HARMONIZING DELEGATION AND DEFERENCE AFTER *LOPER BRIGHT*

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In overturning Chevron*, the Supreme Court's* Loper Bright *decision clearly changed the way in which courts must approach judicial review of agency actions interpreting statutes. But* Loper Bright *stopped well short of declaring that courts should always ignore agency interpretations and only interpret statutes using their independent judgment. In two critical paragraphs, the Court acknowledged that some statutory provisions delegate discretionary authority to agencies. The Court counseled a more restrained judicial review for reasoned decisionmaking when agencies exercise such power, arguably echoing the* Chevron *doctrine that* Loper Bright *overturned. But, whereas* Chevron *focused nearly exclusively on the purported ambiguity of the statutory word or phrase that an agency was endeavoring to interpret and implement,* Loper Bright *shifts the inquiry to the delegations themselves—i.e., the statutory terms that give agencies the authority to act in the first place. With this new emphasis in mind, and drawing on prior work, we propose a framework that categorizes statutory delegations of rulemaking power as specific authority, general authority/housekeeping, and hybrid delegations. We then propose that* Loper Bright *is best understood and interpreted as demanding independent judgment review, potentially influenced by* Skidmore*'s contextual factors, for general authority/housekeeping rules and reserving the more restrained reasoned decisionmaking review for specific authority and hybrid rules. We explain how this approach harmonizes* Loper Bright*'s vision for judicial review of agency actions with the Supreme Court's recent nondelegation and major questions jurisprudence. We also suggest that reading* Loper Bright *this way will cabin agency discretion in a manner that curtails agency overreach while still allowing executive discretion in implementing and administering statutory requirements.*

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Introduction

In *Loper Bright Enterprises v. Raimondo*,[1] the Supreme Court swept away forty years of jurisprudence and ushered in a new era for judicial review of statutory interpretation. The Court overturned the famed *Chevron* doctrine[2] and held that the Administrative Procedure Act (APA) requires courts to exercise their independent judgment when reviewing agency interpretations of statutes.[3] It rejected the idea that statutory ambiguity represents a congressional delegation of primary interpretive responsibility to agencies, which had required courts to step back and defer to agency interpretations of statutes deemed reasonable.[4]

Because so many of *Loper Bright*'s pages were dedicated to the demise of judicial deference, some early commenters reacted by declaring the decision a death knell to agencies' ability to regulate.[5]

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[1] 144 S. Ct. 2244 (2024).

[2] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (outlining two steps for judicial review of agency interpretations of statutes, leading to judicial deference to reasonable agency interpretations of ambiguous statutes).

[3] *See Loper Bright*, 144 S. Ct. at 2265.

[4] *Id.* at 2265–66.

[5] *See, e.g.*, Jasjit K. Mundh, *With* Loper Bright*, the Supreme Court Guts the Administrative State and Shifts Power to the Courts*, A.B.A. (July 1, 2024), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/summer-issue-2024/loper-bright-supreme-court-guts-administrative-state-shifts-power-to-courts [https://perma.cc/8WTR-FMLN]; Steve Vladeck, *Destabilizing the Administrative State*, One First

Others, however, recognized that two key paragraphs in the opinion carved out more room for agency discretion than the rest of the Court's opinion might suggest.[6]

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes expressly delegate to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as "appropriate" or "reasonable."
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> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries.[7]

Given its declaration that judges rather than agencies are primarily responsible for statutory interpretation, what does the Court intend by turning back to delegation as a basis for agency discretion and judicial restraint? Are these paragraphs merely a way to preserve the thousands of detailed, nonmajor regulations that the Court's opinion otherwise calls into question[8]—a concern the Court also tried to lessen by invoking

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(July 8, 2024), https://www.stevevladeck.com/p/89-destabilizing-the-administrative [https://perma.cc/TTA2-NG9E] (contending that *Loper Bright* "will result in the short-, medium-, and long-term destabilization of administrative regulatory regimes"); *see also* Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After* Loper Bright, 77 ADMIN. L. REV. 1, 18–24 (2025) (documenting similar commentary while cautioning against overreacting).

