *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426; *National Union of General and Municipal Workers v Gillian* [1946] KB 81; *Bonsor v Musicians' Union* [1956] AC 104.
32 77 US 566 (1870).
33 (1947) 74 CLR 375 at 388 per Starke J.

32 The issue in *Chaff and Hay Acquisition Committee* was whether the committee, a statutory body created under South Australian legislation, was a legal entity which the courts of New South Wales should recognise as competent to sue or be sued in its own name. This Court held that the committee had an independent legal existence which should be recognised. It rejected arguments that recognition should not be given to the committee because it was "to operate as a Crown agent"[34] or that it had but a temporary existence[35]. As the Full Court of the Supreme Court of New South Wales did[36], this Court noted[37] that the statute constituting the committee had not used express words of incorporation[38] and that the committee was not "created a corporation according to the requirements of English law in force in South Australia"[39]. But neither of those observations was treated as determinative of the issue that was before the Court: could the committee sue and be sued in its own name? Understood in the light of that issue, what was said in *Chaff and Hay Acquisition Committee* gives no direct assistance in deciding this case. In particular, and contrary to the tenor of the Authority's submissions, *Chaff and Hay Acquisition Committee* does not support drawing a distinction between corporations of the kind or kinds referred to in s 51(xx) and other forms of artificial legal entity that are not bodies politic.

33 In *Liverpool Insurance Company*, the Supreme Court of the United States decided[40] that, despite declarations in the English statutes constituting the insurance company that it was not a corporation, "[s]uch local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body". Especially was that so when, as the Supreme Court rightly observed[41], what was said in the relevant English statutes was directed to denying that the members of the insurance company had limited liability and did not detract from what the Court called the "true character" of the company.

34 The decision in *Liverpool Insurance Company* offers no guidance about the reach of the legislative power given by s 51(xx). It does emphasise, however, the need to examine the

34 (1947) 74 CLR 375 at 379.
35 (1947) 74 CLR 375 at 384.
36 *J A Hemphill & Sons Pty Ltd v Chaff and Hay Acquisition Committee* (1946) 47 SR (NSW) 218 at 220.
37 (1947) 74 CLR 375 at 385 per Latham CJ, 388 per Starke J.
38 cf *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517 at 534.
39 (1947) 74 CLR 375 at 388 per Starke J.
40 77 US 566 at 576 (1870).
41 77 US 566 at 576 (1870).

reasons for, and effect to be given to, a legislative declaration that a body is or is not a "body corporate" or a "corporation".

35 *Williams v Hursey* concerned the liability of an organisation of employees to damages for the tort of conspiracy and directed particular attention to whether the Waterside Workers' Federation and its Hobart "branch" could sue or be sued. The Federation was an organisation registered under the *Conciliation and Arbitration Act* 1904 (Cth); the Hobart branch was not registered under that Act or the *Trade Unions Act* 1889 (Tas), which reproduced the English *Trade Union Acts* of 1871 and 1876. Members of the Hobart branch were also members of the registered organisation.

36 Fullagar J, with whose reasons Dixon CJ and Kitto J agreed, made two points of present relevance. First, he said[42] that the *Conciliation and Arbitration Act* 1904 gave the Federation, as a registered organisation, "what I would not hesitate to call a corporate character – an independent existence as a legal person". Second, Fullagar J said[43] that "[t]he notion of qualified legal *capacity* is intelligible, but the notion of qualified legal *personality* is not" (emphasis added). Hence, the section of the *Conciliation and Arbitration Act* 1904 which provided that every registered organisation "shall for the purposes of the Act have perpetual succession and a common seal and may own possess and deal with any real or personal property"[44] was, without more, "quite enough to give to a registered organization the full character of a corporation"[45]. Neither the particular statutory root of incorporation nor the particular capacities which the body was given were treated as determining whether it had "the full character of a corporation". Rather, independent existence as a legal person, which is to say recognition as a right and duty bearing entity, was the determinative consideration.

37 *Williams v Hursey* points firmly against accepting the Authority's submissions that corporations, or bodies corporate, form a class of statutorily created right and duty bearing entities distinct from another class of statutorily created right and duty bearing entities identified only according to whether the constituting legislation (and legislature) "intended" to create the entity concerned as a corporation. It also points against accepting the submissions of the Attorney-General for Victoria that the power of a State to create artificial legal entities gives it a

42 (1959) 103 CLR 30 at 52.
43 (1959) 103 CLR 30 at 52.
44 (1959) 103 CLR 30 at 52 per Fullagar J, citing s 136 of the *Conciliation and Arbitration Act* 1904.
45 (1959) 103 CLR 30 at 52.

"broad scope" to create a right and duty bearing entity which is not a corporation for the purposes of s 51(xx).

38 Like the Federation considered in *Williams v Hursey*, the Authority is created as a separate right and duty bearing entity. It may own, possess and deal with real or personal property. It is an entity which is to endure regardless of changes in those natural persons who control its activities and, in that sense, has "perpetual succession". Its constituting Act provides for mechanisms by which its assumption of rights and duties may be formally recorded and signified. The Authority has "the full character of a corporation".

A "trading corporation"?

39 As already noted, the Authority submitted that its activities were not such as to make it a trading corporation. In its written submissions, the Authority submitted that it dealt only with a related entity, QRL, and made no profit from those dealings, and that these "peculiar" activities did not make it a trading corporation. The Authority did not elaborate on these matters in oral argument.

40 By contrast, some of the interveners, especially the Attorney-General of the Commonwealth and the Attorney-General for Victoria, advanced detailed submissions about what test or tests should be applied in deciding whether a corporation is a trading corporation. In order to decide this case, however, it is not necessary to examine those submissions in any detail. Instead, it is enough to conclude that no matter whether attention is directed to the constitution and purposes of the Authority, or what it now does, or some combination of those considerations, the Authority must be found to be a trading corporation.

41 The QRTA Act established the Authority as an entity having functions which included "managing railways"[46], "controlling rolling stock on railways"[47], "providing rail transport services, including passenger services"[48] and "providing services relating to rail transport services"[49]. The QRTA Act provides[50] that the Authority is to "carry out its functions as a commercial enterprise". Provision is made[51] for the Authority to pay dividends to the State and, to

46 s 9(1)(a).
47 s 9(1)(b).
48 s 9(1)(c).
49 s 9(1)(d).
50 s 10(1).
51 s 55.

that end, the Authority is obliged[52] to give the responsible Ministers in May each year an estimate of its profit for the financial year. Not only that, the Authority is liable[53] to pay to the Treasurer, for payment into the consolidated fund of the State, amounts equivalent to the amounts for which the Authority would have been liable if it had been liable to pay tax imposed under a Commonwealth Act. In light of these provisions, the conclusions that the Authority was constituted with a view to engaging in trading and doing so with a view to profit are irresistible.

42 Even if the Authority is treated as now doing nothing more than supplying labour to QRL (a related entity) for the purposes of QRL providing rail services and even if, as the Authority submitted, the Authority chooses to supply that labour at a price which yields it no profit, those features of its activities neither permit nor require the conclusion that the Authority is not a trading corporation. Labour hire companies are now a common form of enterprise. The engagement of personnel by one enterprise for supply of their labour to another enterprise is a trading activity. That the parties to the particular supply arrangement are related entities does not deny that characterisation of the activity. That the prices for supply are struck at a level which yields no profit to the supplier likewise does not deny that the supplier is engaged in a trading activity.

43 In combination, these considerations require the conclusion that the Authority is a trading corporation. It is not necessary to consider which of them is or are necessary or sufficient to support the conclusion.

Inconsistency of laws

44 Little attention was given in oral argument to the question asked in the special case about inconsistency between the QRTA Act and the *Fair Work Act* 2009 or between the Queensland Industrial Relations Act and the *Fair Work Act* 2009. Instead, argument proceeded on the footing that, if the Authority is held to be a trading corporation, the inconsistency consequences urged by the plaintiffs would follow. The answer which is given to the question about inconsistency of laws follows from the conclusion that the Authority is a trading corporation but should be framed by reference to the particular provisions which were the focus of the litigation.

52 s 56(1)(a).
53 s 62.

Conclusion and orders

45 The plaintiffs are entitled to have the questions asked in the special case answered substantially in their favour. Having regard, however, to what has been said about the parties' assumption that it is useful to ask a separate question about whether the Authority is a "corporation" within the meaning of s 51(xx), it is better to provide no answer to that question and, instead, answer the second question, which directs attention to whether the Authority is a "trading corporation". What relief the plaintiffs should have in the proceedings is a matter better dealt with by a single Justice.

The questions in the special case should be answered as follows:

[…]

2 […] [I]s Queensland Rail a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution?

Answer: Yes.

3 If so, does the *Fair Work Act* 2009 (Cth) apply to Queensland Rail and its employees by the operation of s 109 of the Constitution, to the exclusion of the [*Queensland Rail Transit Authority Act* 2013 (Q)] or the *Industrial Relations Act* 1999 (Q) or both?

Answer: Except to say that the *Fair Work Act* 2009 (Cth) applies to Queensland Rail as a "national system employer" for the purposes of that Act and that

(a) ss 69, 72 and 73 of the *Queensland Rail Transit Authority Act* 2013 (Q) and

(b) ss 691A-691D of the *Industrial Relations Act* 1999 (Q)

are to that extent inconsistent with the *Fair Work Act* 2009 (Cth) and invalid in so far as they apply to Queensland Rail or its employees or the QR Passenger Pty Limited Traincrew Union Collective Workplace Agreement 2009 and Queensland Rail Rollingstock and Operations Enterprise Agreement 2011, it is not necessary to answer this question.

[**This means that the plaintiffs succeeded in establishing that the *Fair Work Act 2009* still applies and consequently with it the industrial relations agreements which are based thereon.**]

[…]

4. Questions on the decision

1. What was decisive for the Supreme Court to qualify Queensland Rail?
2. What significance did the court attach to the asserted "intention of the Parliament" or the labelling "is not a body corporate"?
3. Do you agree with the arguments?
4. What role did profit play in the assessment?

IV. Administrative Action (Lecture 3)

A. General Questions

1. Why does the form of administrative action matter? (legal protection, due process, administrative prerogatives etc.)
2. Possible challenges of administrative acts (informal governmental actions etc.)
3. What are the particularities if an agency stipulates rules and regulations? (legal basis, legal effects, procedure etc.)?

B. NL: General Administrative Law Act

(Algemene wet bestuursrecht, accessible through https://wetten.overheid.nl/BWBR0005537/2025-01-01 (Dutch), translated version taken from https://legislationline.org/sites/default/files/documents/96/Netherlands_administrative_law_act_2010_en.pdf and (formally and linguistically) adjusted, in the current version as of February 2025)

1. Instruction

Below you will find an extract from a translation of the General Administrative Law Act of the Netherlands. Read the extract and ask yourself what procedural rights are guaranteed in case of an "order" (in Switzerland an administrative decision). Is something missing? What advantages or disadvantages do you see in codifying them in an act?

2. Table of Contents

3. The legal text

GENERAL ADMINISTRATIVE LAW ACT

[…]

CHAPTER 7 SPECIAL PROVISIONS CONCERNING OBJECTIONS AND ADMINISTRATIVE APPEALS *(mostly contained below)*

Division 7.1 Notice of objection preceding appeal to an administrative court

Article 7:1

1. The one who has the right to appeal against an order to an administrative court shall lodge an objection against the order before lodging an appeal, unless the order:

(a) has been made in respect of an objection or an administrative appeal;

(b) is subject to approval;

(c) is one approving another order or refusing such approval; or

(d) was prepared in accordance with one of the procedures provided in division 3.5.

2. An appeal may be lodged against the decision on the objection in accordance with the regulations which govern the lodging of an appeal against the order against which the objection was made.

Division 7.2 Special provisions on objections (mostly contained below)

Article 7:2

1. Before an administrative authority decides on an objection, it shall give the interested parties the opportunity to be heard.
2. For this purpose, the administrative authority shall in any event inform the petitioner and the interested parties who stated their views when the order was being prepared.

Article 7:3

Interested parties need not be heard, if:

(a) the objection is manifestly inadmissible,

(b) the objection is manifestly unfounded,

(c) the interested parties have stated that they do not wish to exercise their right to be heard, or

(d) the objection is completely satisfied and the interests of other interested parties cannot be prejudiced as a result.

Article 7:4

1. Interested parties may submit further documents until ten days before the hearing.
2. The administrative authority shall deposit the notice of objection and all other documents relating to the case for inspection by interested parties for at least one week prior to the hearing.
3. The communication to attend the hearing shall draw the attention of interested parties to subsection 1 and state when and where the documents will be deposited for inspection.
4. Interested parties may obtain copies of these documents at no more than cost price.
5. Subsection 2 need not be applied in so far as the interested parties agree to this.
6. The administrative authority may also refrain from applying subsection 2, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Communication shall be given of the application of this provision.
7. Compelling reasons shall in any event be deemed not to exist in so far as there is an obligation under the Government Information (Public Access) Act to grant a request for information contained in such documents.

8. If the compelling reason is fear of damage to the physical or mental health of an interested party, inspection of the documents in question may be restricted to a legal representative who is either an attorney-at-law or a physician.

Article 7:5

1. Unless the hearing is conducted wholly or partly by the administrative authority itself or by the chairman or a member thereof, the hearing shall be conducted by: (a) a person who was not involved in the preparation of the disputed order, or (b) two or more persons of whom the majority, including the person chairing the hearing, were not involved in the preparation of the disputed order.
2. Unless provided otherwise by statutory regulation, the administrative authority shall decide whether the hearing takes place in public.

Article 7:6

1. Interested parties shall be heard in one another's presence.
2. Interested parties may be heard separately, either on the initiative of the administrative authority or on request, if it is reasonable to assume that a joint hearing would prejudice the proper conduct of the proceedings, or that facts or circumstances will become known during the hearing which should be kept secret for compelling reasons.
3. If interested parties are heard separately, each of them shall be informed of the matters dealt with during the hearing when he was not present.
4. The administrative authority may also refrain from applying subsection 3, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Article 7:4, subsection 6, second sentence, and subsections 7 and 8 shall apply mutatis mutandis.

Article 7:7

A record shall be kept of the hearing.

Article 7:8

1. At the request of the interested party witnesses and experts whom they have brought with them may be heard.

2. The costs of witnesses and experts shall be borne by the interested party who has brought them with them.

Article 7:9

If, after the hearing, facts or circumstances which may be of substantial importance to the decision to be made on the objection become known to the administrative authority, the interested parties shall be informed and given the opportunity to be heard on the subject.

Article 7:10

1. The administrative authority shall decide within six weeks of receiving the notice of objection, or within ten weeks if a committee as referred to in article 7:13 has been established.
2. The time limit shall be suspended with effect from the day on which the petitioner is requested to remedy an omission as referred to in article 6:6 until the day on which the omission is remedied or the time limit set for this purpose expires without being used.
3. The administrative authority may defer the decision for a maximum of four weeks. Written communication shall be given of the deferral.
4. Further postponement shall be possible in so far as the petitioner agrees to this and the interests of other interested parties cannot be prejudiced by this, or these parties have agreed to this.

[…]

Article 7:15

No fee shall be payable for the processing of the objection.

Division 7.3 Special provisions on administrative appeals (mostly contained below)

Article 7:16

1. Before an appeals authority decides on an appeal it shall give the interested parties the opportunity to be heard.
2. The appeals authority shall in any event inform the submittant of the notice of appeal, as well as the administrative authority which made the order and the interested parties who stated their views when the order was being prepared or in the objection procedure.

Article 7:17

Interested parties need not be heard, if:

(a) the appeal is manifestly inadmissible, or

(b) the appeal is manifestly unfounded, or

(c) the interested parties have stated that they do not wish to exercise their right to be heard.

Article 7:18

1. Interested parties may submit further documents until ten days before the hearing.
2. The appeals authority shall deposit the notice of appeal and all other documents relating to the case for inspection by interested parties for at least one week prior to the hearing.
3. The communication to attend the hearing shall draw the attention of interested parties to subsection 1 and shall state when and where the documents will be deposited for inspection.
4. Interested parties may obtain copies of these documents at no more than cost price.
5. Subsection 2 need not be applied in so far as the interested parties agree to this.
6. The appeals authority may also refrain from applying subsection 2, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Communication shall be given of the application of this provision.
7. Compelling reasons shall in any event be deemed not to exist in so far as there is an obligation under the Government Information (Public Access) Act to grant a request for information contained in such documents.
8. If the compelling reason is fear of damage to the physical or mental health of an interested party, inspection of the documents in question may be restricted to a legal representative who is either an attorney-at-law or a physician.

Article 7:19

1. The hearing shall be conducted by the appeals authority.
2. The conduct of the hearing may be assigned by or pursuant to act of Parliament to an advisory committee consisting of one or more members who are not part of, and not employed under the responsibility of, the appeals authority.
3. The hearing shall take place in public, unless the appeals authority decides otherwise at the request of an interested party or, if there are compelling reasons, on its own initiative.

Article 7:20

1. Interested parties shall be heard in one another's presence.
2. Interested parties may be heard separately, either on the initiative of the administrative authority or on request, if it is reasonable to assume that a joint hearing would prejudice the proper conduct of the proceedings or that facts or circumstances will become known during the hearing which should be kept secret for compelling reasons.
3. If interested parties are heard separately, each of them shall be informed of the matters dealt with during the hearing when he was not present.
4. The appeals authority may also refrain from applying subsection 3, either at the request of an interested party or otherwise, in so far as there are compelling reasons for secrecy. Article 7:18, subsection 6, second sentence, and subsections 7 and 8, shall apply mutatis mutandis.

Article 7:21

A record shall be kept of the hearing.

Article 7:22

1. At the request of the interested party, witnesses and experts whom they have brought with them may be heard.
2. The costs of witnesses and experts shall be borne by the interested party who has brought them with them.

[…]

Article 7:24

1. The appeals authority shall decide within sixteen weeks of receiving the notice of appeal.
2. If, however, the appeals authority is part of the same legal entity as the administrative authority against whose order the appeal is brought, it shall decide within six weeks of receiving the appeal or, if a committee as referred to in article 7:19, subsection 2 is established, within ten weeks.
3. The time limit shall be suspended with effect from the day on which the submittant of the notice of appeal is requested to remedy an omission as referred to in article 6:6 until the

day on which the omission is remedied or the time limit set for this purpose expires without being used.

4. The appeals authority may defer the decision for a maximum of eight weeks.
5. In the case referred to in subsection 2, however, the appeals authority may defer the decision for a maximum of four weeks.
6. Written communication shall be given of the deferral.
7. Further postponement shall be possible in so far as the submittant agrees to this and the interests of other interested parties cannot be prejudiced by this or these parties have agreed to this.

[…]

Article 7:26

1. The decision on the appeal shall be based on proper reasons, which shall be stated when the decision is notified. If it has been decided not to have a hearing under article 7:17, it shall also be stated on what grounds.
2. If the decision departs from the opinion of a committee as referred to in article 7:19, subsection 2, the reasons why the opinion was not followed shall be stated in the decision and the opinion shall be sent with the decision.
3. The decision shall be notified by being sent or issued to the persons to whom it is addressed. If it concerns an order which is not addressed to one or more interested parties, the decision shall be notified in the same way as the order was notified.
4. As soon as possible after the decision is notified, the administrative authority against whose order the appeal was brought, the ones to whom the disputed order was addressed and the interested parties who have stated their views in the appeal procedure shall beinformed.
5. Article 6:23 shall apply mutatis mutandis to the communication referred to in subsection 4, which shall also state, with a view to the start of the time limit for appeal, as clearly as possible, when the decision was notified in accordance with subsection 3.

Article 7:27

Article 3:6, subsection 2, divisions 3.4 and 3.5, articles 3:41 to 3:45 inclusive, division 3.7, except for article 3:49, and Chapter 4 shall not apply.

Article 7:28

No fee shall be payable for the processing of the appeal.

CHAPTER 8 SPECIAL PROVISIONS CONCERNING APPEALS TO THE DISTRICT COURT *(mostly contained below)*

Title 8.1 General provisions

Division 8.1.2 Proceedings by a single-judge or three-judge section (not contained below)
Division 8.1.3 Referral, consolidation and separation (not contained below)

Division 8.1.4. Challenge and excusal (mostly contained below)

Article 8:15

At the request of a party, any of the judges dealing with a case may be challenged on the ground of facts or circumstances which could prejudice the judicial impartiality.