6 *See, e.g.*, Ellen P. Aprill, *Unpacking the Most Important Paragraph in* Loper Bright, YALE J. ON REGUL. (Jan. 15, 2025), https://www.yalejreg.com/nc/unpacking-the-most-important-paragraph-in-loper-bright-by-ellen-p-aprill [https://perma.cc/X9EV-E22U] (noting the importance of *Loper Bright*'s recognition of agency discretion); Adrian Vermeule, Chevron *By Any Other Name*, THE NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/9KCR-LYQH] (focusing on the same paragraphs as merely reframing, rather than truly overruling, *Chevron* deference); Christopher J. Walker (@chris_j_walker), X (Sept. 26, 2024, 10:40 PM), https://x.com/chris_j_walker/status/1839495262475358366 [https://perma.cc/7K36-VW8W] (highlighting "the most important paragraph" of *Loper Bright*).

7 *Loper Bright*, 144 S. Ct. at 2263 (internal citations, quotation marks, alterations, and footnotes omitted).

8 *Cf.* Brief of Professor Thomas W. Merrill as Amicus Curiae in Support of Neither Party at 26–27, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-541) (observing that "the lower courts do not have the decisional capacity to engage in an exhaustive

statutory stare decisis?[9] Is the reference to constitutional limits a signal that the Court plans to reconsider the nondelegation doctrine? Or are these paragraphs a quiet acknowledgment, as both pre-*Chevron* jurisprudence[10] and the *Chevron* decision itself[11] also recognized, that however the Court might choose to draw the lines, sometimes Congress really does intend to give agencies a more prominent role when it comes to statutory implementation?[12]

Answering these questions requires appreciating that *Loper Bright* is not an isolated decision. Rather, *Loper Bright* continues two somewhat distinct but related trends in Supreme Court jurisprudence. The first is most explicitly focused on separation of powers principles and the allocation of power among different governmental actors. For several decades, Supreme Court decisions supporting expansive statutory delegations[13] and judicial deference to agency policymaking[14] shifted governmental power away from Congress and courts to agencies and, through them, the executive branch.[15] *Chevron* and its progeny were part of that trend.[16] In contemplating more recent

review of every statutory interpretation question arising on judicial review"); Lisa Schultz Bressman, *Lower Courts After* Loper Bright, 31 Geo. Mason L. Rev. 499, 505–06 (2024) (suggesting, presciently, that courts may turn to *State Farm* if *Chevron* is overturned to deal with the burdens courts face).

9 *See Loper Bright*, 144 S. Ct. at 2273.

10 *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 425–26 (1977) (positing that the Court "is not free to set aside [agency] regulations simply because it would have interpreted the statute in a different manner" (internal citation omitted)); AT&T Co. v. United States, 299 U.S. 232, 236 (1936) ("This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.").

11 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

12 *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 Geo. Wash. L. Rev. 1392, 1458 (2017) ("[A] reviewing court might reasonably interpret a specific statutory grant of discretionary authority—for example to adopt regulations or pursue formal adjudication to elaborate and implement undefined or underdefined statutory terms—as taking precedence over a general call for de novo review contained in the APA.").

13 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); Mistretta v. United States, 488 U.S. 361 (1989); Yakus v. United States, 321 U.S. 414 (1944); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

14 *See, e.g.*, Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

15 *See, e.g.*, Kathryn A. Watts, *Rulemaking as Legislating*, 103 Geo. L.J. 1003, 1013 (2015) ("Congress routinely delegates broad legislative rulemaking power to agencies, empowering agencies to promulgate rules."); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J. Const. L. 251, 254 (2010) ("It is the demise of [the nondelegation] doctrine that has allowed the Congress both to augment and to fragment the executive branch by establishing federal agencies . . . that effectively exercise legislative power through rulemaking.").

16 *See, e.g.*, Kenneth Culp Davis, Administrative Law of the Eighties: 1989 Supplement to Administrative Law Treatise 508 (2d ed. Supp. 1989) (describing *Chevron* as transferring power from courts to agencies) [hereinafter Davis, 1989 Supplement]; Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2075 (1990) (same).

Supreme Court decisions, we resist the rhetoric of a judicial "power grab"[17] in favor of a more nuanced take. We see recent cases concerning the nondelegation doctrine,[18] major questions doctrine,[19] and other issues[20] as an effort by the Court to reclaim power that it possessed through at least the 1950s but gradually gave up, with a nod toward shoring up congressional power as well.[21] In this sense, *Loper Bright* is part of that larger reclamation project. At the same time, we see the Court as trying to avoid intruding too deeply into executive spaces and changing the jurisprudential landscape more incrementally than many might prefer.[22]

Second, *Loper Bright* is just the latest effort to draw the longstanding doctrinal line between mere statutory interpretation (traditionally the province of the courts)[23] and agency exercises of

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17 *See, e.g.*, Ian Millhiser, *The Supreme Court Just Made a Massive Power Grab It Will Come to Regret*, Vox (June 28, 2024), https://www.vox.com/scotus/357900/supreme-court-loper-bright-raimondo-chevron-power-grab [https://perma.cc/68HM-N4UP] (calling *Loper Bright* "an earthquake that reorders US law"); Leonardo Cuello, *Supreme Court (Yet Again) Destroys Longstanding Precedent in Another Power Grab: This Time Federal Agencies Greatly Weakened*, Geo. Ctr. for Child. and Fams. (June 28, 2024), https://ccf.georgetown.edu/2024/06/28/supreme-court-yet-again-destroys-long-standing-precedent-in-another-power-grab-this-time-federal-agencies-greatly-weakened [https://perma.cc/GA9K-NJUA] (calling *Loper Bright* "a deeply partisan decision that will put incredible power in the hands of extremist right wing judges"); *cf.* Josh Chafetz, *The New Judicial Power Grab*, 67 St. Louis U. L.J. 635, 636, 649–52 (2023) (offering the major questions doctrine as one example of the Roberts Court "systematically empowering its own institution at the expense of others").

18 *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (plurality opinion).

19 *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2373–75 (2023); West Virginia v. EPA, 142 S. Ct. 2587, 2610–13 (2022).

20 Other recent, high-profile Supreme Court cases addressing a variety of topics are part of this shift from executive to judicial power but are beyond the scope of this Article. *See, e.g.*, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024) (expanding standing to challenge agency rules many years after their adoption); SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (recognizing a jury trial right for matters previously left to agency adjudicators).

21 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (characterizing the Court's major questions jurisprudence as "ensur[ing] that the national government's power to make the laws that govern us remains . . . with [Congress]").

22 *See, e.g.*, Kristin E. Hickman, *The Roberts Court's Structral Incrementalism*, 136 Harv. L. Rev. F. 75, 76–77 (2022) (describing the Roberts Court approach as "carefully narrow, calibrated to tweak the day-to-day of administrative governance incrementally, with plenty of carve outs and caveats, and with a preference for subconstitutional approaches, notwithstanding lofty flights of rhetoric about the Framers, liberty, and other constitutional values").

23 *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that it is "the province and duty of the judicial department to say what the law is"); Henry P. Monaghan, Marbury *and The Administrative State*, 83 Colum. L. Rev. 1, 2 (1983) (recognizing Justice Marshall's conception of judicial autonomy in *Marbury* as antithetical to judicial deference to agency interpretations of statutes).

delegated discretionary power (likewise not a recent phenomenon).[24] Over time, the Court periodically has found a need to redefine that boundary. For example, as agencies expanded their rulemaking efforts[25] and common understandings of constitutional limitations on statutory delegations evolved,[26] *Chevron* shifted to ambiguity in statutory meaning as the dividing line between statutory interpretation and agency policymaking.[27] After years of judicial revisions to and restrictions upon *Chevron*'s boundaries,[28] *Loper Bright* rejected entirely the idea of statutory ambiguity as delegation.[29] Yet, with those two key paragraphs, *Loper Bright* continued to recognize statutory interpretation and agency policymaking as distinct spheres requiring different judicial attitudes.[30]