Article 8:16

1. The request shall be made as soon as the facts or circumstances become known to the petitioner.
2. The request shall be made in writing, stating the grounds. After the start of the hearing, or after the start of the hearing of parties or witnesses in the preliminary inquiry, the request may also be made orally.
3. All the facts and circumstances must be presented together.
4. A subsequent challenge to the same judge shall not be dealt with unless facts or circumstances are adduced which did not become known to the petitioner until after the previous request.
5. If the request is made, the hearing shall be adjourned.

Article 8:17

A judge who has been challenged may acquiesce in the challenge.

Article 8:18

1. The challenge shall be dealt with as soon as possible by a three-judge section of which the judge who has been challenged is not a member.
2. The petitioner and the judge who has been challenged shall be given the opportunity to be heard. The district court may determine, on its own initiative or at the request of the petitioner or the judge who has been challenged, that they will not be heard in each other's presence.
3. The district court shall decide as soon as possible. The decision shall state the reasons and shall be communicated without delay to the petitioner , the other parties and the judge who has been challenged.
4. In the event of abuse, the district court may order that no subsequent requests shall be dealt with. This shall be stated in the decision.
5. The decision is final.

[…]

Division 8.1.5 The parties (mostly contained below)

Article 8:21

1. Natural persons who are not competent to be parties to litigation shall be represented in the proceedings by their civil-law representatives. For a statutory representative the authorisation of the subdistrict court as referred to in article 349 of Book 1 of the Civil Code is not required.
2. The persons referred to in subsection 1 may represent themselves in the action if they may be deemed to have a reasonable understanding of their interests.
3. If no statutory representative is present, or he is not available and the case is urgent, the district court may appoint a provisional representative. The appointment shall cease to have effect as soon as a statutory representative is present or the statutory representative is available once again.

[…]

Article 8:24

1. The parties may be assisted or represented by a legal representative.

2. The district court may require a legal representative to produce a written authorisation.
3. Subsection 2 shall not apply to attorneys-at-law and procurators.

[…]

Article 8:26

1. Until the end of the hearing the district court may allow interested parties to be joined as parties in the proceedings on its own initiative, at the request of a party or at their own request.
2. If the district court suspects that there are unknown interested parties, it may announce in the Government Gazette that a case is pending before it. The announcement may also be made by other means in addition to the announcement in the Government Gazette.

Article 8:27

1. Parties who have been summoned by the district court to appear in person, or to appear in person or represented by a legal representative, whether or not to provide information, are obliged to appear and provide the information required. The attention of the parties shall be drawn to this and to article 8:31.
2. In the case of a legal entity or an administrative authority which is a body the district court may summon one or more specified administrators or members.

[…]

Article 8:29

1. Parties who are obliged to provide information or submit documents may, if there are compelling reasons, refuse to provide such information or submit such documents, or inform the district court that it alone may take cognizance of the information or documents concerned.
2. Compelling reasons shall in any event be deemed not to exist for an administrative authority in so far as there is an obligation under the Government Information (Public Access) Act to grant a request for information contained in the documents to be submitted.
3. The district court shall decide whether the refusal or restriction on the cognizance referred to in subsection 1 is justified.

4. If the district court decides that the refusal is justified, the obligation shall cease to have effect.
5. If the district court decides that the restriction on the cognizance of the information is justified, it may not give judgment based wholly or partly on the information or documents without the consent of the other parties.

Article 8:30

The parties shall cooperate in an investigation as referred to in article 8:47, subsection 1. The attention of the parties shall be drawn to this and to article 8:31.

Article 8:31

If a party fails to comply with the obligation to appear, provide information, submit documents or cooperate in an investigation as referred to in article 8:47, subsection 1, the district court may draw such conclusions from this as it sees fit.

Article 8:32

1. The district court may, if it is feared that the physical or mental health of a party would be damaged if he or she were to take cognizance of documents, direct that this may be done only by a legal representative who is an attorney-at-law or physician or has been given special permission by the district court.
2. The district court may, if the privacy of a person would be disproportionately invaded by a party taking cognizance of the documents, determine that this may be done only by a legal representative who is an attorney-at-law or physician or has been given special permission by the district court.

Division 8.1.6 Witnesses, experts and interpreters (not contained below)

Division 8.1.7 Sending of documents (not contained below)

Title 8.2 The hearing of appeals (*not contained below*)

[…]

Title 8.3 Provisional remedies and immediate judgment in the proceedings on the merits (*not contained below*)

[…]

Title 8.4 Review (*not contained below*)

[…]

4. Questions on the General Administrative Law Act

1. What procedural rights are guaranteed in case of an "order" (in Switzerland an administrative decision)?
2. Is something missing?
3. What advantages or disadvantages do you see in codifying them in an act?

C. ECtHR: Yöyler v Turkey

(ECtHR, Judgment of 24 July 2003 in App. no. 26973/95 - Yöyler v. Turkey; accessible through https://hudoc.echr.coe.int/eng?i=001-61264)

1. Instruction

Read the extract from the decision and ask yourself what impact the form of administrative action has when the court applies Article 13 of the European Convention of Human Rights. What are the reasons for this court practice? Which problems in administrative law may arise because of this court practice?

2. Summary of the facts

Mr Yöyler had been imprisoned several times due to his involvement with several political organisations. He alleged that State security forces destroyed his house after he left his village. The State denied these allegations.

3. Reasoning and Finding

[…]

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant, Mr Celalettin Yöyler, is a Turkish citizen who was born in 1941 and is at present living in Istanbul (Turkey). Until June 1994 the applicant lived in the village of Dirimpınar, attached to the Malazgirt district in the province of Muş. Between 1966 and 1994 the applicant was the *imam* (religious leader) of the village. As a result of his involvement with a number of political organisations, including the Social Democratic Populist Party (SHP), the People's Labour Party (HEP) and the Democracy Party (DEP), of which he became the local leader, he was imprisoned on a number of occasions. The applicant left and had never returned to his village prior to the alleged events in question, since he had been threatened with death. The application concerns the applicant's allegations that State security forces destroyed his house.

A. The facts

2. The facts surrounding the destruction of the applicant's house are in dispute between the parties.

1. Facts as presented by the applicant

3. In 1994 three young women from the village, all of whom were related to the applicant's extended family, decided to join the PKK.

4. On 15 September 1994 the gendarme unit commander of Malazgirt came to the village and threatened to burn the village to the ground if the women were not brought to him within three days.

5. The applicant's family and the families of the young women, frightened by this threat, loaded up their possessions and fled. However, the gendarmes, accompanied by special teams, forced them to return to the village and to unload their possessions. They gathered the families into a house by force, where they assaulted certain of them, including the applicant's wife. They withdrew from the village telling the villagers to take good photographs of their houses, as that was all they would have to remember them by.

6. On 18 September 1994, at 8 p.m., special gendarme teams and village guards came to the village. Villagers were ordered to go into their homes and to turn off their lamps. The security forces then took diesel oil from the villagers' tractors and barrels and set fire to the houses of the applicant and his family. The applicant was out of the village, in İzmir, when his house was burned down.

7. On 23 September 1994 the applicant filed a criminal complaint with the Karşıyaka public prosecutor in İzmir for submission to the Malazgirt public prosecutor, calling for an on-site investigation and the institution of proceedings against the perpetrators. This document was registered as no. 35798 by the Karşıyaka public prosecutor's office.

8. On 24 September 1994 the applicant made a press statement through a human rights body, the Human Rights Association, which was carried the same day in the pro-Kurdish newspaper *Özgür Ülke*.

9. On 8 November 1994 the public prosecutor (no. 31583) sent a letter to the Gendarme Command in Malazgirt requesting a report on the matters raised in the applicant's allegations. He repeated his request in letters of 8 December 1994 (no. 30965) and 2 February 1995 (no. 31583).

10. By letter of 2 March 1995, the Gendarme Central Command in Malazgirt replied to the prosecutor's letter of 8 December 1994 by submitting the records of the statements they had taken. The prosecutor took further statements in May 1995, and the gendarme commander M.A. in June and November 1995. Since November 1995, there has been no development in the investigation.

2. Facts as presented by the Government

11. The applicant left the village of Dirimpinar of his own free will, together with his spouse and children. He settled first in Adapazarı and then in Istanbul or Izmir. The Government submitted various records of the statements taken by the authorities in relation to the burning of the applicant's house.

(a) Statements taken on 29 May 1995

12. Mr Muhsettin Yöyler, the mayor (*muhtar*) of the village of Dirimpinar, stated to the public prosecutor that on the night of the incident, he had seen some persons setting fire to the applicant's house but as they had their faces covered, he had not been able to recognise them. He did, however, recognise one of them, Ahmet (A.K.), a village guard from the village of Nurettin.

The statement by the applicant's fellow villager, Mr Abdulcebbar Sezen, revealed that the applicant had not been in the village during the incident, but that his family had been.

(b) Statements dated 19 June 1995 before the gendarme commander M.A.

13. Mr Muhsettin Yöyler claimed that although he had seen the applicant's house burning, he had not seen who had set fire to it, as it was dark.

Mr Süleyman Yılmaz and Mr Ömer Sezen from the same village made identical statements.

(c) Statements of 22 November 1995 given by the applicant's fellow villagers to the gendarme commander M.A.

14. Mr Aydın Sezen declared before the same gendarme commander that the applicant had always acted in a subversive manner towards the State, that his house had indeed been burned, that he had not seen who had set fire to it, but it had definitely not been the security forces. He also added that all the villagers were pleased that the applicant had left the village. In a further statement, Mr Muhsettin Yöyler told M.A. that the applicant had always been a PKK supporter, that the applicant and his family had not been in the village on the night of the incident, that he had not seen who had set fire to the house, but that he was sure that it was not the security forces. He also stated that the applicant himself might perhaps have done it.

15. Mr Abdulcebbar Sezen was recorded as having declared to the police officer that the applicant was a member of the PKK, that he used to be a source of trouble in the village and that the villagers were pleased that he had left the village. He also stated that the applicant's house had definitely not been burned by the security forces or the gendarmes and that the security forces had always helped the villagers.

16. Mr Muhlis Umulgan recalled having declared that the applicant was collaborating with the PKK, that on the night of the incident he had seen the applicant's house burning but had been afraid to go out, as he knew that the PKK were in the region at the time. He added that the security forces had not set fire to the applicant's house.

17. As to Süleyman Yılmaz, he declared that the applicant had not been in the village when the incident had occurred, that three days before the fire his spouse and children had left the village as well, taking the furniture, and that although some days before the incident security forces had been in the village, they had not been there during the incident. He finally stated that he did not know who had set fire to the applicant's house but was sure that it had not been the gendarmes.

18. The investigation could not continue in the applicant's absence. According to a letter of 2 April 1995 from the Gendarme Central Command in Malazgirt, the applicant had left Dirimpınar for an unknown place, probably Adapazarı.

[…]

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

19. The applicant, referring to the circumstances of the destruction of his home and eviction of his family from their village, maintained that there had been a breach of Article 3 of the Convention, which reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

20. The Government rejected this complaint as being without any basis.

21. The Court reiterates that Article 3 of the Convention enshrines one of the fundamental values of a democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms treatment contrary to this provision. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see *Selçuk and Asker v. Turkey,* judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 909, §§ 75-76).

22. The Court notes that the applicant's home was burned before the eyes of members of his family, depriving them of shelter and support and obliging them to leave the place where they lived and their family friends. In the Court's opinion, even assuming that the motive behind this impugned act was to punish the applicant and his relatives for their alleged involvement in the PKK, that would not provide a justification for such ill-treatment.

23. The Court considers that the destruction of the applicant's home and possessions, as well as the anguish and distress suffered by members of his family, must have caused him suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3 (see *Selçuk and Asker,* cited above, p. 910, §§ 77-78).

24. The Court concludes that there has been a violation of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

25. The applicant complained of the deliberate destruction of his home and property. He relied on Article 8 of the Convention, which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

and Article 1 of Protocol No. 1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

26. The Government denied the factual basis of the applicant's complaints and averred that his allegations were unsubstantiated.

27. The Court has found it established that the security forces deliberately destroyed the applicant's house and property, obliging his family to leave their village (see paragraph 64 above). There is no doubt that these acts, in addition to giving rise to a violation of Article 3, constituted grave and unjustified interference with the applicant's rights to respect for his private and family life and home, and to the peaceful enjoyment of his possessions (see *Menteş and Others v. Turkey,* judgment of 28 November 1997, *Reports* 1997-VIII, p. 2711, § 73, and *Dulaş v. Turkey*, no. 25801/94, § 60, 30 January 2001, unreported).

28. The Court therefore concludes that there has been a violation of Article 8 of the Convention and of Article 1 of Protocol No. 1.

IV. ALLEGED VIOLATIONS OF ARTICLES 6 AND 13 OF THE CONVENTION

29. The applicant complained that he had been denied an effective remedy by which to challenge the destruction of his home and possessions by the security forces, and to had been denied access to court to assert his civil rights. He relied on Article 6 § 1 of the Convention, which provides, in so far as relevant:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

and Article 13 of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Article 6 § 1 of the Convention

30. The applicant submitted that his right to access to court to assert his civil rights had been denied on account of the failure of the authorities to conduct an effective investigation into his allegations. In his opinion, without such an investigation he had no chance of succeeding in obtaining compensation in civil proceedings.

31. The Government maintained that the applicant had failed to pursue the remedies available in domestic law. Had the applicant filed a civil action, he would have enjoyed effective access to a court.

32. The Court notes that the applicant did not bring an action before the civil courts for the reasons given in the admissibility decision of 13 January 1997. It is therefore impossible to determine whether the national courts would have been able to adjudicate on the applicant's claims had he initiated proceedings. In the Court's view, however, the applicant's complaints mainly pertain to the lack of an effective investigation into the deliberate destruction of his family home and possessions by the security forces. It will therefore examine this complaint from the standpoint of Article 13, which imposes a more general obligation on States to provide an effective remedy in respect of alleged violations of the Convention (see *Selçuk and Asker,* cited above, p. 912, § 92).

The Court therefore finds it unnecessary to determine whether there has been a violation of Article 6 § 1 of the Convention.

B. Article 13 of the Convention

33. The applicant submitted that he had no effective remedy available in respect of his Convention grievances. With reference to previous cases concerning the destruction of villages, the applicant asserted that there was an administrative practice of violating Article 13 of the Convention in south-east Turkey and that he was a victim of that practice.

34. The Government argued that the applicant had deliberately ceased to pursue remedies in domestic law. In this connection, they pointed out that after filing a criminal complaint with the

Public Prosecutor's office in İzmir, the applicant had disappeared without leaving any address to the judicial authorities. Despite this omission, the judicial authorities had carried out an effective investigation into the applicant's allegations by taking statements from his fellow villagers and committing a suspect for trial on charges of setting the applicant's house on fire.

35. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Dulaş*, cited above, § 65).

36. Where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigation procedure (see *Menteş and Others,* cited above, pp. 2715-16, § 89).

37. The Court points out that it has already found that the applicant's home and possessions were destroyed in violation of Articles 3 and 8 of the Convention and Article 1 of Protocol No. 1. The applicant's complaints in this regard are therefore "arguable" for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and *Dulaş*, cited above, § 67).

38. The Court has previously held that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces discloses particular characteristics in south-east Turkey in the first half of the 1990s and that the defects found in the investigatory system in force in that region undermined the effectiveness of criminal law protection during this period. This practice permitted or fostered a lack of accountability of members of the security forces for their actions which was not compatible

with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention (see *Bilgin v. Turkey*, no. 23819/94, § 119, 16 November 2000, unreported).

39. Turning to the particular circumstances of the case, the Court notes that the applicant filed a petition of complaint with the Karşıyaka public prosecutor's office shortly after the destruction of his house. On receipt of this petition, the Malazgirt Public Prosecutor's office instigated an investigation into the applicant's allegations. However, there were striking defects and omissions in the investigation. The Court would observe that the applicant's fellow villagers denied the content and veracity of the statements taken by the gendarmes, stating that they had been asked to sign blank sheets of paper and statements which had been written in advance and which had not been read out to them (see paragraph 57 above). The Court, having found these three witnesses' evidence credible, considers this practice totally incompatible with the notion of an investigation required by Article 13 of the Convention. The Court also points to its earlier finding that the statements taken from fifteen village guards were of a stereotyped nature - giving the impression that they had been prepared by the public prosecutor - and that therefore no particular weight can be attached to them (see paragraph 63 above).

40. Furthermore, the Court notes that the public prosecutors did not make any attempt to interview members of the security forces during the course of the investigation, despite the fact that the applicant had clearly named gendarmes as the perpetrators of the burning of his house and possessions. The Court finds it striking that there seemed to be a general reluctance on the part of the public prosecutors to admit that members of the security forces might have been involved in the destruction of property (see paragraph 62 above). Moreover, the prosecuting authorities visited the scene of the incident more than two years and three months after they had received the applicant's criminal complaint (see paragraph 33 (xvi) above).

41. On 9 September 1996 jurisdiction over the investigation was transferred to the Malazgirt Administrative Council, which decided to discontinue the criminal proceedings against the gendarmes (see paragraph 33 (xv) above). However, the Court has already found in a number of cases that the investigation carried out by this body cannot be regarded as independent since it is composed of civil servants, who are hierarchically dependent on the governor, and an executive officer is linked to the security forces under investigation, (see *Güleç v. Turkey*, judgment of 27 July 1998, Reports 1998-IV, pp. 1732-1733, § 80).

42. Finally, the Court considers it regrettable that the judicial authorities prosecuted and detained Ahmet Kınay, although he was not the perpetrator of the crime and no criminal complaint had been lodged against him. It notes that apparently this was due to a statement dated 20 June 1995, prepared by the gendarmes and bearing the name and the signature of Muhsettin Yöyler, who denied that he had ever made such a statement and told the Court's delegates that the signature on the document was a fake. In the Court's opinion, this is a significant fact, which demonstrates that no serious investigation was conducted into the applicant's Convention grievances and that the involvement of the gendarmes in the investigation resulted in the cover-up of certain facts.

43. As to the Government's assertion that the investigation was undermined by the applicant's failure to leave an address with the authorities, the Court notes that it is true that attempts were made to locate the applicant with a view to obtaining his statements in regard to his allegations. However, it should be borne in mind that, following the destruction of his family home, the applicant had no permanent address to give to the authorities since he was moving from one city to another in order to find a shelter for himself and his family. His feelings of vulnerability and insecurity are also of some relevance in this connection (see *Menteş and Others*, cited above, p. 2707, § 59). Accordingly, the Court considers that the personal circumstances of the applicant and the omissions and the defects in the domestic investigation outweigh his failure to provide his address to the authorities.

44. In the light of the foregoing, the Court concludes that the authorities failed to conduct a thorough and effective investigation into the applicant's allegations and that access to any other available remedy, including a claim for compensation, has thus also been denied him.

45. There has therefore been a breach of Article 13 of the Convention. […]

D. ECtHR: Verein Klimaseniorinnen Schweiz and Others v Switzerland

(ECtHR, Judgment 9 April 2024 in App. no. 53600/20 - Verein Klimaseniorinnen Schweiz and Others v. Switzerland; accessible through https://hudoc.echr.coe.int/eng?i=001-233206)

1. Instruction

Below you will find a summary of the relevant procedural facts in the *Klimaseniorinnen* case. Read it through and ask yourself what the question of victim status or direct

impact entails for the possibility of judicial review of non-formal administrative actions or even omissions.

2. *Summary of the facts*

The case concerns an action brought by a group of elderly Swiss women against the Swiss state for the failure to implement sufficient measures against climate change. At last, before the ECtHR, they (successfully) argued that the state's omission violated – inter alia – their right to respect for private and family life (Art. 8 ECHR).
The procedural issue at hand was whether the applicants had standing to object against the state omissions in question. Art. 25a of the *Swiss Federal Administrative Procedure Act* stipulates that persons may demand – inter alia – a decree which acknowledges the situation (state action or omission) at hand and provides a legal assessment thereof – which in turn provides the basis for possible subsequent court proceedings against the administrative authority/-ies concerned. However, this requires that applicants must be directly impacted by said actions or omissions and thereby possess victim status – just as required by the ECHR.