Under *Loper Bright*, courts are charged with reviewing agency statutory interpretations using independent judgment and evaluating agency exercises of discretion for "reasoned decisionmaking" under the more restrained arbitrary and capricious standard.[31] Congressional delegation is the new dividing line between the two, replacing

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[24] Cases complaining of excessive delegations of discretionary authority to the executive branch go back almost to the beginning of the Republic. *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825); Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813). Correspondingly, legal scholars debating the origins and validity of the nondelegation doctrine have documented many instances of arguable delegations of discretionary power. For just a few examples from that literature, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021).

[25] *See, e.g.*, Richard J. Pierce, Jr., *Rulemaking and The Administrative Procedure Act*, 32 Tulsa L.J. 185, 188 (1996) (documenting a dramatic increase in agency rulemaking in the 1960s and 1970s relative to the 1940s and 1950s); Clark Byse, Vermont Yankee *and The Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1823, 1823 (1978) ("Rulemaking is indeed on the increase.").

[26] *See infra* Section II.A (documenting the evolution, particularly as regards general authority/housekeeping delegations described in Section I.B); *see also* Martin H. Redish, The Constitution as Political Structure 135, 138–39 (1995) (identifying a New Deal "strateg[y]" featuring "a dramatic relaxation of the so-called nondelegation doctrine" and highlighting illustrative cases).

[27] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

[28] *See, e.g.*, King v. Burwell, 576 U.S. 473, 485–86 (2015) (concluding the case raised a major question and thus required a court to interpret the statute in the first instance); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that courts should extend *Chevron* deference to agency statutory interpretations contradicting circuit court precedent if the statute was ambiguous); United States v. Mead Corp., 533 U.S. 218, 229–31, 234–35 (2001) (explaining that generally interpretations with the force of law received *Chevron* deference whereas those without the force of law may be eligible for *Skidmore* deference).

[29] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

[30] *Id.* at 2268.

[31] *Id.* at 2263 (internal citation and quotation marks omitted); *see also* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497, 1511 (2025) (recognizing distinct spheres

ambiguity.[32] Just as we are unpersuaded that *Loper Bright* has gutted agencies' ability to regulate, however, we also are unpersuaded that *Loper Bright* merely altered the Court's rhetoric without making a substantive change.[33] Particularly as the litigants and the lower courts seek to operationalize *Loper Bright*, the key question is to where and by how much did the Court reorient that boundary by shifting from ambiguity to delegation?

The answer lies in the text of statutory delegations themselves. As the Court acknowledged with its examples in *Loper Bright*, statutory delegations of rulemaking power take different linguistic forms and serve different statutory goals.[34] In distinguishing between delegations of agency discretion and statutory interpretation, *Loper Bright* refocuses judicial review at least preliminarily on delegating language—i.e., the words and phrases in the statute that expressly give agencies their power to act in the first place—rather than the statutory words and phrases that agencies interpret and effectuate in the exercise of that power. In other words, we believe the best way to understand and apply *Loper Bright*'s references to statutory delegations of discretionary authority is by contemplating the different types of delegation provisions found in contemporary statutes.

We suggest that different statutory delegations of rulemaking power convey different types of authority within a larger statutory scheme. Our particular focus here is agency rulemaking, rather than agency adjudications, which we leave for another day. Some statutory delegations are targeted and specific, with Congress identifying the topic to be addressed by agency rulemaking efforts.[35] Other statutory delegations are grants of general authority or "housekeeping"

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after *Loper Bright* of de novo review for interpretations of statutes and *State Farm* arbitrary and capricious review when agencies exercise discretion).

[32] *See Loper Bright*, 144 S. Ct. at 2263.

[33] *See, e.g.*, BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R48320, *LOPER BRIGHT ENTERPRISES V. RAIMONDO* AND THE FUTURE OF AGENCY INTERPRETATIONS OF LAW 26 (2024) (noting "[s]ome have questioned whether the *Loper* [*Bright*] decision changed much at all."); Vermeule, *supra* note 6 (interpreting *Loper Bright* to mean "that many, most or even all of the cases that were previously called '*Chevron* deference' cases can now be relabeled as '*Loper Bright* delegation' cases"); Coglianese & Walters, *supra* note 5, at 48 (stating that, because "*Chevron* itself never appeared to have mattered as much as many thought it did[,] . . . [o]ne might . . . suggest that it is generally unlikely that *Loper Bright* will achieve anything of greater impact"); Cary Coglianese & David B. Froomkin, Loper Bright*'s Disingenuity*, 173 U. PA. L. REV. (forthcoming 2025) (asserting "the *Loper Bright* framework is just the *Chevron* framework redescribed").

[34] *See Loper Bright*, 144 S. Ct. at 2263. Although the Court did not expressly single out agency rulemaking as opposed to agency adjudication, all of the examples it cited in the relevant paragraphs concerned agency rulemaking. *See infra* Section III.A.

[35] *See infra* Section II.A.

delegations, with Congress allowing agencies to adopt rules as the agency identifies need, bounded only by the four corners of the statute.[36] Still other statutory delegations are a "hybrid" combination of the two.[37] For several decades, judicial deference doctrine has treated regulations issued pursuant to all types of delegations as legally equivalent.[38] We propose that *Loper Bright* demands rethinking that equivalence, at least regarding standards of judicial review.

By dividing agency action based on the types of delegations under which agencies act, we can achieve what we believe to be the Court's goal with *Loper Bright* as governing judicial review for those actions. For example, consistent with *Loper Bright*'s analysis and cited examples, we contend that actions taken under even broadly worded specific authority and hybrid delegations fall within the Court's proposed "reasoned decisionmaking" box.[39] Actions taken under general authority/housekeeping delegations, however, do not. In those cases, a reviewing court should use its independent judgment, perhaps leavened by the contextual factors of *Skidmore v. Swift & Co*.[40]

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[36] *See infra* Section II.B; *see also* Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 Geo. Wash. L. Rev. 1079, 1098 (2021) [hereinafter Hickman, *Nondelegation*] (using "general authority" to describe these rulemaking grants); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 482–87 (2002) (employing the "housekeeping" term partly, although not exclusively, in association with these sorts of grants). Merrill and Watts focused on a different question, namely identifying which delegations of rulemaking authority supports regulations that carry "the force of law" for *Chevron* deference purposes. *Id.* at 471–72. Merrill and Watts resolved that question by focusing on the imposition of statutory penalties for violating regulations, irrespective of the supporting delegation's other attributes. *See id.* at 472. In other words, for Merrill and Watts, both specific authority and general authority regulations could be legislative rules carrying legal force, thus rendering them eligible for *Chevron* deference. They reserved the "housekeeping" term for grants of rulemaking authority that lacked corresponding penalties and supported only nonlegislative rules. Although we generally concur with Merrill and Watts that regulations issued pursuant to general authority delegations can be legally binding, revisiting whether general authority regulations carry the force of law is beyond the scope of this paper. *But see infra* Section I.B (documenting contrary history). In outlining differences between specific authority and general authority delegations of rulemaking as regards statutory text and structure, however, Merrill and Watts conceded that treating the latter as "housekeeping" delegations would be "reasonable." *Id.* at 483–85. Accordingly, we think it is appropriate to borrow that term in conjunction with our analysis of delegations and deference after *Loper Bright*.

[37] *See* Hickman, *Nondelegation*, *supra* note 36, at 1113–15.

[38] *See, e.g.*, Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 56–57 (2011) (rejecting a distinction between specific authority and general/housekeeping authority regulations for *Chevron* deference purposes); *see also* Hickman, *Nondelegation*, *supra* note 36, at 1106–13 (documenting the Court's treatment of different rulemaking grants similarly for nondelegation purposes).