Can a group indicative of a large demographic of Swiss society possess victim status against practices whose consequences (abstractly) target the whole world population?
The relevant Swiss federal administrative authorities and courts consistently denied the applicant's victim status as the consequences of (alleged) shortcomings in climate change mitigation are too general and thereby not sufficiently individually targeted. Thereby, the applicants were refused said decrees on that procedural ground.

3. *Reasoning and Finding*

In order for Art. 6 ECHR to be applicable, there has to be a genuine and serious dispute over a right under national law, which implies that proceedings must be *directly decisive* for an applicant's civil right(s) which – in the environmental context – requires a personal danger which is serious, specific and imminent.

The application under Art. 25a of the aforementioned Swiss act is essential for addressing the impact of adverse effects on the enjoyment of e.g. the right to life under the Swiss Federal Constitution and Art. 8 ECHR. The elderly as a demographic are

categorically more significantly and critically endangered by a worsened climate than the general public and the notion "directly decisive" is thus to be interpreted more broadly in order to conform to the collective nature of climate change itself, as the protection of rights would otherwise be impossible in that context.
Insofar, Art. 6 ECHR is applicable and [most of] the group accordingly possess[es] victim status.

Violation of Art. 6 ECHR?
The access to a court must be practical and effective and *in casu*, the authorities' and courts' denial of victim status without due consideration of the arguments of urgency and severity constituted a disproportionate interference with that right, impacting its "very essence".
Consequently, the court found a violation of Art. 6 ECHR [in the case of most applicants]. (Note that the examination under Art. 13 ECHR was redundant as its requirements are absorbed by the stricter ones of Art. 6 ECHR.)

E. Questions on the decisions

1. What impact has the form of administrative action when the court applies Articles 6 and 13 of the European Convention of Human Rights?
2. What are the reasons for this court practice?
3. Does the form of administrative action matter?
4. Do you agree with the court's relatively broad interpretation of the notion of *victim status* in the *Klimaseniorinnen* case? What consequences may the possibility of an *action popularis* have on the efficiency of administrative activity?
5. Considering your answers to the question above, do you think there is a conflict between the need for administrative efficiency and the protection of rights in transnational contexts?

F. U.S.: Perez et al v Mortgage Bankers Association et al

(Thomas E. Perez, Secretary of Labor, et al. v. Mortgage Bankers Association, et al., Jerome Nickols, et al. v. Mortgage Bankers Association (575 U.S. 92 (2015)), accessible through https://supreme.justia.com/cases/federal/us/575/13-1041/case.pdf)

1. *Instruction*

Read the case below. What is the difference between a legislative and an interpretive rule and does such a distinction make sense?

2. *Summary of the facts*

The Fair Labor Standards Act (FLSA) requires employers to pay overtime wages to employees who work more than 40 hours per week. However there exist exemptions to this rule. Since 2006, mortgage loan officers (people who assist prospective buyers in finding and applying for mortgage offers) qualified for the exemption. In 2010, however, the Deputy Administrator issued a new pronouncement declaring that mortgage loan officers did not qualify for the exemption. Mortgage Bankers Association (MBA), in representing mortgage loan officers, argued that the agency could not change its interpretation without first going through a notice-and-comment period required by the Administrative Procedure Act.

3. *Reasoning and Finding*

[…]

When a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA or Act). See 5 U. S. C. §553(b)(A). The United States Court of Appeals for the District of Columbia Circuit has nevertheless held, in a line of cases beginning with *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (1997), that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted. The question in these cases is whether the rule announced in *Paralyzed Veterans* is consistent with the APA. We hold that it is not.

I

A

The APA establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." §551(5). "Rule," in turn,

is defined broadly to include "statement[s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy." §551(4).
Section 4 of the APA, 5 U. S. C. §553, prescribes a three-step procedure for so-called "notice-and-comment rulemaking." First, the agency must issue a "[g]eneral notice of proposed rulemaking," ordinarily by publication in the Federal Register. §553(b). Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." §553(c). An agency must consider and respond to significant comments received during the period for public comment. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971); *Thompson* v. *Clark*, 741 F. 2d 401, 408 (CADC 1984). Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." §553(c). Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the "force and effect of law." *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303 (1979) (internal quotation marks omitted).

Not all "rules" must be issued through the notice-and-comment process. Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U. S. C. §553(b)(A). The term "interpretative rule," or "interpretive rule," is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate. See generally Pierce, Distinguishing Legislative Rules From Interpretative Rules, 52 Admin. L. Rev. 547 (2000); Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893 (2004). We need not, and do not, wade into that debate here. For our purposes, it suffices to say that the critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995) (internal quotation marks omitted). The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Ibid.* […]

II

The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the "maximum procedural

requirements" specified in the APA, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978).

A

The text of the APA answers the question presented. Section 4 of the APA provides that "notice of proposed rule making shall be published in the Federal Register." 5 U. S. C. §553(b). When such notice is required by the APA, "the agency shall give interested persons an opportunity to participate in the rule making." §553(c). But §4 further states that unless "notice or hearing is required by statute," the Act's notice-and-comment requirement "does not apply . . . to interpretative rules." §553(b)(A). This exemption of interpretive rules from the notice-and-comment process is categorical, and it is fatal to the rule announced in *Paralyzed Veterans*.

Rather than examining the exemption for interpretive rules contained in §4(b)(A) of the APA, the D. C. Circuit in *Paralyzed Veterans* focused its attention on §1 of the Act. That section defines "rule making" to include not only the initial issuance of new rules, but also "repeal[s]" or "amend[ments]" of existing rules. See §551(5). Because notice-and-comment requirements may apply even to these later agency actions, the court reasoned, "allow[ing] an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment" would undermine the APA's procedural framework. 117 F. 3d, at 586.

This reading of the APA conflates the differing purposes of §§1 and 4 of the Act. Section 1 defines what a rulemaking is. It does not, however, say what procedures an agency must use when it engages in rulemaking. That is the purpose of §4. And §4 specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules. So, the D. C. Circuit correctly read §1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. See *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action"). Where the court went wrong was in failing to apply that accurate understanding of §1 to the exemption for interpretive rules contained in §4: Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.

B

The straightforward reading of the APA we now adopt harmonizes with longstanding principles of our administrative law jurisprudence. Time and again, we have reiterated that the APA "sets

forth the full extent of judicial authority to review executive agency action for procedural correctness." *Fox Television Stations, Inc.*, 556 U. S., at 513. Beyond the APA's minimum requirements, courts lack authority "to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Vermont Yankee*, 435 U. S., at 549. To do otherwise would violate "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Id.,* at 544. These foundational principles apply with equal force to the APA's procedures for rulemaking. We explained in *Vermont Yankee* that §4 of the Act "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Id.,* at 524. "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Ibid.*

The *Paralyzed Veterans* doctrine creates just such a judge-made procedural right: the right to notice and an opportunity to comment when an agency changes its interpretation of one of the regulations it enforces. That requirement may be wise policy. Or it may not. Regardless, imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts. We trust that Congress weighed the costs and benefits of placing more rigorous procedural restrictions on the issuance of interpretive rules. See *id.,* at 523 (when Congress enacted the APA, it "settled long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest" (internal quotation marks omitted)). In the end, Congress decided to adopt standards that permit agencies to promulgate freely such rules—whether or not they are consistent with earlier interpretations. That the D. C. Circuit would have struck the balance differently does not permit that court or this one to overturn Congress' contrary judgment. Cf. *Law* v. *Siegel*, 571 U. S. ___, ___ (2014) (slip op., at 11).

III

MBA offers several reasons why the *Paralyzed Veterans* doctrine should be upheld. They are not persuasive.

A

MBA begins its defense of the *Paralyzed Veterans* doctrine by attempting to bolster the D. C. Circuit's reading of the APA. "*Paralyzed Veterans*," MBA contends, "simply acknowledges the reality that where an agency significantly alters a prior, definitive interpretation of a

regulation, it has effectively amended the regulation itself," something that under the APA requires use of notice-and-comment procedures. Brief for Respondent 20–21.

The act of "amending," however, in both ordinary parlance and legal usage, has its own meaning separate and apart from the act of "interpreting." Compare Black's Law Dictionary 98 (10th ed. 2014) (defining "amend" as "[t]o change the wording of " or "formally alter . . . by striking out, inserting, or substituting words"), with *id.,* at 943 (defining "interpret" as "[t]o ascertain the meaning and significance of thoughts expressed in words"). One would not normally say that a court "amends" a statute when it interprets its text. So too can an agency "interpret" a regulation without "effectively amend[ing]" the underlying source of law. MBA does not explain *how*, precisely, an interpretive rule changes the regulation it interprets, and its assertion is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. See *Chrysler Corp.*, 441 U. S., at 302, n. 31 (citing Attorney General's Manual on the Administrative Procedure Act 30, n. 3 (1947)); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

MBA's "interpretation-as-amendment" theory is particularly odd in light of the limitations of the *Paralyzed Veterans* doctrine. Recall that the rule of *Paralyzed Veterans* applies only when an agency has previously adopted an interpretation of its regulation. Yet in that initial interpretation as much as all that come after, the agency is giving a definite meaning to an ambiguous text—the very act MBA insists requires notice and comment. MBA is unable to say why its arguments regarding revised interpretations should not also extend to the agency's first interpretation. Next, MBA argues that the *Paralyzed Veterans* doctrine is more consistent with this Court's "functional" approach to interpreting the APA. Relying on *Christensen* v. *Harris County*, 529 U. S. 576 (2000), and *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, MBA contends that we have already recognized that an agency may not "avoid notice-and-comment procedures by cloaking its actions in the mantle of mere 'interpretation.'" Brief for Respondent 23–24.

Neither of the cases MBA cites supports its argument. Our decision in *Christensen* did not address a change in agency interpretation. Instead, we there refused to give deference to an agency's interpretation of an unambiguous regulation, observing that to defer in such a case would allow the agency "to create *de facto* a new regulation." 529 U. S., at 588. Put differently, *Christensen* held that the agency interpretation at issue was substantively invalid because it

conflicted with the text of the regulation the agency purported to interpret. That holding is irrelevant to this suit and to the *Paralyzed Veterans* rule, which assesses whether an agency interpretation is *procedurally* invalid. […]

B

In the main, MBA attempts to justify the *Paralyzed Veterans* doctrine on practical and policy grounds. MBA contends that the doctrine reinforces the APA's goal of "procedural fairness" by preventing agencies from unilaterally and unexpectedly altering their interpretation of important regulations. Brief for Respondent 16.

There may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions. But regulated entities are not without recourse in such situations. Quite the opposite. The APA contains a variety of constraints on agency decisionmaking—the arbitrary and capricious standard being among the most notable. As we held in *Fox Television Stations*, and underscore again today, the APA requires an agency to provide more substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." 556 U. S., at 515 (citation omitted); see also *id.,* at 535 (KENNEDY, J., concurring in part and concurring in judgment).

In addition, Congress is aware that agencies sometimes alter their views in ways that upset settled reliance interests. For that reason, Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations. The FLSA includes one such provision: As amended by the Portal-to-Portal Act of 1947, 29 U. S. C. §251 *et seq.,* the FLSA provides that "no employer shall be subject to any liability" for failing "to pay minimum wages or overtime compensation" if it demonstrates that the "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the Administrator of the Department's Wage and Hour Division, even when the guidance is later "modified or rescinded." §§259(a), (b)(1). These safe harbors will often protect parties from liability when an agency adopts an interpretation that conflicts with its previous position. […]

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit is reversed. [This means that the *Paralyzed Veterans* doctrine is overruled – interpretative rules are therefore not subject to the notice-and-comment procedure.] […]

V. Administrative Discretion (Lecture 3)

A. General Questions

1. What is the role of courts in the administrative system? (What is "applying" the law?)
2. What is the idea of administrative discretion?
3. What is the role of the legislator in framing judicial review and administrative discretion?

B. U.K.: Associated Provincial Picture Houses Ltd v Wednesbury Corporation

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, accessible through https://www.bailii.org/ew/cases/EWCA/Civ/1947/1.html)

1. Summary of the facts

The Sunday Entertainments Act 1932 allows local licensing authorities to open cinemas on Sundays. Associated Provincial Picture Houses was granted a licence by the Wednesbury Corporation to operate a cinema on the condition that no children under 15, whether accompanied by an adult or not, were admitted on Sundays. Associated Provincial Picture Houses argued that Wednesbury's condition was unacceptable and outside the power of the corporation to impose.

2. Reasoning and Finding

[…]

In the action out of which this appeal arises, the plaintiffs, who are the proprietors of a cinema theatre in Wednesbury, sought to obtain from the court a declaration that a certain condition imposed by the defendants, the corporation of Wednesbury, on the grant of a licence for Sunday performances in that cinema was ultra vires. The action was dismissed by Mr Justice Henn Collins and, in my opinion, his decision was clearly right. The powers and duties of the Local Authority are to be found in the Sunday Entertainments Act, 1932. That Act legalized the opening of cinemas on Sundays, subject to certain specified conditions and subject to such conditions as the licensing authority think fit to impose. The licensing authority are the licensing authority set up under the Cinematograph Act, 1909, and in this case are the council of the borough of

Wednesbury. Before the Act of 1932, the opening of cinematograph theatres on Sundays was, in fact, illegal. Local authorities had purported in some cases to allow Sunday opening under the licences which they granted, but that permission was strictly irregular. The position under the Act now with regard to licensing is stated conveniently by Mr Justice Atkinson in *Harman v. Butt* [1944] Kings Bench at page 493. He there says:

"It is apparent that there are at least three totally different occasions on which licensing justices may be called on to exercise their discretion to issue a licence and to determine on what conditions the licence shall be issued. The application may be under the Cinematograph Act, 1909, relating to six days of the week, excluding Sundays. It may be one relating solely to Sundays under the Sunday Entertainments Act, 1932, where in the case of a borough the majority of the local government electors have expressed a desire for Sunday performances. Thirdly, it may be one where the local government electors have expressed no such wish, but where the application is made for the benefit of those members of the forces who are stationed in the neighbourhood for the time being."

Under a regulation, the commanding officer of forces stationed in the neighbourhood had power to make a representation to the licensing authority and the case of *Harman v. Butt* [1944] Kings Bench 491, was, in fact, a case where that had taken place.
The actual words in question here are to be found in s.1, sub-s.1, of the Sunday Entertainments Act of 1932:

SUNDAY ENTERTAINMENTS ACT 1932 CHAPTER 51.

An Act *to permit and regulate the opening and use of places on Sundays for certain entertainments and for debates, and for purposes connected with the matters aforesaid. [13th July 1932.]*

BE *it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—*

1.—(1) The authority having power, in any area to which this section extends, to grant licences under the Cinematograph Act, 1909, may, notwithstanding anything in any enactment relating to Sunday observance, allow places in that area licensed under the said Act to be opened and

used on Sundays for the purpose of cinematograph, entertainments, subject to such conditions as the authority think fit to impose :
Provided that no place shall be allowed to be so opened and used unless among the conditions subject to which it is allowed to be so opened and used there are included conditions for securing—
(a) that no person will be employed by any employer on any Sunday in connection with a cinematograph entertainment or any other entertainment or exhibition given therewith who has been employed on each of the six previous days either by that employer in any occupation or by any other employer in connection with similar entertainments or exhibitions; and
(b) that such sums as may be specified by the authority not exceeding the amount estimated by the authority as the amount of the profits which will be received from cinematograph entertainments given while the place is open on Sundays, and from any other entertainment or exhibition given therewith, and calculated by reference to such estimated profits or to such proportion of them as the authority think fit, will be paid as to the prescribed percentage thereof, if any, to the authority for the purpose of being transmitted to the Cinematograph Fund constituted in accordance with the provisions of this Act, and as to the remainder thereof to such persons as may be specified by the authority for the purpose of being applied to charitable objects;
and for the purpose of any conditions imposed by an authority as to the payment of sums calculated by reference to such estimated profits as aforesaid, the profits shall be computed in such manner as the authority may direct.

The power to impose conditions is expressed in quite general terms. The sub-section goes on to refer to certain conditions which must be imposed, but with those we are not concerned. In the present case, the defendants imposed the following condition in their licence:
"No children under the age of fifteen years shall be admitted to any entertainment, whether accompanied by an adult or not."

Mr. Gallop, for the plaintiffs, argued that it was not competent for the Wednesbury Corporation to impose any such condition and he said that if they were entitled to impose a condition prohibiting the admission of children, they should at least have limited it to cases where the children were not accompanied by their parents or a guardian or some adult. His argument was that the imposition of that condition was unreasonable and that in consequence it was ultra vires the corporation.

The plaintiffs' contention is based, in my opinion, on a misconception as to the effect of this Act in granting this discretionary power to local authorities. The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case.

As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted, the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable."

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."

Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Lord Justice Warrington in *Short v. Poole Corporation* [1926] Chancery 66 at pages 90 and 91, gave the example of the redhaired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In the present case, it is said by Mr. Gallop that the authority acted unreasonably in imposing this condition. It appears to me quite clear that the matter dealt with by this condition was a matter which a reasonable authority would be justified in considering when they were making up their mind what condition should be attached to the grant of this licence. Nobody, at this time of day, could say that the well-being and the physical and moral health of children is not a

matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider.

Here Mr. Gallop did not, I think, suggest that the council were directing their mind to a purely extraneous and irrelevant matter, but he based his argument on the word "unreasonable," which he treated as an independent ground for attacking the decision of the authority; but once it is conceded, as it must be conceded in this case, that the particular subject-matter dealt with by this condition was one which it was competent for the authority to consider, there, in my opinion, is an end of the case. Once that is granted, Mr. Gallop is bound to say that the decision of the authority is wrong because it is unreasonable, and in saying that he is really saying that the ultimate arbiter of what is and is not reasonable is the court and not the local authority.

It is just there, it seems to me, that the argument breaks down. It is clear that the local authority [is] entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.

That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind.

Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in

that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

This case, in my opinion, does not really require reference to authority when once the simple and well known principles are understood on which alone a court can interfere with something *prima facie* within the powers of the executive authority, but reference has been made to a number of cases. I can deal, I think, quite shortly with them. First, Mr Justice Henn Collins followed a decision of Mr Justice Atkinson in the case I have mentioned of *Harman v. Butt* [1944] Kings Bench 491. In that case a condition of this character had been imposed and I think the only difference between the two cases is that in *Harman v. Butt* [1944] Kings Bench 491. the licence to open on Sundays originated in a representation by the commanding officer of forces stationed in the neighbourhood. Mr Justice Atkinson dealt with the matter thus [1944] Kings Bench 491 at page 499:

"I am satisfied that the defendants were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and of any section of it, and I hold that this condition that no child under the age of sixteen should be admitted to this cinematograph theatre on Sunday is not ultra vires on the ground that it is not confined to the user of the premises by the licensee, but relates to the interest of a section of the community."
Then he goes on to deal with the question of reasonableness. That was a case in which the decision, in my opinion, is unassailable. There are two other cases relied upon. One is *R. v Burnley Justices* 85 Law Journal Reports, King's Bench 1565, and another not dissimilar case on one point, *Ellis v. Dubowski* [1921] 3 Kings Bench 621. Those were cases where the illegal element which the authority had imported into the conditions imposed consisted of a delegation of their powers to some outside body. It was not that the delegation was a thing which no reasonable person could have thought was a sensible thing to do. It was outside their powers altogether to pass on this discretion which the legislature had confided to them to some outside body.

Another case on which Mr. Gallop relied is *Roberts v. Hopwood* [1925] AC 578. That was a totally different class of case. The district auditor had surcharged the members of a council who had made payments of a minimum wage of 4l. a week to their lowest grade of workers. That particular sum had been fixed by the local authority not by reference to any of the factors which

go to determine a scale of wages, but by reference to some other principle altogether, and the substance of the decision was that they had not fixed 4l. a week as wages at all and that they had acted unreasonably. When the case is examined, the word "unreasonable" is found to be used rather in the sense that I mentioned a short while ago, namely, that in fixing 4l. they had fixed it by reference to a matter which they ought not to have taken into account and to the exclusion of those elements which they ought to have taken into consideration in fixing a sum which could fairly be called a wage.

That is no authority whatsoever to support the proposition that the court has power, a sort of overriding power, to decide what is reasonable and what is unreasonable. The court has nothing of the kind. I do not think I need take up time by referring to other authorities, but I might say this in conclusion. An early case under the Cinematograph Act, 1909, much discussed before us, was *Theatre de Luxe (Halifax) Ltd v. Gledhill* [1915] 2 Kings Bench 49. That was a decision of a Divisional Court as to the legality or a condition imposed under the Act to the following effect: "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m."

That case was heard by a Divisional Court of the King's Bench Division, consisting of Lush, Rowlatt and Mr Justice Atkin. The majority, consisting of Justice Lush and Mr Justice Rowlatt held that the condition was ultra vires as there was no connexion, as the headnote says, "between the ground upon which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions."

That case is one which, I think, I am right in saying has never been referred to with approval, but often referred to with disapproval, though it has never been expressly overruled. I myself take the view that the decision of the majority in that case puts much too narrow a construction upon the licensing power given by that Act, which, of course, is not the same Act as we have to consider here. Mr Justice Atkin on the other hand, delivered a dissenting judgment in which he expressed the opinion that the power to impose conditions was nothing like so restricted as the majority had thought. Quoting again from the headnote, his opinion was "that the conditions

must be (1.) reasonable; (2.) in respect of the use of the licensed premises; (3.) in the public interest. Subject to that restriction there is no fetter upon the power of the licensing authority."

If I may venture to express my own opinion about that, I think that Mr Justice Atkin was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language may not perhaps be read in rather a different sense from that which I think he must have intended. I do not find in the language that he used any justification for thinking that it is for the court to decide on the question of reasonable-ness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether what is prima facie within the power of the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose.

Similarly, when he refers to the public interest, I do not read him as saying more than that the public interest is a proper and legitimate thing which the council or the licensing authority can and ought to have in mind. He certainly does not suggest anywhere that the court is entitled to set up its view of the public interest against the view of the local authority. Once the local authority have properly taken into consideration a matter of public interest such as, in the present case, the moral and physical health of children, there is, it seems to me, nothing in what Mr Justice Atkin says to suggest that the court could interfere with a decision because it took a different view as to what was in the public interest. It is obviously a subject on which different minds may have different views. I do not read him as saying any more than that the local authority can and should take that matter into account in coming to their decision.

In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come

to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them. The appeal must be dismissed with costs. […]

C. U.S.: From Chevron to Loper Bright

1. *Instruction*

The following two U.S. cases below indicate a shift in how far the U.S. Supreme Court permits administrative discretion. How does the two-step approach in Chevron differ from the rule established in Loper Bright and what are the implications of the overruling of the former for the scope of administrative discretion and the separation of powers?

2. *U.S.: Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

(Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al. (467 U.S. 837 (1984)), accessible through https://supreme.justia.com/cases/federal/us/467/837/)

a. Summary of the facts

The Clean Air Act addresses states that had failed to attain the air quality standards established by the Environmental Protection Agency (EPA). The Act required the establishment of rules regarding "the source of air pollution". Firstly, the EPA defined a source as any device in a manufacturing plant that produced pollution. In 1981, the EPA adopted a new definition that didn't consider the environmental impact of each device of the plant as long as the total emissions from the plant itself did not increase. The Natural Resources Defense Council, an environmental protection group, challenged the EPA regulation.

b. Reasoning and Finding

[…]

In the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685, Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The

amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met.' The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source." Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October 14, 1981. 46 Fed. Reg. 50766. Respondents filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U. S. C. § 7607(b)(1).
The Court of Appeals set aside the regulations. *National Resources Defense Council, Inc.* v. *Gorsuch,* 222 U. S. App. D. C. 268, 685 F. 2d 718 (1982).
The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source, to which the permit program ... should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." *Id.,* at 273, 685 F. 2d, at 723.

In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." *Id.,* at 276, n. 39, 685 F. 2d, at 726, n. 39. Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. *Id.,* at 276, 685 F. 2d, at 726.

Since the purpose of the permit program – its *"raison d'etre,"* in the court's view – was to

improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. *Ibid.*

It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, 461 U. S. 956 (1983), and we now reverse.
The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals. Nevertheless, since this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

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."

"The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. *Ruiz,* 415 U. S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its

own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, e. g., National Broadcasting Co. v. United States, 319 U. S. 190; Labor Board v. Hearst Publications, Inc., 322 U. S. 111; Republic Aviation Corp. v. Labor Board, 324 U. S. 793; Securities & Exchange Comm'n v. Chenery Corp., 332 U. S. 194; Labor Board v. Seven-Up Bottling Co., 344 U. S. 344.

"... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States* v. *Shimer,* 367 U. S. 374, 382, 383 (1961). Accord, *Capital Cities Cable, Inc.* v. *Crisp, ante,* at 699-700.

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.

Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. See generally *Train* v. *Natural Resources Defense Council, Inc.,* 421 U. S. 60, 63-64 (1975). The Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, "sharply increased federal authority and in the continuing effort to combat air pollution," 421 U. S., at 64, but continued to assign "primary responsibility for assuring air quality" to the several States, 84 Stat. 1678. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's) and § 110 directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, § 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard. Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided:

"For purposes of this section: "(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." 84 Stat. 1683.
In the 1970 Amendments that definition was not only applicable to the NSPS program required by § 111, but also was made applicable to a requirement of § 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards."

In due course, the EPA promulgated NAAQS's, approved SIP's, and adopted detailed regulations governing NSPS's for various categories of equipment. In one of its programs, the EPA used a plantwide definition of the term "stationary source." In 1974, it issued NSPS's for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant.

Nonattainment
The 1970 legislation provided for the attainment of primary NAAQS's by 1975. In many areas of the country, particularly the most industrialized States, the statutory goals were not attained.

In 1976, the 94th Congress was confronted with this fundamental problem, as well as many others respecting pollution control. As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus.'

In light of this situation, the EPA published an Emissions Offset Interpretative Ruling in December 1976, see 41 Fed. Reg. 55524, to "fill the gap," as respondents put it, until Congress acted. The Ruling stated that it was intended to address "the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources." *Id.,* at 55524-55525.
In general, the Ruling provided that "a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met." *Id.,* at 55525.

The Ruling gave primary emphasis to the rapid attainment of the statute's environmental goals.' Consistent with that emphasis, the construction of every new source in nonattainment areas had to meet the "lowest achievable emission rate" under the current state of the art for that type of facility. See *Ibid.* The 1976 Ruling did not, however, explicitly adopt or reject the "bubble concept."

The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute--91 Stat. 745-751 (Part D of Title I of the amended Act, 42 U. S. C. §§7501-7508)-expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments."

Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA's interpretative Ruling of December 21, 1976. 91 Stat. 745. The deadline for attainment of the primary NAAQS's was extended until December 31, 1982, and in some cases until

December 31, 1987, but the SIP's were required to contain a number of provisions designed to achieve the goals as expeditiously as possible.'

Most significantly for our purposes, the statute provided that each plan shall "(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 . . . ." *Id.,* at 747.

Before issuing a permit, § 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to § 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER).

The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in § 111(a)(3), applicable by the terms of the Act to the NSPS program. Section 302(j), however, defines the term "major stationary source" as follows: "(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." 91 Stat. 770.

The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the "bubble concept" or the question whether a plant-wide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Indeed, the House Committee Report identified the economic interest as one of the "two main purposes" of this section of the bill. It stated:

"Section 117 of the bill, adopted during full committee markup establishes a new section 127 of the Clean Air Act. The section has two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretative regulations afford.

"The new provision allows States with nonattainment areas to pursue one of two options. First, the State may proceed under EPA's present 'tradeoff' or 'offset' ruling. The Administrator is authorized, moreover, to modify or amend that ruling in accordance with the intent and purposes of this section. "The State's second option would be to revise its
implementation plan in accordance with this new provision." H. R. Rep. No. 95-294, p. 211 (1977).

The portion of the Senate Committee Report dealing with nonattainment areas states generally that it was intended to "supersede the EPA administrative approach," and that expansion should be permitted if a State could "demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S. Rep. No. 95-127, p. 55 (1977). The Senate Report notes the value of "case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard," explaining that such a review "requires matching reductions from existing sources against emissions expected from the new source in order to assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline." *Ibid.*

This description of a case-by-case approach to plant additions, which emphasizes the net consequences of the construction or modification of a new source, as well as its impact on the overall achievement of the national standards, was not, however, addressed to the precise issue raised by these cases. Senator Muskie made the following remarks:
"I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset Ruling]-and to the permit requirements of the revised implementation plans under the conference bill-is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant-or precursor. Thus, a new source is still subject to such requirements as 'lowest achievable emission rate'

even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.

"A source-including an existing facility ordered to convert to coal-is subject to all the nonattainment requirements as a modified source if it makes any physical change which increases the amount of any air pollutant for which the standards in the area are exceeded." 123 Cong. Rec. 26847 (1977).

As previously noted, prior to the 1977 Amendments, the EPA had adhered to a plantwide definition of the term "source" under a NSPS program. After adoption of the 1977 Amendments, proposals for a plantwide definition were considered in at least three formal proceedings.
In January 1979, the EPA considered the question whether the same restriction on new construction in nonattainment areas that had been included in its December 1976 Ruling should be required in the revised SIP's that were scheduled to go into effect in July 1979.
After noting that the 1976 Ruling was ambiguous on the question "whether a plant with a number of different processes and emission points would be considered a single source," 44 Fed. Reg. 3276 (1979), the EPA, in effect, provided a bifurcated answer to that question. In those areas that did not have a revised SIP in effect by July 1979, the EPA rejected the plantwide definition; on the other hand, it expressly concluded that the plantwide approach would be permissible in certain circumstances if authorized by an approved SIP. It stated:

"Where a state implementation plan is revised and implemented to satisfy the requirements of Part D, including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost." *Ibid.*

In April, and again in September 1979, the EPA published additional comments in which it indicated that revised SIPs could adopt the plantwide definition of source in nonattainment areas in certain circumstances. See *id.,* at 20372, 20379, 51924, 51951, 51958.

On the latter occasion, the EPA made a formal rulemaking proposal that would have permitted the use of the "bubble concept" for new installations within a plant as well as for modifications of existing units. It explained:

"'Bubble' Exemption: The use of offsets inside the same source is called the 'bubble.' EPA proposes use of the definition of 'source' (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

"i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

"ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of 'installation' as an identifiable piece of process equipment."

Significantly, the EPA expressly noted that the word "source" might be given a plantwide definition for some purposes and a narrower definition for other purposes. It wrote:
"Source means any building structure, facility, or installation which emits or may emit any regulated pollutant.

'Building, structure, facility or installation' means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out." *Id.,* at 51925.

The EPA's summary of its proposed Ruling discloses a flexible rather than rigid definition of the term "source" to implement various policies and programs:

"In summary, EPA is proposing two different ways to define source for different kinds of NSR programs: "(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plantwide bubble. "(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

"In addition, for the restrictions on construction, EPA is proposing to define 'major modification' so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape NSR regardless of whether they are within a major plant." *Id.,* at 51934.

In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these cases. The EPA took particular note of the two then-recent Court of Appeals decisions, which had created the bright-line rule that the "bubble concept" should be employed in a program designed to maintain air quality but not in one designed to enhance air quality. Relying heavily on those cases, EPA adopted a dual definition of "source" for nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plant-wide definition because it "would bring in more sources or modifications for review," 45 Fed. Reg. 52697 (1980), but its primary legal analysis was predicated on the two Court of Appeals decisions.

In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." 46 Fed. Reg. 16281. In the context of that review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." *Ibid.*

It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard

progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." *Ibid.* Moreover, the new definition "would simplify EPA's rules by using the same definition of 'source' for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency." *Ibid.*

Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQSs as expeditiously as possible." These conclusions were expressed in a proposed rulemaking in August 1981 that was formally promulgated in October. See *id.,* at 50766.

In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality.

Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition-if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source.

They thus contend that the EPA rules adopted in 1980, insofar as they apply to the maintenance of the quality of clean air, as well as the 1981 rules which apply to nonattainment areas, violate the statute.

Statutory Language

The definition of the term "stationary source" in § 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. See *supra,* at 846.

This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this definition applicable to the permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning

of stationary source in the permit program aside from § 302(j), which defines the term "major stationary source." See *supra,* at 851. We disagree with petitioners on this point.

The definition in § 302(j) tells us what the word "major" means-a source must emit at least 100 tons of pollution to qualify-but it sheds virtually no light on the meaning of the term "stationary source." It does equate a source with a facility-a "major emitting facility" and a "major stationary source" are synonymous under § 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose.

Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of § 302(j) simply does not compel any given interpretation of the term "source." Respondents recognize that, and hence point to § 111(a)(3).

Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute.

As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant.' A "word may have a character of its own not to be submerged by its association." *Russell Motor Car Co. v. United States,* 261 U. S. 514, 519 (1923).

On the other hand, the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms-a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation.

Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that § 111(a)(3) defines "source" as

that term is used in § 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.'

We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents "were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire...." *Jewell Ridge Coal Corp.* v. *Mine Workers,* 325 U. S. 161, 168-169 (1945).

Respondents' argument based on the legislative history relies heavily on Senator Muskie's observation that a new source is subject to the LAER requirement. But the full statement is ambiguous and like the text of § 173 itself, this comment does not tell us what a new source is, much less that it is to have an inflexible definition.

We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns-the allowance of reasonable economic growth-and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. […]

Indeed, its reasoning is supported by the public record developed in the rulemaking process, as well as by certain private studies. Our review of the EPA's varying interpretations of the word "source"-both before and after the 1977 Amendments-convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly-not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena.

The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. The distinction the court drew may well be a sensible one, but our labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product. We conclude that it was the Court of Appeals, rather than Congress or any of the decision-makers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency.

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.

In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, 39 the agency considered the matter in a detailed and reasoned fashion, 0 and the decision involves reconciling conflicting policies.
Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.

For judicial purposes, it matters not which of these things occurred. Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges-who have no constituency-have a duty to respect legitimate policy choices made by those who do.

The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." *TVA* v. *Hill,* 437 U. S. 153, 195 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. "The Regulations which the Administrator has adopted provide what the agency could allowably view as ... [an] effective reconciliation of these twofold ends .... *United States v. Shimer,* 367 U. S., at 383.

The judgment of the Court of Appeals is reversed.

3. *U.S.: Loper Bright Enterprises v Raimondo*

(Loper Bright Enterprises, et al. v. Gina Raimondo, Secretary of Commerce, et al., Relentless, Inc. et al. v. Department of Commerce, et al. (603 U.S. 369 (2024)), accessible through https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf)

a. Summary of the facts

A group of commercial fishermen took legal action against the National Marine Fisheries Service after it enacted a rule that required industry to fund at-sea monitoring programs at an estimated cost of $710 per day. The fishermen argued that the Magnuson-Stevens Fishery Conservation and Management Act of 1976 did not authorise the Service to create industry-funded monitoring requirements and that the Service thus failed to follow proper rulemaking procedure.

b. Reasoning and Finding

[…]

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation.

That task does not suddenly become policymaking just because a court has an “agency to

fall back on." *Kisor*, 588 U. S., at 575 (opinion of the Court).
Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches. See The Federalist, No. 78, at 522–525.
They were to construe the law with "[c]lear heads . . . and honest hearts," not with an eye to policy preferences that had not made it into the statute. 1 Works of James Wilson 363 (J. Andrews ed. 1896).

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction. See *Buffington* v. *McDonough*, 598 U. S. ___, ___ (2022) (GORSUCH, J., dissenting from denial of certiorari) (slip op., at 11); *Cuozzo*, 579 U. S., at 286 (THOMAS, J., concurring); Scalia, 1989 Duke L. J., at 517; see also *post*, at 15 (opinion of KAGAN, J.).
So, we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.'" *United States* v. *Mead Corp.*, 533 U. S. 218, 230 (2001) (quoting *Christensen* v. *Harris County*, 529 U. S. 576, 597 (2000) (Breyer, J., dissenting)); see also *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 649 (1990).

Consider the many refinements we have made in an effort to match *Chevron*'s presumption to reality. We have said that *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533

U. S., at 226–227. In practice, that threshold requirement—sometimes called *Chevron* "step zero"—largely limits *Chevron* to "the fruits of notice-and-comment rulemaking or formal adjudication." 533 U. S., at 230.

But even when those processes are used, deference is still not warranted "where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 220 (2016) (quoting *Mead*, 533 U. S., at 227).

Even where those procedural hurdles are cleared, substantive ones remain. Most notably, *Chevron* does not apply if the question at issue is one of "deep 'economic and political significance.'" *King* v. *Burwell*, 576 U. S. 473, 486 (2015). We have instead expected Congress to delegate such authority "expressly" if at all, *ibid.*, for "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s],'" *West Virginia* v. *EPA*, 597 U. S. 697, 723 (2022) (quoting *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); alteration in original). Nor have we applied *Chevron* to agency interpretations of judicial review provisions, see *Adams Fruit Co.*, 494 U. S., at 649–650, or to statutory schemes not administered by the agency seeking deference, see *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 519–520 (2018). And we have sent mixed signals on whether *Chevron* applies when a statute has criminal applications. Compare *Abramski* v. *United States*, 573 U. S. 169, 191 (2014), with *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 704, n. 18 (1995).

Confronted with this byzantine set of preconditions and exceptions, some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another.

And even when they do invoke *Chevron*, courts do not always heed the various steps and nuances of that evolving doctrine. In one of the cases before us today, for example, the First Circuit both skipped "step zero," see 62 F. 4th, at 628, and refused to "classify [its] conclusion as a product of *Chevron* step one or step two"—though it ultimately appears to have deferred under step two, *id.*, at 634.

This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. See *Cuozzo*, 579 U. S., at 280 (most recent occasion). But *Chevron* remains on the books. So, litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents, see *Agostini* v. *Felton*, 521 U. S. 203, 238 (1997)—understandably continue to apply it.

The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing *court*," to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added).

The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. *Stare decisis* is not an "inexorable command," *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), and the *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision," *Knick* v. *Township of Scott*, 588 U. S. 180, 203 (2019) (quoting *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018))—all weigh in favor of letting *Chevron* go.

Chevron has proved to be fundamentally misguided. Despite reshaping judicial review of agency action, neither it nor any case of ours applying it grappled with the APA—the statute that lays out how such review works. Its flaws were nonetheless apparent from the start, prompting this Court to revise its foundations and continually limit its application. It has launched and sustained a cottage industry of scholars attempting to decipher its basis and meaning.

And Members of this Court have long questioned its premises. See, *e.g.*, *Pereira* v. *Sessions*, 585 U. S. 198, 219–221 (2018) (Kennedy, J., concurring); *Michigan*, 576 U. S., at 760–764 (THOMAS, J., concurring); *Buffington*, 598 U. S. ___ (opinion of GORSUCH, J.); B. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–2154 (2016). Even Justice Scalia, an early champion of *Chevron*, came to seriously doubt whether it could be

reconciled with the APA. See *Perez*, 575 U. S., at 109–110 (opinion concurring in judgment). For its entire existence, *Chevron* has been a "rule in search of a justification," *Knick*, 588 U. S., at 204, if it was ever coherent enough to be called a rule at all.

Experience has also shown that *Chevron* is unworkable. The defining feature of its framework is the identification of statutory ambiguity, which requires deference at the doctrine's second step. But the concept of ambiguity has always evaded meaningful definition. As Justice Scalia put the dilemma just five years after *Chevron* was decided: "How clear is clear?" 1989 Duke L. J., at 521.

We are no closer to an answer to that question than we were four decades ago. "'[A]mbiguity' is a term that may have different meanings for different judges." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 572 (2005) (Stevens, J., dissenting). One judge might see ambiguity everywhere; another might never encounter it. Compare L. Silberman, Chevron—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 822 (1990), with R. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 323 (2017).

A rule of law that is so wholly "in the eye of the beholder," *Exxon Mobil Corp.*, 545 U. S., at 572 (Stevens, J., dissenting), invites different results in like cases and is therefore "arbitrary in practice," *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 283 (1988). Such an impressionistic and malleable concept "cannot stand as an every-day test for allocating" interpretive authority between courts and agencies. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 125 (1965).