[39] *Loper Bright*, 144 S. Ct. at 2263.

[40] 323 U.S. 134, 140 (1944) (calling upon courts to give "respect" or "weight" to agency interpretations based upon contextual factors like thoroughness, validity, and consistency); *see also Loper Bright*, 144 S. Ct. at 2262 (acknowledging that *Skidmore* is consistent with

In addition to determining which agency actions fit into which *Loper Bright* box, dividing statutory delegations categorically as we suggest offers additional benefits. It sets up a more precise framework for judicial review of agency interpretations of statutes by allowing courts more readily to determine whether the "best reading" of a statute requires judicial restraint or independent judgment.[41] In other words, our approach operationalizes *Loper Bright* for the lower courts in a way that we think is actually workable. Second, the framework makes clearer where the nondelegation doctrine and the major questions doctrine fit and, for many cases, we predict, will result in case outcomes that often are quite restrained or, dare we say, "deferential," even if the courts avoid that term.[42]

Part I of this Article will set the stage by describing different types of statutory delegations—specific authority delegations; general authority/housekeeping delegations; and hybrid delegations—drawing at least partly on past work.[43] We will also discuss in Part I the idea of implied delegations as introduced by *Chevron*[44] as well as circumstances in which agencies lack any statutory delegation of authority to adopt rules or regulations but nevertheless possess statutory responsibilities that require them to interpret statutes. Part II will build upon Part I by discussing how the Supreme Court's jurisprudence over time has allocated and reallocated governmental power among Congress, agencies, and courts through its varying treatment of general authority/housekeeping delegations. This shifting of governmental power includes not only nondelegation jurisprudence but also the introduction in *Chevron* and the rejection in *Loper Bright* of implied delegations, which we see as corresponding with a rejection of general authority/housekeeping delegations as a basis for delegated discretion. Part III will turn back to the Court's decision in *Loper Bright* to discuss how we believe each of the categories of delegations should fare going forward, as courts attempt to distinguish statutory interpretation from exercises of delegated policymaking discretion. We acknowledge that the Court did not explicitly use the same labels as we do in describing different

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the APA and employing its factors "may be especially useful in determining [a] statute's meaning").

41 *See* discussion *infra* Section III.A.

42 *See* discussion *infra* Part III.

43 *See* Hickman, *Nondelegation*, *supra* note 36, at 1096–1118 (categorizing and documenting the history of different types of statutory grants of rulemaking power and the nondelegation doctrine); Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1563–78 (2006) [hereinafter Hickman, *The Need for* Mead] (documenting the same for judicial deference doctrine pre- and post-*Chevron*).

44 *See infra* Section I.D.

types of delegations in the above-quoted paragraphs from *Loper Bright*. Nevertheless, to the extent that the Court's explanation of what to do with delegations of discretionary authority was somewhat abbreviated and unclear, we maintain that our analysis fits well with what we think the Court was trying to accomplish.

I
Types of Delegations

Cases and doctrines governing judicial review of agency actions implementing statutes—including *Chevron* and *Loper Bright*, but also the nondelegation doctrine and the major questions doctrine—all have focused on statutory delegations of authority from Congress to agencies, albeit in different ways. In recent decades, this focus has increased.

For example, *United States v. Mead Corp.* called for courts to determine *Chevron*'s applicability by asking whether the statute at issue authorized an agency to act with the force of law.[45] The major questions doctrine requires courts to consider whether statutes authorize agency actions with sufficient clarity.[46] With the nondelegation doctrine, courts must analyze statutory text in relation to a statutory delegation to ascertain whether Congress included "intelligible principles" to guide and constrain agency actions in the exercise of delegated power.[47] Even the alternative nondelegation standard that Justice Gorsuch proposed in *Gundy* does not move away from statutory analysis. Rather, Justice Gorsuch sought to change the inquiry from intelligible principles to "policy decisions" versus mere "details."[48] *Loper Bright* is no different in this regard, telling reviewing courts to consider whether a statute has delegated discretionary power to an agency, either "expressly" or through the statute's "best reading."[49] In other words, all of these standards require identifying and analyzing delegations on their own terms—i.e., the language in the statute that formally calls upon agencies to adopt rules and regulations—within the context of a larger statutory scheme.