The dissent proves the point. It tells us that a court should reach *Chevron*'s second step when it finds, "at the end of its interpretive work," that "Congress has left an ambiguity or gap." *Post*, at 1–2. (The Government offers a similar test. See Brief for Respondents in No. 22–1219, pp. 7, 10, 14; Tr. of Oral Arg. 113–114, 116.) That is no guide at all. Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. The statute still has a best meaning, necessarily discernible by a court deploying

its full interpretive toolkit. So, for the dissent's test to have any meaning, it must think that in an agency case (unlike in any other), a court should give up on its "interpretive work" before it has identified that best meaning. But how does a court know when to do so? On that point, the dissent leaves a gap of its own. It protests only that some other interpretive tools—all with pedigrees more robust than *Chevron*'s, and all designed to help courts identify the meaning of a text rather than allow the Executive Branch to displace it—also apply to ambiguous texts. See *post*, at 27.

That this is all the dissent can come up with, after four decades of judicial experience attempting to identify ambiguity under *Chevron*, reveals the futility of the exercise.

Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. Our attempts to do so have only added to *Chevron*'s unworkability, transforming the original two-step into a dizzying breakdance. See *Adams Fruit Co.*, 494 U. S., at 649–650; *Mead*, 533 U. S., at 226–227; *King*, 576 U. S., at 486; *Encino Motorcars*, 579 U. S., at 220; *Epic Systems*, 584 U. S., at 519–520; on and on. And the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. See, *e.g.*, *Cargill* v. *Garland*, 57 F. 4th 447, 465–468 (CA5 2023) (plurality opinion) (May the Government waive reliance on *Chevron*? Does *Chevron* apply to agency interpretations of statutes imposing criminal penalties? Does *Chevron* displace the rule of lenity?), aff 'd, 602 U. S. ___ (2024).

Four decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of "say[ing] what the law is." *Marbury*, 1 Cranch, at 177. And its continuing import is far from clear. Courts have often declined to engage with the doctrine, saying it makes no difference. See n. 7, *supra*. And as noted, we have avoided deferring under *Chevron* since 2016. That trend is nothing new; for decades, we have often declined to invoke *Chevron* even in those cases where it might appear to be applicable. See W. Eskridge & L. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L. J. 1083, 1125 (2008). At this point, all that remains of *Chevron* is a decaying husk with bold pretensions.

Nor has *Chevron* been the sort of "'stable background' rule" that fosters meaningful reliance. *Post*, at 8, n. 1 (opinion of KAGAN, J.) (quoting *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 261 (2010)). Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case. And even if it were possible to predict accurately when courts will apply *Chevron*, the doctrine "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.'" *Janus*, 585 U. S., at 927 (quoting *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 186 (2018)).

To plan on *Chevron* yielding a particular result is to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the stability that comes with them. History has proved neither bet to be a winning proposition.

Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistency" being "at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious." *Brand X*, 545 U. S., at 981. But statutory ambiguity, as we have explained, is not a reliable indicator of actual delegation of discretionary authority to agencies.

Chevron thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.
Chevron accordingly has undermined the very "rule of law" values that *stare decisis* exists to secure. *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). And it cannot be constrained by admonishing courts to be extra careful, or by tacking on a new batch of conditions.

We would need to once again "revis[e] its theoretical basis . . . in order to cure its practical deficiencies." *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009). *Stare decisis* does not require us to do so, especially because any refinements we might make would only point courts back to their duties under the APA to "decide all relevant questions of law" and "interpret . . .

statutory provisions." §706. Nor is there any reason to wait helplessly for Congress to correct our mistake. The Court has jettisoned many precedents that Congress likewise could have legislatively overruled. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 485 U. S. 617, 618 (1988) (*per curiam*) (collecting cases). And part of "judicial humility," *post*, at 3, 25 (opinion of KAGAN, J.,), is admitting and in certain cases correcting our own mistakes, especially when those mistakes are serious, see *post*, at 8–9 (opinion of GORSUCH, J.). This is one of those cases. *Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986), is for us to leave *Chevron* behind.

By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. See *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 457 (2008). Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014) (quoting *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000)). That is not enough to justify overruling a statutory precedent.

The dissent ends by quoting *Chevron*: "'Judges are not experts in the field.'" *Post*, at 31 (quoting 467 U. S., at 865). That depends, of course, on what the "field" is. If it is legal interpretation, that has been, "emphatically," "the province and duty of the judicial department" for at least 221 years. *Marbury*, 1 Cranch, at 177. The rest of the dissent's selected epigraph is that judges "'are not part of either political branch.'" *Post*, at 31 (quoting *Chevron*, 467 U. S., at 865). Indeed. Judges have always been expected to apply their "judgment" *independent* of the political branches when interpreting the laws those branches enact. The Federalist No. 78, at 523. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.

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 may not defer to an agency interpretation of the law simply because a statute is ambiguous. Because the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

VI. Principles (Lecture 4)

A. CH: Article 5 of the Federal Constitution of the Swiss Confederation

(Federal Constitution of the Swiss Confederation of 18 April 1999 [SR 101]; accessible through https://www.fedlex.admin.ch/eli/cc/1999/404/en)

1. Instruction

Below you will find article 5 of the Swiss Federal Constitution. What principles are stated in this article? Do you think that some principles are missing? At what level (parliamentary act, constitution) are these principles regulated in your country?

2. The article

Art. 5 Rule of law

1 All activities of the state are based on and limited by law.

2 State activities must be conducted in the public interest and be proportionate to the ends sought.

3 State institutions and private persons shall act in good faith.

4 The Confederation and the Cantons shall respect international law.

B. General Questions

1. What do we understand by the principle of legality?
2. What do we understand by the principle of proportionality?
3. How do these principles affect our understanding of the role of courts and administration?

C. ECtHR: Gross v Switzerland

(ECtHR, Judgment of 14 May 2013 in App. no. 67810/10 - Gross v. Switzerland; accessible through https://hudoc.echr.coe.int/eng?i=001-146780)

1. *Instruction*

Read the case below. What are the requirements of the principle of legality as outlined by the court?

2. *Summary of the facts*

Gross, an elderly Swiss woman, could not bear her age-related physical decline and expressed the wish to end her life. A doctor certified that she was capable to form her own judgment and that her wish was not based on any psychiatric condition – he did however not certify the existence of any terminal illness. She consulted multiple doctors who declined her request given that the Code of Professional Medical Conduct mandates the existence of a terminal illness for assisted suicide.

She therefore requested to be given a lethal dose of sodium pentobarbital alternatively which was denied by the Zurich Department of Health and subsequently the relevant courts which held that Article 8 ECHR doesn't confer a right to assisted dying.

She applied to the ECHR, arguing primarily that she was hindered in the exercise of her right to end her life without any legal basis (as e.g. the Code of Professional Medical Conduct doesn't qualify as a law) – amounting to a violation of Article 8 ECHR.

3. *Reasoning and Finding*

[…]

58. The Court reiterates that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept, which encompasses, *inter alia*, the right to personal autonomy and personal development (see *Pretty*, cited above, § 61, and *A, B and C v. Ireland* [GC], no. 25579/05, § 212, ECHR 2010). Without in any way negating the principle of the sanctity of life protected under the Convention, the Court has considered that, in an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity (see *Pretty*, cited above, § 65, and *Koch*, cited above, § 51). In the *Pretty* case, the Court was "not prepared to exclude" that preventing the applicant by law from exercising her choice to avoid what she

considered would be an undignified and distressing end to her life constituted an interference with her right to respect for her private life as guaranteed under Article 8 § 1 of the Convention (see *Pretty*, cited above, § 67).

59. In the *Haas* case, the Court further developed this case-law by acknowledging that an individual's right to decide the way in which and at which point his or her life should end, provided that he or she was in a position to freely form his or her own judgment and to act accordingly, was one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention (see *Haas*, cited above, § 51; see also *Koch v. Germany*, no. 497/09, § 52, 19 July 2012).

60. Having regard to the above, the Court considers that the applicant's wish to be provided with a dose of sodium pentobarbital allowing her to end her life falls within the scope of her right to respect for her private life under Article 8 of the Convention.

61. The Court further reiterates that the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to the Court's settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and in particular that it is proportionate to one of the legitimate aims pursued by the authorities (see, for example, *A, B and C*, cited above, § 229).

62. In addition, there may also be positive obligations inherent in an effective "respect" for private life. These obligations may even involve the adoption of measures designed to secure respect for private life in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Tysiąc v. Poland*, no. 5410/03, § 110, ECHR 2007-I).

63. In the *Haas* case, the Court considered that it was appropriate to examine the applicant's request to obtain access to sodium pentobarbital without a medical prescription from the perspective of a positive obligation on the State to take the necessary measures to permit a dignified suicide (see *Haas*, cited above, § 53). In contrast, the Court considers that the instant case primarily raises the question whether the State had failed to provide sufficient guidelines defining if and, in the case of the affirmative, under which circumstances medical practitioners were authorised to issue a medical prescription to a person in the applicant's condition.

64. Turning to the circumstances of the instant case, the Court observes at the outset that in Switzerland, pursuant to Article 115 of the Criminal Code, inciting and assisting suicide are punishable only where the perpetrator of such acts is driven to commit them by "selfish motives". Under the case-law of the Swiss Federal Supreme Court, a doctor is entitled to prescribe sodium pentobarbital in order to allow his patient to commit suicide, provided that specific conditions laid down in the Federal Supreme Court's case-law are fulfilled (compare paragraph 30, above).

65. The Court observes that the Federal Supreme Court, in its case-law on the subject, has referred to the medical ethics guidelines on the care of patients at the end of their life, which were issued by a non-governmental organisation and do not have the formal quality of law. Furthermore, the Court observes that these guidelines, according to the scope of application defined in their section 1, only apply to patients whose doctor has arrived at the conclusion that a process has started which, as experience has indicated, will lead to death within a matter of days or a few weeks (compare paragraph 33 above). As the applicant is not suffering from a terminal illness, her case clearly does not fall within the scope of application of these guidelines. The Court further observes that the Government have not submitted any other material containing principles or standards which could serve as guidelines as to whether and under which circumstances a doctor is entitled to issue a prescription for sodium pentobarbital to a patient who, like the applicant, is not suffering from a terminal illness. The Court considers that this lack of clear legal guidelines is likely to have a chilling effect on doctors who would otherwise be inclined to provide someone such as the applicant with the requested medical prescription. This is confirmed by the letters from Drs B. and S. (see paragraph 11, above), who both declined the applicant's request on the grounds that they felt prevented by the medical practitioners' code of

conduct or feared lengthy judicial proceedings and, possibly, negative professional consequences.

66. The Court considers that the uncertainty as to the outcome of her request in a situation concerning a particularly important aspect of her life must have caused the applicant a considerable degree of anguish. The Court concludes that the applicant must have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life which would not have occurred if there had been clear, State-approved guidelines defining the circumstances under which medical practitioners are authorised to issue the requested prescription in cases where an individual has come to a serious decision, in the exercise of his or her free will, to end his or her life, but where death is not imminent as a result of a specific medical condition. The Court acknowledges that there may be difficulties in finding the necessary political consensus on such controversial questions with a profound ethical and moral impact. However, these difficulties are inherent in any democratic process and cannot absolve the authorities from fulfilling their task therein.

67. The foregoing considerations are sufficient to enable the Court to conclude that Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, does not provide sufficient guidelines ensuring clarity as to the extent of this right. There has accordingly been a violation of Article 8 of the Convention in this respect.

68. As regards the substance of the applicant's request to be granted authorisation to acquire a lethal dose of sodium pentobarbital, the Court reiterates that the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms contained therein should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity (compare, among other authorities, *Z. and Others v. the United Kingdom,* no. 29392/95, § 103, ECHR 2001-V, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 147, ECHR 2009).

69. Having regard to the above considerations, and, in particular, the principle of subsidiarity, the Court considers that it is primarily up to the domestic authorities to issue comprehensive

and clear guidelines on whether and under which circumstances an individual in the applicant's situation – that is, someone not suffering from a terminal illness – should be granted the ability to acquire a lethal dose of medication allowing them to end their life. Accordingly, the Court decides to limit itself to the conclusion that the absence of clear and comprehensive legal guidelines violated the applicant's right to respect for her private life under Article 8 of the Convention, without in any way taking up a stance on the substantive content of such guidelines.
[…]

4. Questions on the decision

1. Some would argue that the principle of legality is the most essential one in administrative law. Would you agree – and why (not)?
2. What does the requirement entail for the flexibility of administrative action? Do you think this principle could have any negative effects if applied too strictly?
3. Generally, only legislative acts qualify as laws. Can you think of any issues if private entities are entrusted with administrative power?

D. CH: A et al v Council of State of the Canton of Fribourg

(BGE/ATF 149 I 191, accessible through http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F149-I-191%3Ade&lang=de&type=show_document (French))

1. Instruction

Read the case below. What are the requirements of the principle of proportionality as held in this case?

2. Summary of the facts

During the height of the COVID pandemic in 2021, the government of the Canton of Fribourg (Switzerland) issued a decree which mandated a requirement that students must provide a certificate (of vaccination or recovery) or negative test result to be admitted to physical lectures at the University of Fribourg.

22 students took legal action against the decree, arguing primarily that the measure was disproportionate.

3. Reasoning and Finding

[…]

6. In accordance with Art. 36 Cst., any restriction of a fundamental right must be based on a legal basis that must be of legislative rank in the case of a serious restriction (para. 1); it must also be justified by a public interest or by the protection of a fundamental right of others (para. 2) and proportionate to the aim pursued (para. 3), without violating the essence of the right in question (para. 4).

6.1 The contested ordinance was based in particular on Art. 40 EPO. According to Art. 40 para. 1 EPO, the competent cantonal authorities order the measures necessary to prevent the spread of communicable diseases within the population or in certain groups of persons and coordinate their action (para. 1). According to Art. 40 para. 2 LEp, the cantonal authorities may in particular take the following measures: pronounce a total or partial ban on demonstrations (let. a), close schools, other public institutions or private companies, or regulate their operation (let. b), prohibit or limit entry and exit from certain buildings or areas, or certain activities taking place in defined places (let. c).
Case law has already had the opportunity to confirm on several occasions that this provision, and in particular its paragraph 2, constitutes a sufficient formal legal basis within the meaning of Art. 36 para. 1 Cst. allowing the cantonal authorities to take the measures mentioned therein to combat the spread of COVID-19 […].

The list in Art. 40 para. 2 LEp is not exhaustive (ATF 147 I 393 consid. 5.1.3, ATF 147 I 478 consid. 3.7.2). The broad wording of the possible measures is essentially intended to leave the cantons considerable room for manoeuvre, so that they can respond as precisely as possible to the spread of communicable diseases in the light of local specificities (ATF 147 I 393 consid. 5.1.3 and the judgments cited). Such room for manoeuvre is in accordance with the Constitution and inevitable due to the nature of the dangers and the lack of predictability of appropriate measures (ATF 148 I 33 consid. 5.4; ATF 147 I 478 consid. 3.7.2). Furthermore, the measures referred to in Art. 40 para. 2 EPLA, which are quite incisive, must a fortiori also include the possibility for the cantons to adopt less restrictive measures, in compliance with the principle of proportionality and making use of the room for manoeuvre left to them by the wording of Art. 40 EPLA (ATF 149 I 105 consid. 4.4.3.1; ATF 147 I 478 consid. 3.7 and 3.8.1).

6.2 The Epidemics Act contains in its Art. 22 a specific regulation concerning vaccination ordered by the cantons […]. According to this provision, the cantons "may declare vaccinations compulsory for risk groups, for persons particularly exposed and for persons carrying out certain activities, provided that a serious danger is established". Under the old Epidemics Act of 18 December 1970 [RO 1974 1071], the cantons could already order compulsory vaccinations (Art. 23 para. 2 EPLA). The competence is retained in the new law, but is expressly limited to certain groups of persons (cf. Message of 3 December 2010 concerning the revision of the Federal Act on the fight against communicable diseases in humans, FF 2011 291, 360). The administration of a vaccine under duress is excluded (cf. Art. 38 EPLA).

6.3 In this case, since the obligation to present a COVID-19 certificate included an obligation for students to be tested in order to follow their training (see above, recital 5.4), Art. 40 LEp constituted a sufficient legal basis to impose it on them. Since Art. 40 LEp provided a sufficient legal basis, it is not necessary to verify whether the measure could have been based on another legal basis (see judgment 2C_429/2021 of 16 December 2021, recital 5.1.2 concerning the obligation to wear a mask in compulsory school).
On the other hand, if we consider that the requirement for a COVID certificate to access training in Fribourg universities amounted to imposing a vaccination obligation on students, as the appellants maintain, Art. 40 LEp was not the appropriate legal basis, given the specific regulations of Art. 22 LEp relating to compulsory vaccination. In this regard, it may be asked whether students were part of the groups of people to whom compulsory vaccination could have been applied at the time the contested ordinance was adopted. Since the requirement for a COVID-19 test certificate, as provided for in the contested ordinance, appears to be disproportionate (see infra recital 7.8), it is not necessary, in this case, to rule further on the question of the admissibility of a vaccination obligation.

6.4 From the perspective of the public interest pursued by the measure (art. 36 para. 2 Cst.), the restriction of access to holders of the COVID-19 certificate for face-to-face courses and research activities of universities was intended in particular to combat the spread of COVID-19 (see preamble to the contested ordinance: "anticipate a new wave of infections"). For this reason alone, it must be admitted that it pursued a public interest within the meaning of art. 36 para. 2 Cst. (ATF 148 I 89 consid. 7 and the judgments cited). The contested order also aimed

to "ensure as much as possible face-to-face teaching that guarantees the quality of training", which also represents a public interest. To the extent that the appellants argue that they did not have to bear the deficits of the hospital system and that it was the Confederation's responsibility to provide sufficient and quality basic medical care, it is noted that these arguments do not detract from the legitimacy of the public interest aim of preventing the spread of the COVID-19 disease and, as a result, mass hospitalisations or even deaths.

7. The proportionality of the requirement for a COVID-19 test certificate must be verified.

7.1 In order to comply with the principle of proportionality, a restriction of a fundamental right must be suitable for achieving the aim sought (rule of suitability), which cannot be achieved by a less incisive measure (rule of necessity); there must also be a reasonable relationship between the effects of the measure on the situation of the person targeted and the result expected from the point of view of the public interest (rule of proportionality in the narrow sense; ATF 147 I 393 recital 5.3; ATF 146 I 157 recital 5.4 and the judgments cited).

7.2 The principle of proportionality is of particular importance when it comes to harmonizing conflicting constitutional principles, such as the protection of life and public health on the one hand and restrictions on freedoms ordered for this purpose on the other (see ATF 147 I 393 consid. 5.3.1 and the judgments cited). Thus, even if there is a duty of protection of the State against dangers to health (judgment 2C_183/2021 of 23 November 2021 consid. 5.2, unpublished in ATF 148 I 89 and the reference cited), the measures that it may adopt to prevent the transmission of diseases must remain reasonable. Zero risk cannot be expected, even if it is a question of avoiding dangers that are highly detrimental to the population. An acceptable risk must be aimed at by weighing up all the interests concerned (judgment 2C_183/2021 of 23 November 2021, consid. 5.2, not published in ATF 148 I 89 and the judgments cited; ATF 147 I 393, consid. 5.3.1).

7.3 Any protective or preventive measure involves a certain uncertainty as to its future concrete effects. This is always the case for risk prevention measures. In particular, the arrival of new infectious diseases has as a corollary a great deal of uncertainty as to the causes, consequences and the choice of appropriate measures. This means that these measures cannot be provided for by the legislator but must be taken taking into account the current state of

knowledge, which is generally incomplete, which also leaves the authorities some room for manoeuvre (ATF 149 I 105 recital 4.4.4.2; ATF 147 I 393 recital 5.3.2 and the judgments cited). However, the authorities may only rely on the current state of knowledge to take restrictive measures if they actively seek to update this knowledge. As soon as knowledge evolves, the measures must be adapted. The measures ordered must therefore not last longer than necessary to prevent the spread of a communicable disease. However, it may be justified to take strict measures directly, before serious negative effects occur, in order to avoid having to take even more restrictive measures later (ATF 147 I 393 recital 5.3.2 and the judgments cited).

7.4 In this case, from the perspective of fitness, a negative test certifies that the person is in principle not a carrier of the disease and is therefore not contagious without their knowledge. Restricting access to universities to persons with a COVID-19 test certificate was therefore a measure capable of achieving the aim of limiting the spread of the virus. The appellants do not dispute this.

7.5 As regards the necessity of the measure, it should be noted that at the time when the State Council adopted the contested ordinance, the situation in hospitals was tense and the occupancy of intensive care beds was very high. With the arrival of autumn and colder weather, a sharp increase in hospitalisations and therefore an overload of hospitals could not be ruled out […]. Given the relatively wide margin of appreciation to be granted to the authorities (decision 2C_183/2021 of 23 November 2021 consid. 5.7, unpublished in ATF 148 I 89) and the circumstances of the moment, the cantonal authorities cannot be criticised for having considered that access to courses and research activities, which often bring together a large number of students, should be limited to people who can attest that they were not carriers of the virus. Of course, the other option available to the canton of Fribourg would have been to reduce the number of students admitted to classes, while imposing the wearing of masks (see art. 19a al. 2 COVID-19 special situation ordinance). However, reducing the capacity of the premises to two-thirds would also have entailed its share of inconveniences and constraints, since it would also have deprived some students of face-to-face classes. It also raised questions of equal treatment between vaccinated, cured or negatively tested persons, who had immunity or could attest to the absence of the virus, and unvaccinated, uncured or untested persons. It was therefore not necessarily a less incisive measure, from a fundamental rights point of view, than the requirement to present a COVID-19 test certificate.

7.6 The appellants dispute the need for the measure in vain on the grounds that students in higher education institutions are mostly young (between 18 and 29 years old according to the Council of State) and therefore less affected, overall, by the COVID-19 disease. As the Council of State notes, a non-vulnerable person (because they are young and healthy) could infect one or more vulnerable people (because they are older and/or less healthy). Restricting large gatherings in higher education institutions to students who are immune or not carrying the virus reduced the risk of spread to a significant extent. As a result, the risk of contagion and the development of serious forms in and outside higher education institutions by vulnerable people was also reduced (see judgment 2C_429/2021 of 16 December 2021, point 5.6.3). As for the statistics put forward by the appellants, these show, with regard to the occupancy rate in intensive care units, that it increased sharply before decreasing to a minimal extent in the days preceding the adoption of the contested ordinance. These figures do not contradict the observation that the situation was getting worse at that time. Finally, the link with the waves of seasonal flu and the death and hospitalization curves for 2021 is not relevant. The Federal Court has in fact already noted that a comparison between the number of deaths after the appearance of COVID-19 and previous years was misleading. Even if the number of deaths could be similar (in particular in the event of strong waves of influenza), excess mortality in previous years occurred in the absence of specific measures, while the deaths that occurred with the appearance of COVID-19 occurred despite the measures taken (ATF 147 I 450 consid. 3.3.4). It can be admitted with sufficient plausibility that deaths were avoided thanks to the measures taken by the authorities, contacts having been restricted between people particularly at risk of becoming infected and spreading the virus […]. In view of the epidemiological situation at the time the contested ordinance was adopted, the requirement to present a COVID-19 test certificate was necessary, noting that this was a measure intended to be adapted and reassessed.

7.7 Finally, the principle of proportionality in the narrow sense remains to be examined, i.e. the reasonable relationship between the aim pursued and the private interests compromised.

7.7.1 From the point of view of private interests, the severity of the harm caused by the requirement for the COVID-19 test certificate must be considered. This severity is determined by several factors. First of all, there is the frequency of the test and the organisational arrangements. The test had to be carried out at very regular intervals, since the validity period of a COVID-19

certificate issued following a test was 48 hours for a rapid test and 72 hours for a PCR test (Art. 21 para. 3 COVID-19 Certificates Ordinance). It was also necessary to find out about the available centres, make an appointment and ensure that the result and certificate were obtained in time to attend classes. In this respect, this was a significant constraint. For a five-day course week, a student had to rely on at least two PCR tests. Then there is the type of test. Physically, the saliva test does not cause any significant inconvenience - and the appellants do not mention any -, while it must be admitted that a nasopharyngeal test causes a certain inconvenience, amplified by the frequency. According to the provisions in force at the time of the appeal, the saliva PCR test, as well as the rapid saliva test, gave access to a COVID-19 test certificate. Subsequently, for rapid tests, only the nasopharyngeal test was allowed (see above recital 4). Finally, the cost parameter must be taken into account. If at the time the ordinance was adopted, the tests giving access to the COVID-19 certificate were still covered by the Confederation, this was no longer the case from 11 October 2021, subject to exceptions (see above recital 4). Contrary to what the Council of State argues, the fact that the Confederation has reintroduced free testing for certain tests that give rise to a certificate, namely rapid antigen tests and group PCR tests, as of 18 December 2021 (COVID-19 Ordinance 3, amended on 17 December 2021, RO 2021 881) cannot be taken into account when assessing the degree of harm to the personal interests of the applicants. The decisive moment is in fact the filing of the appeal (see above, recital 2.4 unpublished and 4). With regard to the amount to be paid, the Council of State notes that students benefited from a preferential offer thanks to a collaboration between the University of Fribourg and the Swiss Integrative Centre for Human Health, which offered 10 tests for CHF 300. For one semester, including two tests per week, the cost thus amounted to CHF 840. This amount is not negligible in the student budget. The Council of State claims, however, that needy students could benefit from financial support from the University Social Service. For the students of the University, with the financial aid available, the financial burden could therefore be bearable. On the other hand, the Council of State says nothing about the cost of the tests for students from other universities in the canton and does not indicate that financial aid was offered to them. In any case, the contested ordinance did not provide for any financial support. The question is whether the constraints created by the frequency and costs of the tests were acceptable in light of the public interest goals pursued.

7.7.2 From the point of view of the public interest, it is stressed that the aim was to limit the spread of the coronavirus disease 2019 and thus the number of hospitalizations and the number

of deaths, as well as the economic dangers linked to complications of this disease (ATF 147 I 393 consid. 5.3.5). It is also necessary to take into account the public interest in face-to-face teaching (see supra consid. 6.4) and the interest of students other than the appellants (see art. 36 al. 2 Cst. *in fine*). The aforementioned interests justified the constraint of even very regular tests, especially if these could consist of saliva tests, less invasive than nasopharyngeal tests. On the other hand, from the point of view of proportionality in the strict sense, it is not admissible that the continuation of face-to-face training was subject to such a significant financial burden (at least CHF 840 per semester), without the contested ordinance having provided for even a minimal support system. At the time when the disputed regulation was adopted, there was already a certain immunity within the population and the virus was considered less dangerous. Under these circumstances, it is not admissible that a student who could not afford regular tests was forced to follow an online course. Admittedly, the Council of State explained for the University of Fribourg that assistance could be provided to students in need. However, for the other universities, the Council of State did not claim that support had been put in place. It is also true that Art. 3 para. 2 of the contested ordinance provided that universities could provide for exceptions to the requirement of the COVID-19 certificate, but this provision only stated one possibility, dependent on the premises, the number of students and the nature of the activities and therefore unrelated to the financial aspects of the COVID-19 test. Under these circumstances, the complaint based on the violation of the principle of proportionality must be accepted. The question of whether the Confederation or the cantons should have assumed the financial support, taking into account Art. 3 para. 6 of the COVID-19 Act (RO 2021 153) on the coverage of tests by the Confederation as in force at the time, does not fall within the scope of this dispute.

7.8 In conclusion, the requirement for a COVID-19 certificate obtained subsequently from a negative test for access to face-to-face courses and research activities, without a provision relating to the financial coverage of tests, even for students with a limited monthly budget, was disproportionate. In order to continue their face-to-face training, the only option for students in a precarious financial situation was to resort to vaccination, which has always been free, but which constituted a more incisive attack. In this sense, the requirement for a COVID-19 certificate indirectly imposed a vaccination obligation on certain students at universities. However, it was possible to consider a less incisive measure, which would be just as adequate to protect public health, in the form of regular free saliva tests. […]

4. Questions on the decision

1. What are the requirements of the principle of proportionality as laid down here?
2. Do you agree with the application of the principle of proportionality in the matter?
3. How does the principle of proportionality differ from the principle of proportionality as understood in your country?
4. What factors would you consider when determining whether the necessity requirement (as part of the proportionality analysis) is met?

E. Article: Proportionality vs Rationality Review: A False Dichotomy?

(Written by LAM RACHELLE[1], King's Student Law Review, Dickson Poon School of Law, King's College London, 1 July 2021, article as well as its sources (see hyperlinks) accessible through https://blogs.kcl.ac.uk/kslr/2021/07/01/1860/)

1. Instruction

Read the journal article below. What does it say about the relationship between the rationality and proportionality standards of review?

2. Text

[…]

Introduction

In English Administrative Law, much ink has been spilt over the relative intensities of review of a proportionality standard, as opposed to a test of unreasonableness, and whether the former should replace the latter as a general head of substantive judicial review. This article argues that such an assumption is premised upon an inaccurate portrayal of the relationship between the two tests, and proposes an alternative theoretical framework where the focus shifts away from formalist doctrinal veneers to the subject matter and context of each case.

[1] Rachelle Lam is an LLM Candidate at University of Cambridge, having recently completed her undergraduate studies in Law with First Class Honours, also at Cambridge. Her areas of interest include Administrative Law, Company Law, and International Commercial Arbitration.

The *Wednesbury* standard of review involves posing the question of whether the administrative act is "so unreasonable that no reasonable authority would ever have come to it".[2] In contrast, the test of proportionality involves four distinct stages: (i) whether the objective of the measure is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to that objective; (iii) whether a less intrusive measure could have been used; and (iv) whether a fair balance has been struck between the rights of the individual and the interests of the community.[3]

A more "stringent" form of review

On its face, proportionality appears to offer more structure than the *Wednesbury* test. This is because proportionality requires the judge to examine the normative content of the private rights being vindicated, and the justification for the relative weight accorded to competing public interests.[4] This has the potential to significantly attenuate the administrator's capacity to make policy choices by circumscribing the range of substantive options available to the decision-maker.

In contrast, the *Wednesbury* test involves posing a relatively undemanding question on the decision-maker. In instances which concern the formulation and implementation of national political and economic policy, the courts will show considerable deference to the judgment of elected ministers and recognise that there is room for more than one view.[5] As a result, *Wednesbury* review can often be vague and tautologous, as it fails to expose the structure and underlying values of the judicial reasoning process which necessarily precedes a finding of unreasonableness.

The disparity in the proportionality and *Wednesbury* processes is illustrated by the decision in *Regina v. Ministry of Defence, ex parte Smith*[6] and subsequently, *Smith and Grady v. United*

2 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (CA), 234 (Lord Greene MR). Lord Diplock's formulation of the principle was that a decision may be irrational, and hence unlawful, if it 'is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it': Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL), 410.

3 *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38 [20] (Lord Sumption).

4 R (on the application of Daly) v Secretary of State for the Home Department [2001] 2 AC 532 (HL) [27], [30] (Lord Steyn).

5 R v London Borough of Hammersmith and Fulham and Others, ex p Burkett and Another [1991] 1 AC 521 (HL), 597 (Lord Bridge); see also: Jeffrey Jowell, Anthony Lester QC, 'Beyond Wednesbury: Substantive Principles of Administrative Law' [1987] PL 368.

6 [1996] QB 51.

Kingdom.[7] The applicants were discharged from their service in the armed forces on account of their homosexuality. The domestic court applied the *Wednesbury* test: the existence of an apparent justification for the qualification on the applicants' right to respect for private life,[8] namely that of ensuring discipline, morale and unit cohesiveness in the army,[9] was within the range of responses open to a reasonable decision-maker, and hence, in the court's view, established the legality of the government's policy.[10] In contrast, the European Court of Human Rights, in applying the proportionality test, questioned whether the UK government's policy was "necessary in a democratic society", and concluded that although it may answer a pressing social need, the magnitude of the reservation placed upon human rights was disproportionate.[11]

The chameleonic nature of the two tests

The Wednesbury and proportionality tests are not monolithic,[12] and both operate as sliding scales of review.[13] Indeed, *Wednesbury* unreasonableness may even prove to be a more "stringent" standard of review than proportionality. In *Keyu v. Secretary of State for Foreign and Commonwealth Affairs*,[14] Lady Hale articulated the respective competing interests that should have been taken into account by a reasonable decision-maker, and held that, in the calculus of pros and cons, the decision-maker had failed to ascribe sufficient weight to the individual's rights.[15]

In contrast, where proportionality is coupled with a significant degree of judicial deference, there is little analytical weighing of interests, such that the test being applied in effect amounts to a test based on arbitrariness of conduct[16] Furthermore, what proportionality requires can be malleable. For example, the term "fair balance" can sometimes be taken to be a criterion of its own, whilst at other times it is treated as being synonymous to proportionality as a whole.

7 (1999) 29 EHRR 493.
8 Article 8 of the European Convention on Human Rights.
9 Smith (n 6) 529E-H (Brown LJ).
10 Smith (n 6) 558A-C (Lord Bingham MR).
11 For instance, a code of conduct governing relationships between military personnel (regardless of their sexual orientation) would have been sufficient to secure the government's objective; see also: Mark Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' [2001] 60 CLJ 301.
12 Gráinne de Búrca, 'The principle of proportionality and its application in EC Law' (1993) 13 Yearbook of European Law 105.
13 Sir John Laws, 'The Limitations of Human Rights' [1998] PL 254, 259-260.
14 [2015] UKSC 69.
15 Ibid [309]-[312].
16 Takis Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed.), The Principle of Proportionality in the Laws of Europe (Oxford 1999), 70-72.

Understood thus, the two tests are not necessarily as distinct as their paradigm characterizations may imply.

Proportionality as a "general principle"?

The wisdom in preserving *Wednesbury* reasonableness in English administrative law has been questioned both judicially and academically. Dyson LJ professed that he had "difficulty in seeing what justification there now is for retaining the *Wednesbury* test".[17] It is argued that although the time has not come for *Wednesbury* to be expunged yet, the courts should throw off the rigid constitutional division between proportionality and *Wednesbury*, and adopt a third route distinct from both bifurcation and consolidation.

There are strong grounds for supporting the endorsement of proportionality as a general principle. A key attractiveness of proportionality is in its requirement of a reasoned explanation from the decision maker. Once a claimant has established that there has been an interference in his right, it is for the court to weigh up competing considerations and articulate why it came to its conclusion. For example, *Miller (No. 2)*[18] appeared to employ proportionality review in scrutinizing the exercise of prerogative powers:[19] although the court was satisfied by the government's pursuit of the objective of ushering in a new legislative agenda,[20] it held that the Prime Minister failed to discharge the burden[21] of showing that the prorogation was necessary, due to a failure to consider the alternative of a Parliamentary recess,[22] and a fair balance was not struck due to its unjustified length.[23] It is argued (and elaborated below) that an explicit switch to utilising proportionality review across the board should be accompanied by variable application, which would involve adjusting the intensity of proportionality according to the context and the doctrine of deference.

An objection to the adoption of proportionality as a general principle is that proportionality would have to mean different things in different contexts. If review is variable according to the normative weight to be attached to the relevant interest, proportionality review could simply amount to identifying whether there has been a "manifest error",[24] and will no longer exhibit

17 R (British Civilian Internees (Far East Region)) v Secretary of State for Defence [2003] EWCA Civ 473 [34].
18 R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland UKSC 41.
19 Ibid [56], [59] (Lord Reed).
20 Ibid [17], [51].
21 Ibid [51].
22 Ibid [60].
23 Ibid [60]-[61].
24 R v Secretary of State for Health ex parte Eastside Cheese Co [1999] 3 CMLR 123 [47] (Lord Bingham).

the intensity of review nor the structure which defines it. This argument against adopting proportionality as a general head of review suggests that the wholesale elimination of *Wednesbury* is altogether unsatisfactory.

On the other hand, those who advocate for the retention of separate heads of review argue that the proportionality methodology is only useful where there is a yardstick to which a public body's actions can be compared with. Without the "anchor" of rights, proportionality will become an indeterminate standard which conceals unconstrained judicial discretion when controlling exercises of administrative discretion.[25] Taggart has proposed a "rainbow of review": proportionality should replace *Wednesbury* where human and other "fundamental" rights are directly engaged, and in cases involving "public wrongs" *Wednesbury* unreasonableness should be applied.[26]

However, this doctrinally-bifurcated vision of substantial judicial review is flawed, because a clean division between "rights" and "public wrongs" is impossible. It is rarely the case that only one of the two is categorically engaged, as the range of circumstances in which the proportionality doctrine applies is broader than has generally been acknowledged. For example, in *Secretary of State for the Home Department v. Pham*,[27] the court held that a requirement to act proportionately was normatively warranted when a statutory power threatened a sufficiently important interest (British citizenship). While the ground for complaint may appear to be one of maladministration, an applicant is motivated to litigate precisely because the decision impinges upon an underlying right or interest of fundamental importance.[28] Other well-established substantive principles of good administration, such as consistency of treatment, non-retrospectivity and access to court, are just as capable of buttressing the proportionality methodology as are fundamental rights.

The Future

Ultimately, to debate whether proportionality should replace *Wednesbury* is to begin from a false proposition, as this postulates a bright-line distinction between the two principles which

25 Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] NZ L Rev 423.

26 It is also worth noting that similarly distinct modes of review manage to co-exist in US public law, embraces both "rational basis" and strict scrutiny" review: Ian Loveland, 'A Fundamental Right to be Gay under the Fourteenth Amendment?' [1996] PL 601.

27 [2015] UKSC 19.

28 Murray Hunt, 'Against Bifurcation' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), A Simple Common Lawyer: Essays in Honour of Michael Taggart (Oxford 2009).

does not, in reality, exist. The two principles need not inevitably be conceptualised as competing forms of review which must be chosen between.

A new framework for substantive judicial review is proposed as follows: firstly, the applicant must identify a "badge of unreasonableness" which identifies a flaw in the decision-maker's decision and is capable of justifying judicial intervention.[29] Then, the court should decide how heavy a burden of justification should be placed on the administrative body. Judicial deference and the rigour and scope of review should be flexibly modulated by reference to normative, institutional and constitutional considerations,[30] such as the inherent significance of the right being vindicated, the character of the policy, and the expertise of the decision-maker. Finally, the court should examine whether that burden has been discharged;[31] in other words, whether the explanation provided by the decision-maker is justified.

This approach has three key advantages. Firstly, it simplifies English law. Rather than leaving the vindication of individual interests to hang upon arbitrary classifications, the framework provides analytical clarity and transparency. Secondly, it acknowledges the fact that courts are not necessarily well placed to assess policy decisions. The flexible and context-sensitive process means that the court will be better able to accord due respect to the institutional competence of decision-makers when need be. Thirdly, the framework promotes more effective judicial supervision of administrative decisions, facilitating legitimate government action whilst upholding the rule of law. It exemplifies constitutional collaboration and counter-balancing at its best.

3. Questions on the article

1. What exactly are the arguments against the total replacement of the *Wednesbury* unreasonableness test by the proportionality analysis put forward? Do you agree?
2. Do you agree with the author's assertion that the combination of both standards is the most fruitful option available?

[29] See: Delios v Canada (Attorney General) 2015 FCA 117 [27]; Paul Daly, 'Substantive Review in the Common Law World: AAA v Minister for Justice [2017] IESC 80 in Comparative Perspective' [2019] 1 ISCR 105.

[30] Mark Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Michael Ramsden and Anne Scully Hill (eds), Effective Judicial Review: A Cornerstone of Good Governance (Oxford 2010).

[31] Rebecca Williams, 'Structuring Substantive Review' [2017] PL 99.

F. CN: Wang Liping v Zhongmou County Transportation Bureau

(Wang Liping v Zhongmou County Transportation Bureau (2003), no accessible source)

1. *Instruction*

Read the extract from the Chinese decision below. Do you agree with the way the court frames and applies the principle of proportionality?