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[45] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (interpreting *Chevron* as predicated on delegation and basing eligibility for *Chevron* deference on exercising delegated authority to act with the force of law).

[46] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373–76 (2023); West Virginia v. EPA, 142 S. Ct. 2587, 2610–13 (2022).

[47] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (describing the intelligible principle standard as requiring "construing the challenged statute to figure out what task it delegates and what instructions it provides").

[48] *Id.* at 2136 (Gorsuch, J., dissenting).

[49] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

Yet, the language of statutory delegations is highly variable. Some of the differences are a matter of degree, as Congress uses words that are more or less specific and detailed in describing the task for an agency to perform. Other differences are a matter of kind regarding the role that a given delegation plays within the larger statutory scheme of which it is a part. For purposes of this analysis, and drawing from prior work,[50] we describe and categorize different statutory delegations in terms of specific authority delegations; general authority/housekeeping delegations; and hybrid delegations.

A. Specific Authority Delegations

The most obvious delegations of agency policymaking discretion take the form of specific grants of rulemaking authority. As the Supreme Court acknowledged in *Loper Bright*, Congress often identifies a particular statutory term, requirement, or limitation that needs elaboration and instructs the agency responsible for administering the statute to adopt rules and regulations to serve that purpose.[51] The language of the delegations themselves may be quite broad, but that broad language is tied to particularized, congressionally-identified subject matter that Congress has expressly identified as requiring regulations. Specific authority delegations are littered throughout modern legislation and the U.S. Code. Here, we offer just a few examples.

Enacted in 2010, the Patient Protection and Affordable Care Act (ACA)[52] contained dozens of specific calls for the Secretary of Health and Human Services (HHS) or another federal official,[53] sometimes in coordination with state agencies or private parties,[54] to develop rules,[55]

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[50] *See* Hickman, *Nondelegation*, *supra* note 36, at 1096–1118; Hickman, *The Need for* Mead, *supra* note 43, at 1563–72.

[51] *Loper Bright*, 144 S. Ct. at 2263.

[52] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

[53] *See, e.g.*, *id.* § 1421(a), 124 Stat. 119, 237–38 (adopting a tax credit for small business employees to be administered by the Treasury Department and Internal Revenue Service as part of the Internal Revenue Code); *id.* § 1512, 124 Stat. 119, 252 (codified at 29 U.S.C. § 218B) (amending a provision of the Federal Labor Standards Act and expanding the rulemaking power of the Secretary of Labor).

[54] *See, e.g.*, *id.* § 2706(c)(1), 124 Stat. 119, 325 (codified at 42 U.S.C. § 1396a) (requiring HHS to consult with the states as well as pediatricians in establishing quality of care guidelines for accountable care organizations); *id.* § 2715, 124 Stat. 119, 132 (codified at 42 U.S.C. § 300gg–15) (amending the Public Health Service Act and requiring HHS to consult with the National Association of Insurance Commissioners, a "working group" consisting of private health experts, in developing standards for health insurance plans).

[55] *See, e.g.*, *id.* § 1333(b)(5), 124 Stat. 119, 208 (telling HHS to issue "rules for the offering of nationwide qualified health plans").

regulations,[56] standards,[57] or guidelines,[58] or otherwise just resolve the details of specific statutory programs or requirements.[59] In some instances, ACA delegations of rulemaking authority and policymaking discretion are part of a single substantive provision that contains further instructions to guide and constrain agency choices. For example, section 1311(c)(1) of the ACA authorizes HHS, "by regulation, [to] establish criteria for the certification of health plans as qualified health plans."[60] The same provision, in the very next sentence, lists eight different criteria that "at a minimum" must be satisfied.[61] Other specific authority delegations include cross-references to nearby provisions that elaborate and limit the delegation's scope.[62]