2. *Summary of the facts*

In the hot and sunny morning of 27.09.2001 in China's Henan Province, a pig farmer (Wang Liping) and her employees, were transporting 31 pigs on three vehicles previously borrowed from another party.
On their way, they were stopped by officers of the Transportation Bureau of Zhongmou County who discovered that the vehicle owners had failed to pay the road maintenance fee (which motorists are required to pay in order to use roads). The officers therefore decided to seize the tractors pursuant to Article 36 of the *Highway Law of the People's Republic of China and* Article 53 (2) of the *Henan Provincial Highway Management Regulations.* Liping requested to transport the pigs to the destination before the seizure of the tractors, fearing that the pigs might die from being exposed to high temperatures – to no avail. The officers removed the vehicles' engines, causing the vehicles to tilt. The pigs were consequently squashed against each other for hours – leading to most of them dying from prolonged high temperature exposure which in turn caused economic damage to Liping's company (who sought to sell the pigs).

Liping applied for compensation from the Transportation Bureau, arguing that the seizure of the vehicles without prior removal of the pigs was disproportionate and thus constituted unreasonable and inappropriate state conduct. After being ignored by the administrative authority, she made a claim before the People's Court of Zhongmou County.

3. *Reasoning and Finding*

[…]

Administrative compensation is a form of national compensation, and only when it meets the constitutive requirements of administrative compensation liability can the state bear

compensatory responsibility for the damage caused by administrative infringements. Therefore, in administrative compensation litigation, solving the composition of administrative compensation liability is the primary issue.

The constituent elements of administrative compensation liability include:
The subject of infringement refers to who carries out actions that may cause administrative compensation liability. The *State Compensation Law of the People's Republic of China* (hereinafter referred to as the *State Compensation Law*) stipulates that the main entities that can become the subject of administrative infringement include: (1.) Administrative organs and their civil servants; (2.) Organizations and their staff authorized by laws and regulations; (3.) Organizations and their staff entrusted by administrative agencies; (4.) Individuals entrusted by administrative agencies.

[…] Administrative illegal behaviour refers to the nature of actions that may lead to the state bearing administrative compensation responsibility. According to Article 3, Article 4, and Article 5 (1) of the *National Compensation Law*, administrative organs and their staff are only responsible for compensation if they infringe on the legitimate rights and interests of the administrative counterpart "in the exercise of administrative powers"; the state shall not be liable for compensation for personal actions of administrative personnel that are not related to the exercise of their powers. The legality of specific administrative actions not only entails clear determination of facts, correct application of laws, and compliance with legal procedures, but also the reasonable use of administrative discretion by administrative agencies in the realm of discretion. Clearly unreasonable specific administrative actions constitute abuse of power.

The small […] vehicles driven by Zhang Junming, Wang Laohu, and Wang Shutian [were] driving on the highway without paying the road maintenance fee. Based on this fact, the staff of the defendant county transportation bureau decided to temporarily detain the vehicles. Since the […] Zhang Junming, Wang Laohu, Wang Shutian, […] the plaintiff Wang Liping in this case have no objections to the decision to temporarily detain [the] vehicles, the legality of this decision will not be examined in this case.

[…] Regardless of whether the decision to temporarily detain the vehicle is legal or not, the staff of the defendant's county transportation bureau should [have been] aware that in hot weather, pigs […] should not be squeezed, nor should they stay on the road for a long time. No

matter who [owned these pigs], only by promptly and properly disposing of [them] before detaining [the vehicles] can we ensure that [they] will not be damaged due to the detainment. However, the staff of the county transportation bureau did not consider the safety of the property, and even ignored Wang Liping's request to transport the [pigs] to the destination before detaining the car. […] The administrative [conduct] of the staff of the […] [T]ransportation [B]ureau when implementing the decision to temporarily detain vehicles does not meet [the requirements of reasonability and appropriateness] and is an abuse of power. According to Article 54, Paragraph 1 (2) (5) of the *Administrative Litigation Law* and Article 57, Paragraph 2 (2) of the *Supreme People's Court's Interpretation on Several Issues Concerning the Implementation of the Administrative Litigation Law of the People's Republic of China*, it shall be confirmed that the [state conduct was] illegal.

[…] The plaintiff Wang Liping's 15 live pigs died due to prolonged heat and pressure, which was caused by unreasonable and inappropriate administrative actions taken by the staff of the defendant [the Transportation Bureau] during the execution of the decision to temporarily detain vehicles. There is a causal relationship between the two. The administrative decision to temporarily detain vehicles is independently executed by the staff of the [T]ransportation [B]ureau, and the consequences caused by improper implementation measures should naturally be borne by the [same authority].

In summary, the plaintiff Wang Liping [suffered] property damage […] due to the […] abuse of power by the defendant's […] staff and filed a lawsuit requesting compensation. Her [demand] should be supported. After deducting the 390 yuan received from selling dead pigs, Wang Liping suffered an economic loss of 10500 yuan, which should be compensated by [the County Transportation Bureau]. […]

4. Questions on the decision

1. Do you agree with the intertwinement of the notions of reasonability and proportionality?
2. Where would you draw the line between (dis)proportionality and (un)reasonability? Can you think of instances of disproportionate conduct being so severe that you would call it unreasonable and/or irrational?
3. How would you describe the notion of “abuse of power”? Is it used in your home jurisdiction?

VII. Legitimate Expectations (Lecture 5)

A. General Questions

1. What are "legitimate expectations" (categories, e.g. formal in substance; prerequisites, e.g. basis, good faith, action, damage etc.)?
2. How do legitimate expectations differ from other administrative law principles (reasonableness, proportionality etc.)?
3. Should legitimate expectations be accepted as an administrative law principle? If so to what extent? What are the likely consequences (and dangers) of such a doctrine?

B. SG: Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority

(Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority [2013] SGHC 262, accessible through https://www.elitigation.sg/gd/s/2013_SGHC_262)

1. Summary of the facts

The applicant was a property developer which had acquired state land for redevelopment. In Singapore, to ensure that land is used according to land usage policy, it is common for state leases to specify, as a condition of the lease, the permitted uses of the land and the maximum gross floor area for these permissible uses of the land. However, a payment, known as the "differential premium" is payable for lifting these restrictions. The Singapore Land Authority is responsible for assessing the differential premium payable. The applicant argued that they had a legitimate expectation in the way the differential premium would be calculated because of information available from the Singapore Land Authority's circulars to developers and from its website. The circulars and website stated that the differential premium would be calculated based on a Table of Development Charge Rates (DC Table) published by the Urban Redevelopment Authority.

2. Reasoning and Finding

[…]

1 This case concerns the judicial review of the Singapore Land Authority's ("the SLA") assessment of the differential premium ("DP") payable for the lifting of title restrictions for two particular plots of land. The applicant alleges that the assessment of the DP was done without reference to the Development Charge Table of Rates ("the DC Table") published by the Urban

Redevelopment Authority ("the URA"). The applicant thus seeks a quashing order against the assessed DP and a mandatory order to direct the SLA to assess the DP in accordance with the DC Table. The Attorney-General, a non-party to the action, also made submissions during the hearing before me. […]

The issues

50 Accordingly, two main issues arose for consideration in this case:

(a) Was the SLA's decision to assess the DP through a spot valuation instead of abiding by the DC Table irrational and/or unreasonable?

(b) Should the doctrine of substantive legitimate expectation be recognised in Singapore law? If so, can the applicant avail itself of this doctrine?

Was the SLA's decision to assess DP via a spot valuation irrational and/or unreasonable?

51 The applicant's first argument is that the SLA's decision to assess the DP by means of a spot valuation was irrational and/or unreasonable. The assessment, it submitted, ought to have been in accordance with the DC Table.

[*The court compared notions of irrationality/unreasonableness and legitimate expectations in the common law jurisdictions of England, Canada, Australia and Hong Kong*.]

97 *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 ("*UDL Marine*") concerned a case where a tenant applied unsuccessfully to its landlord, a statutory board, for the renewal of a lease. The application for leave for judicial review was dismissed on the ground that the respondent's act of not renewing the lease was not susceptible to judicial review because it was exercising its *private* contractual rights not to renew the lease. Lai Siu Chiu J commented, *obiter*, that both parties had not submitted on the issue of legitimate expectation. Nevertheless, she doubted that the doctrine of substantive legitimate expectation was part of Singapore law because of the presence of competing tensions and her concern that the need to check against inconsistent treatment must be balanced against the undesirable effects of excessively fettering administrative discretion (at [65] and [66]).

98 In *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 ("*Borissik Svetlana*"), the applicant was a joint owner of a semi-detached house who applied for leave for judicial review of the Urban Redevelopment Authority's decision to deny the applicant's application for the construction of a detached bungalow. Leave was denied on the ground that the applicant had not exhausted all her remedies before applying for judicial review. Tan Lee Meng J nevertheless found, *obiter*, that the applicant could not point to any promise made to her by a person with actual or ostensible authority. Tan J went on to state (at [49]):

> [*De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) lists four conditions for the creation of a legitimate expectation, namely that the expectation must be:
>
> (i) clear, unambiguous and devoid of relevant qualification;
>
> (ii) induced by the conduct of the decision maker;
>
> (iii) made by a person with actual or ostensible authority; and
>
> (iv) applicable to the applicants, who belong to the class of persons to whom the representation is reasonably expected to apply.

It is unclear if Tan J was referring to a procedural or substantive legitimate expectation. However, at [46], Tan J said:

> Finally, the applicant's claim that she had a legitimate expectation that the proposal to redevelop No 2 would be approved **will be considered**. [emphasis added]

The above passage seems to suggest that Tan J had procedural, rather than substantive, legitimate expectation in mind.

99 The Court of Appeal case of *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong*") concerned an appellant who was convicted of a drug trafficking offence and sentenced to death. In a concurring judgment, Andrew Phang and V K Rajah JJA addressed the appellant's argument that a legitimate expectation had arisen that it is the President who would make the decision as to whether the appellant would be pardoned. Citing *Regina v Director of Public Prosecutions, Ex parte Kebilene* [2000] 2 AC 326, they held that such a legitimate

expectation could not arise on the facts because clear statutory words will override any expectation. In this respect, Art 22P(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) clearly states that the President shall act "on the advice of the Cabinet".

100 Prior case law has thus not addressed, head-on, the issue of whether the doctrine of substantive legitimate expectation is part of Singapore law. Lai J in *UDL Marine* did not have any submissions on this issue before her and doubted that the doctrine existed. Tan J in *Borissik Svetlana* ostensibly had procedural, rather than substantive, legitimate expectation in mind when he cited a framework espoused in the sixth edition of *De Smith*. Andrew Phang and V K Rajah JJA in *Yong Vui Kong* did not address the issue of whether substantive legitimate expectation is part of Singapore law. They dismissed the appellant's argument on the basis that no substantive legitimate expectation could have arisen on the facts.

Summary of respective submissions

101 The applicant here relied chiefly on *Borissik Svetlana* for the proposition that the doctrine of substantive legitimate expectation has received implicit judicial recognition in Singapore. The applicant submitted that Tan J had in that case assumed that judicial review could be used to protection legitimate expectations of substantive benefit. The applicant further contended that a legitimate expectation arose on the facts. Firstly, the SLA Circulars and the SLA website constituted clear and unambiguous representations that the DP would be computed on the basis of the DC Table. Secondly, in deciding whether to acquire the Land and in determining the appropriate price it was willing to pay, the applicant was induced by the representations. Thirdly, the SLA Circulars and the SLA website were circulated by a person with actual or ostensible authority. Lastly, the applicant belonged to the class of persons to whom the representations were reasonably expected to apply. The applicant also argued that there was no way for it to discover that the SLA had considered directly-alienated land to be an exception to the prescribed method of assessment. There was no publicly available document which stated that directly-alienated land was an exception to the prescribed method of assessment. There was in fact no way for the applicant to find out that the Land was directly alienated to its former owner. The Land Return Clauses in the two lease documents merely state that the DP would be payable in accordance with the DP Clauses. The DP Clause is found in all state leases and there is therefore nothing to disturb the applicant's understanding that the DP would be assessed in accordance with the DC Table.

102 The SLA relied on *UDL Marine* for the proposition that the High Court had, in that case, doubted the existence of the doctrine of substantive legitimate expectation in our law. The SLA, however, conceded that local jurisprudence has not definitively pronounced whether the doctrine of substantive legitimate expectation is part of Singapore law. The SLA submitted that the reasons for and against the said doctrine are finely balanced. In England, the doctrine is hedged with qualifications. Even then, the English approach was categorically rejected by the Australian High Court in *Ex p Lam*, where the court found that the English position did not sit well with the Australian constitutional framework. The SLA also asserted that no expectations whatsoever arose in this case. The threshold for a representation that is clear, unambiguous and devoid of qualification is a high one. Further, the applicant in fact already knew or ought to have known that the DP in its case would be assessed via a spot valuation by the Chief Valuer at 100% in enhancement in land value. There were media releases concerning the redevelopment of a property located at Market Street. Any reasonable developer would have noticed that the leases contained a special covenant — the Land Return Clause — which is not ordinarily found in other State leases.

103 The Attorney-General argued that the doctrine of substantive legitimate expectation should not be adopted in Singapore for three reasons. First, the doctrine was developed in England against the backdrop of the Human Rights Act 1998 and the pressure to assimilate European doctrine into the common law. Second, the underlying rationale of the doctrine is that of abuse of power, which is not principled. Third, the doctrine is inconsistent with the doctrine of separation of powers as enshrined in the Singapore Constitution. In any event, no legitimate expectation arose on the facts. There was no clear, unambiguous or unqualified representation. The SLA Circulars were directed to the general public and did not have the character of a contract. There was also no inducement.

My decision on the doctrine of legitimate expectation

104 The above analysis (at [97] to [100]) shows that case law in Singapore has not addressed directly the issue of whether the doctrine of substantive legitimate expectations is part of Singapore law.

The separation of powers

105 Both the SLA and the Attorney-General placed especial emphasis on the cases of *Ex p Lam* and *Mount Sinai* [*the Australian and Canadian cases compared in this case yet left out of this reader for the sake of simplification*]. I shall deal with both cases in turn.

106 Both the SLA and the Attorney-General relied on *Ex p Lam* for the proposition that the doctrine of substantive legitimate expectation was influenced by European law and is inconsistent with the Australian Constitution and, more specifically, the separation of powers. As Singapore and Australia both have written constitutions, the reasoning in *Ex p Lam* also applies to Singapore.

107 As a preliminary matter, I note that this line of reasoning was present in only McHugh and Gummow JJ's speech and thus did not command the assent of the majority of the court. Gleeson CJ and Hayne J, in separate speeches, did not consider the question of whether the doctrine of substantive legitimate expectation ought to be part of Australian law. Callinan J opined that the said doctrine is not part of Australian law but did not cite the Australian Constitution and the separation of powers as a reason for this holding […]. This line of reasoning was also not adopted by the Canadian Supreme Court in *Mount Sinai.*

108 Secondly, although European law may have influenced English law, is the English system of government, with its unwritten Constitution, fundamentally different from the Singaporean and Australian systems of government with their written Constitutions? Implicit in the SLA's and the Attorney-General's argument is that a written constitution is a pre-requisite for the separation of powers. According to this argument, the written constitutions of Australia and Singapore explicitly demarcate the powers that are to be allocated to the legislative, executive and judicial branches respectively and it would therefore tantamount to judicial overreach for the judiciary to enforce substantive legitimate expectations. However, it is clear that the UK system, despite the absence of a written constitution, also recognises the separation of powers. In the House of Lords decision of *Regina v Secretary of State for the Home Department, Ex parte Fire Brigades Union and others* [1995] 2 AC 513 ("*Ex p Fire Brigades*"), Lord Keith of Kinkel said (at 567D – E):

It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The

executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. *This requires the courts on occasion to step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended.* Concurrently with this judicial function Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. [emphasis added in bold and in italics]

109 As a side-note, this case was decided when the House of Lords was still functioning as a court of law, 14 years before the establishment of the Supreme Court of the United Kingdom in 2009 which formalized the separation of the legislative and the judicial functions of the House of Lords in order to comply with the European Convention on Human Rights. In this respect, I refer to a consultation paper entitled *Constitutional Reform: A Supreme Court for the United Kingdom* (July 2003, CP11/03) (available at http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/consult/su premecourt/supreme.pd last accessed 28 October 2013) (at para 3):

It is not always understood that the decisions of the 'House of Lords' are in practice decisions of the Appellate Committee and that non judicial members of the House never take part in the judgments. Nor is the extent to which the Law Lords themselves have decided to refrain from getting involved in political issues in relation to legislation on which they might later have to adjudicate always appreciated. The fact that the Lord Chancellor, as the Head of the Judiciary, was entitled to sit in the Appellate and Judicial Committees and did so as Chairman, added to the perception that their independence might be compromised by the arrangements. *The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so.* [emphasis added in bold and in italics]

110 It cannot be argued, therefore, that the doctrine of substantive legitimate expectation should not be law in Singapore simply because Singapore has a written constitution while England, which recognises the doctrine, does not. Instead, this issue should be looked at from first principles.

111 If private individuals are expected to fulfil what they have promised, why should a public authority be permitted to renege on its promises or ignore representations made by it? If an individual or a corporation makes plans in reliance on existing publicized representations made by a public authority, there appears no reason in principle why such reliance should not be protected. [emphasis added in bold]

112 The upholding of legitimate expectations is eminently within the powers of the judiciary. In the context of private law, this is expressed through the enforcement of contracts (which upholds bargains freely made) and the equitable doctrine of estoppel (which upholds the reliance interest of a representee if a representor resiles from his representation inequitably). However, in the public law sphere, in deciding whether a legitimate expectation ought to be upheld, the court must remember that there are concerns and interests larger than the private expectation of an individual or a corporation. If there is a public interest which overrides the expectation, then the expectation ought not to be given effect to. In this way, I believe the judiciary can fulfil its constitutional role without arrogating to itself the unconstitutional position of being a super-legislature or a super-executive.

113 In my view, there ought to be no difference in principle between procedural and substantive legitimate expectations. The reasons enumerated above do not distinguish between the procedural and the substantive and apply equally to both. […]

The doctrine and its requirements

118 In my opinion, the doctrine of legitimate expectation should be recognised in our law as a stand-alone head of judicial review and substantive relief should be granted under the doctrine subject to certain safeguards. Having regard to the case law from the various common law jurisdictions and applying some commonsensical principles, I believe the doctrine can operate effectively and fairly in the following manner without the court overstepping its judicial role:

a. The applicant must prove that the statement or representation made by the public authority was unequivocal and unqualified;

i. If the statement or representation is open to more than one natural interpretation, the interpretation applied by the public authority will be adopted; and

ii. The presence of a disclaimer or non-reliance clause would cause the statement or representation to be qualified.

b. The applicant must prove the statement or representation was made by someone with actual or ostensible authority to do so on behalf of the public authority;

c. The applicant must prove that the statement or representation was made to him or to a class of persons to which he clearly belongs;

d. The applicant must prove that it was reasonable for him to rely on the statement or representation in the circumstances of his case.

i. If the applicant knew that the statement or representation was made in error and chose to capitalize on the error, he will not be entitled to any relief;

ii. Similarly, if he suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so, he will not be entitled to any relief;

iii. If there is reason and opportunity to make enquiries and the applicant did not, he will not be entitled to any relief.

e. The applicant must prove that he did rely on the statement or representation and that he suffered a detriment as a result;

f. Even if all the above requirements are met, the court should nevertheless not grant relief if:

i. Giving effect to the statement or representation will result in a breach of the law or the State's international obligations;

ii. Giving effect to the statement or representation will infringe the accrued rights of some member of the public;

iii. The public authority can show an overriding national or public interest which justifies the frustration of the applicant's expectation.

Application of the doctrine's requirements to the facts

119 I shall first deal with the statements or representations set out in the SLA website. The use of the website is governed by its Terms of Use […] which explicitly state that "the SLA does not make any representations or warranties whatsoever" including "any representations or warranties as to the accuracy, completeness, reliability, timeliness, currentness, quality or fitness for any particular purpose of the Contents of this Site". The representations set out in the SLA website were therefore qualified and cannot found a claim for substantive relief under the doctrine of legitimate expectation. Faced with such a wide disclaimer, the applicant should have written to the SLA to confirm its alleged understanding of how the policy would work in practice and, more specifically, how it would impact the particular transaction that the applicant was contemplating getting into. It did not do so and cannot now claim relief under the doctrine.

120 I next consider the SLA Circulars. The SLA Circulars were circulated to the public at large. However, realistically speaking, the only people who would have read (or would be expected to read) the SLA Circulars were property developers or their advisors. The applicant, a property developer, is clearly within the class of persons that the SLA Circulars were targeted at.

121 The SLA Circulars did contain unequivocal and unqualified statements or representations. The 2000 SLA Circular stated that the "determination of DP will be based on the published [DC Table] rates". The 2007 SLA Circular reiterated this by its statement that the "determination of DP will still be based on the published [DC Table] rates". Both circulars also enumerated certain exceptions to the applicability of DC Table: where the use as spelt out in the particular title restriction does not fit into any of the use groups and where the lease tenure is upgraded (only the 2000 Circular). The two Circulars stated that the SLA reserves the right

to determine if title restrictions should be lifted. However, this does not mean that the SLA also reserves the further right to deviate from the DC Table if title restrictions are indeed lifted. Both Circulars did not state that there might be other unpublished exceptions or policies.

122 There was no dispute that the SLA Circulars and the SLA website were published by or with the authority of the SLA.

123 The applicant must prove that it was reasonable for him to rely on the statement or representation. The applicant must also prove that he did rely on the statement or representation and that he suffered a detriment as a result. The applicant averred that it had relied upon the representation in the SLA Circulars that DC Table rates would apply in purchasing the land. It would appear therefore that reliance was placed on the SLA's publications and if the applicant now has to pay a much higher DP than was represented, there would definitely be detriment caused to the applicant. However, was it reasonable for the applicant to have relied on the SLA's publications in the circumstances of this case?

124 The Land Return Clause (present in the leases of both Plots) […] provided that the applicant as lessee was obliged to notify the lessor, the Singapore Government, if the land in question was not used for the purposes specified. Upon notification, the Government would have a year to decide whether or not to buy over the land at Land Acquisition Act (Cap 152, 1985 Rev Ed) rates. Such rates might turn out to be lower than the price which the land would have fetched in the market, simply because potential purchasers would have paid a higher price in the anticipation of getting approval for a change of the use of the land or for an increase in the plot ratio. In particular, s 33(5)(*e*) of the Land Acquisition Act explicitly states that:

the market value of the acquired land shall be deemed not to exceed the price which a bona fide purchaser might reasonably be willing to pay, after taking into account the zoning and density requirements and any other restrictions imposed by or under the Planning Act (Cap. 232) as at the date of acquisition and any restrictive covenants in the title of the acquired land, and ***no account shall be taken of any potential value of the land for any other use more intensive than that permitted by or under the Planning Act as at the date of acquisition.*** [emphasis added]

The applicant in purchasing the Land took upon itself the risk of compulsory acquisition which, if it had occurred, could have resulted in a huge loss.

125 The SLA furnished evidence that the Land Return Clause was present in only 242 State leases, representing only 1.25% of the total number of State leases. The applicant, an experienced property developer, would have known that the Land Return Clause was peculiar and atypical of State leases. The applicant tried to understate this by arguing that the Land Return Clause merely referred back to the DP Clause for the computation of the DP payable and that it was therefore unaware of the significance of the Land Return Clause. I was not convinced by this. The Land Return Clause should have alerted an experienced property developer like the applicant to the fact that the Land was not under a "normal" State lease.

126 It was widely reported in the local media in 2008 that Capitaland had to pay a DP equivalent to 100% of the enhancement in land value to redevelop the Market Street Car Park. At the hearing, the applicant tried to downplay this by saying that it understood 100% of the enhancement in land value to mean 100% of the enhancement in land value as indicated by the DC Table (because the convention after the 2007 SLA Circular was to charge 70%, an increase from the 50% payable under the 2000 SLA Circular). I accept that the local media reports did not state the method upon which the 100% enhancement in value was calculated. However, the press release by Capitaland on 3 January 2008 (almost two years before Lot 1338M was acquired), stated that the said redevelopment was subject to two conditions, one of which was "the payment by the lessee (CCT) of 100% of the enhancement in land value as assessed by the Chief Valuer in a spot valuation".

127 Considering the evidence cumulatively, the irresistible inference is that the applicant ought to have known that the DP for the Land would not be assessed according to the DC Table. At the very least, the applicant should have written to the SLA to ask if DC Table rates would be applied to State leases which contain the Land Return Clause, especially in the light of the widely-reported Market Street Car Park redevelopment. In fact, the applicant started construction work sometime after 8 April 2011 and before the SLA letter dated 29 November 2011, where the SLA first approved the lifting of title restrictions and stated that the DP would be assessed at 100% of the enhancement in land value in a spot valuation. The construction costs could very easily have been incurred for nothing had the SLA not given approval for the lifting of title restrictions in the first place.

128 As an experienced property developer going into a multi-million dollar transaction, it was therefore not reasonable for the applicant to have relied solely on the SLA's publications in the circumstances of this case. It was in the business of making money from land development. It had many professional advisors and could have easily checked with the SLA on what the DP would be if it decided to buy the Land and embark on its redevelopment plans. In any case, the SLA had made it clear in its correspondence with the applicant that the DP was assessed without reference to the DC Table.

129 Assuming that the applicant had satisfied the first five requirements (which it clearly had not) for invoking the doctrine of legitimate expectation to claim relief, there would still be the safeguards in the sixth requirement to consider. As the SLA has rightfully pointed out, it is under a statutory duty to "optimise land resources" (s 6(1)(*a*) of the SLA Act) and to "have regard to efficiency and economy and to the social, industrial and commercial and economic needs of Singapore" in the carrying out of its functions (s 6(2)(*a*) of the SLA Act). Its statutory duty would encompass getting the best returns for the State when it deals with State land. This would in turn benefit the public at large. It is therefore unacceptable in the circumstances here to argue that the State's finances would not suffer as much as the applicant's if the SLA were to make an exception for this case and not apply its unpublished policy relating to directly-alienated State land to the Land here. The overriding public interest must therefore prevail over the financial interests of a commercial enterprise like the applicant in this case.

Conclusion and costs

130 The applicant has failed to show irrationality on the part of the SLA or to establish a legitimate expectation on the facts of this case. Accordingly, its application for judicial review on these grounds is dismissed.

131 The applicant is to pay the costs of the SLA and of the Attorney-General, such costs to be agreed or taxed. The parties may also agree that the costs be fixed by me. In that event, I will fix the amount of costs after hearing their submissions on the appropriate quantum to award.

C. CH: X v Conservatory of the Canton of Fribourg

(BGE/ATF 137 I 69, accessible through http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F137-I-69%3Afr&lang=fr&type=show_document (German))

1. *Instruction*

Read the following Swiss case and think about what principles should be considered in cases of legitimate expectations. Which of these principles is the court's opinion based on? Do you agree with those arguments?

2. *Summary of the facts*

X, a pianist and conservatory student (Music College) was an aspiring music teacher. He had experienced difficulties to perform his final exam in front of an audience due to emotional stress. Therefore, he was granted an exception to repeat that same exam in front of the examination board and without a public audience. The examination board offered him this setting. He passed the exam and received a written protocol from the examination board. Hereinafter, he received a written statement in the form of an administrative decision that he had successfully completed his educational training for his teaching certificate.

However, the director of the school then requested that the certificate should not be issued because X had not completed the aforementioned exam in front of a public audience. Subsequently, the competent authority (EKSD) decided to refuse the issuing of the certificate. The supervisory authority (EKSD) argued that the exam was not performed in accordance with the law and that the initial administrative decision (decision that X passed the exam) was therefore incorrect and had to be revoked although it was already legally binding.

3. *Reasoning and Finding*

[…]

2.2 The complainant passed the examination on 13 October 2008. The order came into formal force in mid-November; the EKSD only revoked it at the beginning of March 2009. The order is legally binding, which is why formally legally binding orders may only be revoked unilaterally or amended to the detriment of the addressee under certain conditions […].

Contrary to the opinion of the lower court, it is therefore not at the discretion of the authorities whether they want to revoke a decision.

2.3 The PrVK[32] and the law of 23 May 1991 on administrative justice (VRG; SGF 150.1) contain neither provisions on the revocation of examination decisions nor on those of diplomas nor on revocation in general. It is therefore necessary to proceed according to the Federal Court's case law (cf. BGE 127 II 306 consid. 7a p. 313 f.), according to which a materially incorrect order can be revoked after the period for appeal has expired under certain conditions. Accordingly, the interest in the correct implementation of objective law (consid. 2.4) and that in the protection of legitimate expectations are opposed to each other - however, only if its requirements are met (consid. 2.5). The two interests must then be weighed against each other (consid. 2.6). An order cannot, in principle, be revoked if the interest in protecting legitimate expectations takes precedence over the interest in the correct implementation of objective law:

This is generally the case if the administrative order established a subjective right or the order was issued in a procedure in which the opposing interests had to be examined from all sides and weighed against each other, or if the private individual has already made use of a power granted to him by the order. However, this rule is not absolute; In these three cases, too, revocation may be considered if it is warranted by a particularly important public interest […]. In any case, all aspects of the individual case must be taken into account.

2.4 In order for a student to be admitted to the final examination for the teaching diploma according to Art. 36 lit. a PrVK, he must meet various requirements: in addition to attending classes for 8 semesters, he must have passed the theory examination specified in the curriculum (Art. 40 para. 2 lit. b PrVK) and the obligatory additional examinations (Art. 40 para. 2 lit. d PrVK) as well as the elimination examination (Art. 40 para. 2 lit. c PrVK), which consists of a presentation lasting around 30-45 minutes (Art. 39 PrVK). In addition, various internships must be completed for the teaching diploma and a diploma thesis in pedagogy must be accepted (Art. 47 PrVK). The entire four-year training course is concluded with the final examination, which consists of a recital of works from all eras and styles and lasts 30-45 minutes (Art. 41 PrVK). According to Art. 46 PrVK, this must be done in front of an audience. The final examination, which the complainant passed, was done behind closed doors and thus contravened the legal

[32] Cantonal decree on examinations of the Conservatory of 5 April 2005 (SGF 481.4.12)

requirements. The order of 13 October 2008 was therefore originally incorrect. The following must now be examined to what extent the complainant can invoke the protection of legitimate expectations.

2.5

2.5.1 The principle of good faith enshrined in Article 9 of the Federal Constitution gives a person the right to protection of legitimate expectations, including - as in the present case - in a ruling […]. However, it is also assumed that the person who invokes the protection of legitimate expectations was entitled to rely on this basis and, on this basis, made disadvantageous arrangements which he can no longer reverse […].

2.5.2 The lower court and the EKSD accuse the complainant of a lack of good faith. He should have realised, at least from the first examination, which was public, that the final examination was only to be held in front of an audience. The complainant, on the other hand, points out that it was the examination board that suggested to him, and not he to the board, that he could take his examination in camera. The duty of care to be observed here is based on the knowledge and skills of a music student and not a lawyer […]. Consultation of the regulation cannot therefore be required. Students can generally rely on the statements of the examination experts and the examination board. After all, it would be obvious to deduce from the failed examination that the examination to be repeated must also be carried out in front of an audience. However, the students were not examined in accordance with the regulations on several occasions: for example, contrary to Art. 37 para. 1 and 2 PrVK, the director has not been a member and president of the examination board for years. In addition, several examination procedures had been conducted differently than prescribed and the examination board had often not been composed in accordance with the regulations. It therefore did not have to appear unusual to the complainant and was within the scope of what was permissible when the examination board made him the suggestion that the examination be repeated in camera. Contrary to the opinion of the lower court, the conduct of the examination board must also be taken into account […]. If the director had taken a seat on the examination board in accordance with the legal requirements, he would also have been able to intervene and make corrections before the examination was taken.

2.5.3 The complainant then made arrangements in reliance on the basis of trust established by the authority. He was given a job as a piano teacher based on his examination certificate. It

must also be taken into account that he could have requested a public examination at the same time if he had known about the invalid basis of trust. As part of his training for a teaching diploma, he gave public lectures and passed them successfully. It is not claimed that he wanted to avoid a public lecture, and there is no apparent reason why he should have failed the second attempt at the final examination. By preparing for the examination based on the examination committee's suggestion, taking it and not insisting on a public lecture instead, he made irreversible arrangements.

2.6 In the following, the interest in the correct implementation of objective law (principle of legality) and that in maintaining legal certainty (protection of legitimate expectations) must first be weighted (consid. 2.6.1 and 2.6.2) and then weighed against each other (consid. 2.6.3).

2.6.1 The final examination was not conducted in front of an audience and is therefore inconsistent with the legal requirements. In order to determine the importance of the interest in the correct implementation of objective law, the examination must be considered in its entirety. As explained (above consid. 2.4), the final examination merely marks the end of the entire four-year training course; for the teaching diploma (course I; Art. 36 lit. a PrVK), in addition to the requirements that apply to all courses (Art. 39 and 40 PrVK), the completion of various internships and the acceptance of a pedagogy diploma thesis are required. The final examination must indeed be conducted in front of an audience according to Art. 46 PrVK which also applies to the teaching diploma; However, public performance does not have the same importance in all courses of study, as the interests behind it vary: It is obvious that performance in front of an audience is essential for the concert diploma and the soloist diploma (course of study II; Art. 36(b) PrVK), as well as for the higher study certificate for choir conducting or the higher study certificate for wind orchestra (course of study IV; Art. 36(d) PrVK). The activities on which these examinations are based are in principle only carried out in front of an audience. This does not apply to the teaching diploma, as the complainant rightly points out. The skills that a piano teacher must have consist primarily in imparting technical ability and understanding of pieces of music - in other words, pedagogical skills that are required as a special prerequisite for the teaching diploma under Art. 47 PrVK. Performing works in front of an audience is less important in comparison. The regulatory authority was aware of this gradation, which is why it waived a public final examination for the (albeit less important) teaching diploma for music and singing lessons at orientation schools and middle schools (course III; Art. 36 lit. c PrVK) (Art. 46 PrVK).

2.6.2 When weighing the interest in trust, it is generally assumed that the trust was exercised (see above consid. 2.5.3), in this case the failure to demand an examination in front of an audience in 2008. The weight is determined primarily by the disadvantage that the complainant faces in the event of a breach of trust […]. In such a case, he would have to take the exam or several exams with all the associated inconveniences, at best re-enroll in a course of study that is no longer possible in Freiburg following the change in the law […], and accept financial losses due to the course of study and the lack of income. At best, the complainant would even have to forego continuing and completing the course of study, which would mean that the four-year course would lose much of its benefit.

2.6.3 According to the explanations, the weight of the public interest in a lawful examination in front of an audience is low, while the interest in trust is relatively important. With an examination behind closed doors, the *ratio legis* for the teaching diploma according to Art. 36 lit. a PrVK is not greatly affected, as the pedagogical skills are the main decisive factor. It must also be taken into account that the examination board itself persuaded the complainant to hold the examination behind closed doors, which also makes it responsible for the increased level of trust. In view of this circumstance, the interest in the legal certainty of the order of 13 October 2008, based on the basis of trust, good faith and the exercise of trust, is to be given greater weight than compliance with objective law. In this respect, the state is bound by the basis of trust it has created; the original order is legal and may not be revoked.

4. Questions on the decision

1. What principles should be considered in cases of legitimate expectations?
2. Which of these principles is the court's opinion based on?
3. Do you agree with those arguments?

VIII. Good Administration (Lecture 5)

A. EU: Article 41 of the Charter of Fundamental Rights

1. Instruction

Read the article below and think about the advantages and disadvantages of codifying the right to good administration as a fundamental right. Do you think there is something missing in the article that you think would be important for "good administration"? Are there further guarantees codified as fundamental rights in your country to ensure "good administration"?

2. Text

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
   (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
   (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
   (c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

3. Questions on the article

1. What are the advantages and disadvantages of codifying the right to good administration as a fundamental right?

2. Do you think there is something missing in the article that you think would be for "good administration"?
3. Are there further guarantees codified as fundamental rights in your country to ensure "good administration"?

B. EU: Sytraval and Brink's France v Commission

(CJEU, judgment 28 September 1995 in Case T-95/94 - Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (Sytraval) and Brink's France SARL v Commission of the European Communities; accessible through https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994TJ0095, included summary accessibly through https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994TJ0095_SUM)

1. *Instruction*

Read the case below. It took place prior to the adoption of the Charter of Fundamental Rights – still, it laid the ground for the scope of the duty to give reasons codified in Article 41(2)(c) of the Charter.

2. *Summary of the facts*

In 1987, the French postal service was partly privatized and the firm *Sécuripost* was newly entrusted with a range of services and loans of multiple million French Francs. Various companies and associations, including *Sytraval* lodged a complaint alleging an infringement of Articles 92 and 93 of the EC treaty (which concerned state aids).
In 1993, the European Commission informed the complainants that it decided to close the case as there were no grounds to conclude that the agreements between the French state and *Sécuripost* involved state aid.
The complainants were *inter alia* dissatisfied with the lack of a detailed reasoning and therefore brought an action before the Court of First Instance.

3. *Reasoning and Finding*

1. A decision of the Commission rejecting a complaint alleging the grant of aid by a Member State to an undertaking on the ground that the measures objected to by the complainant do not constitute aid within the meaning of Article 92 of the Treaty must contain a statement of reasons disclosing in a clear and unequivocal fashion the reasoning which led the Commission to

conclude that those measures did not constitute aid, in such a way as to make the complainant aware of the reasons for the rejection of its complaint and thus enable it to defend its rights and the Court to review the interpretation and application of the concept of State aid referred to in Article 92, as undertaken, in the present case, by the Commission.
That obligation to provide a statement of reasons for the decision is not satisfied.

The decision was adopted after a particularly lengthy inquiry into a complaint initially acknowledged as credible; it makes no mention, even with reference to the *de minimis* rule, to one of the points raised in the complaint, acknowledges a divergence from the system of social security costs applying to the competitors of the undertaking allegedly in receipt of aid, but without explaining why that divergence did not constitute aid, omits to analyse the advantages which that undertaking may have received from the public authorities as regards the rent charged for the premises made available to it, despite the objections raised in that regard in the complaint, fails to examine whether, as contested in the complaint, the services provided by the undertaking and the public authorities to each other are invoiced at the market rate and, finally, denying that a loan granted by the public authorities constitutes aid, merely observes that interest is payable on that loan, without verifying whether or not the rate of interest payable constitutes an advantage for the undertaking concerned.

Such defective reasoning cannot be justified by the alleged flimsiness of the evidence put forward by the complainant in its complaint. It is very much more difficult for a complainant than it is for the Commission to gather the information and evidence needed in order to verify the validity of an apparently credible complaint, since the complainant is generally faced with obstacles raised by the administrative authorities whose acts it seeks to challenge, whereas the Commission has at its disposal more effective and appropriate means of gathering the information necessary for a detailed and impartial investigation of the complaint, in the course of which, where it decides to reject the complaint, without giving the complainant an opportunity to comment, prior to the adoption of the definitive decision, on the information obtained, it is under an automatic obligation to examine the objections which the complainant would certainly have raised had it been able to take cognizance of that information.

2. The Commission's obligation to state reasons for its decision rejecting a complaint against a grant of aid to an undertaking by a Member State on the ground that the measures objected to by the complainant do not constitute aid within the meaning of Article 92 of the Treaty may in

certain circumstances require an exchange of views and arguments with the complainant, since, in order to justify to the requisite legal standard its assessment of the nature of the measures complained of, the Commission needs to ascertain what view the complainant takes of the information gathered by it in the course of its inquiry.

In those circumstances, that obligation constitutes a necessary extension of the Commission's obligation to deal diligently and impartially with its inquiry into the matter by eliciting all such views as may be necessary, without thereby pre-judging in any way whether it is necessary to initiate the procedure provided for by Article 93(2) of the Treaty.

4. Questions on the decision

1. What is the procedural significance of the right to receive reasons?
2. Can you think of instances in which the reasons given must be more detailed than in other cases?
3. Can you think of constellations in which the right to receive reasons may be abused?

C. EU: Annual Report of the European Ombudsman

1. Instruction

Read the report which you can access through the link below and think about what is considered as “good administration” in it.

2. The report

Please consult the following link: https://www.ombudsman.europa.eu/en/doc/annual-report/en/183636

3. Questions on the report

1. What is in the report considered as “good administration”?
2. Do you agree with that?
3. What else would you understand under “good administration”?