The Internal Revenue Code (IRC), which codifies innumerable pieces of legislation, contains hundreds of specific delegations of rulemaking authority to the Secretary of the Treasury.[63] In a lengthy report, a committee of the New York State Bar Association Tax Section identified 550 such delegations with several functional subcategories: "'how' regulations," whereby Congress imposed a self-executing requirement and then authorized Treasury to adopt regulations to "effectuate" that same requirement with additional detail regarding its operation; "'whether' or 'when' regulations," whereby Congress imposed a requirement but then limited its applicability until Treasury adopted implementing regulations; regulations whereby Treasury "turn[s] off"

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56 *See, e.g.*, *id.* § 1302(d)(2)(A)–(B), 124 Stat. 119, 167 (codified at 42 U.S.C. § 18022) (providing for "regulations issued by the Secretary" to determine the level of an insurance plan's coverage based on essential health benefits and authorizing "regulations under which employer contributions to a health savings account . . . may be taken into account in determining the level of coverage for a plan of the employer").

57 *See, e.g.*, *id.* § 2703(b), 124 Stat. 119, 319 (codified at 42 U.S.C. § 1396w-4) (amending Title XIX of the Social Security Act to, among other things, require HHS to "establish standards for qualification as a designated provider for the purpose of being eligible to be a health home for purposes of this section").

58 *See, e.g.*, *id.* § 1302(d)(3), 124 Stat. 119, 167 (codified at 42 U.S.C. § 18022) (instructing HHS to "develop guidelines to provide for a de minimis variation in the actuarial variations used in determining the level of coverage of a plan to account for differences in actuarial estimates").

59 *See, e.g.*, *id.* § 1302(b)(1), 124 Stat. 119, 163–64 (codified at 42 U.S.C. § 18022) (instructing HHS to "define the essential health benefits" to be covered by health insurance plans according to several listed categories and subject to specified limitations).

60 *Id.* § 1311(c)(1), 124 Stat. 119, 174 (codified at 42 U.S.C. § 18031).

61 *Id.* § 1311(c)(1)(A)–(H), 124 Stat. 119, 174 (codified at 42 U.S.C. § 18031).

62 *See, e.g.*, *id.* § 1104(b)(2), 124 Stat. 119, 147–53 (amending § 1173(a) of the Social Security Act by adding, inter alia, an instruction to HHS to adopt "operating rules . . . in accordance with subparagraph (C), following consideration of the operating rules developed by the non-profit entity described in paragraph (2) and the recommendation submitted by the National Committee on Vital and Health Statistics under paragraph (3)(E) and having ensured consultation with providers").

63 *See* 26 U.S.C.

statutory requirements in certain circumstances; and regulations by which Treasury varies statutory requirements as needed to carry out statutory purposes.[64]

One paradigmatic example of an even broader, yet still specific, delegation of rulemaking authority in the IRC is section 1502. Following a provision that authorizes affiliated groups of corporations to file consolidated income tax returns,[65] section 1502 is a short, two-sentence paragraph instructing Treasury to adopt regulations as needed

> in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability.[66]

The provision is open-ended, even allowing Treasury to "prescribe rules that are different from" those applicable to corporations filing separately.[67] Courts have recognized that this language gives Treasury tremendous latitude to choose among several methods of adapting the income tax laws for consolidated return filing.[68] Nevertheless, Congress has both identified the specific subject matter to be addressed—consolidated returns for affiliated groups—and provided basic parameters, however broad, for implementing regulations.

The listing provisions of the Endangered Species Act (ESA) offer yet another straightforward example of a specific authority delegation.[69] The ESA defines the term "species";[70] "endangered species";[71] and "threatened species."[72] The ESA requires the Secretary to determine "whether any species is an endangered species or a threatened species,"[73] more commonly referred to as making the decision to "list" a species because it is eventually to be included on the endangered or threatened

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64 *See* N.Y. State Bar Ass'n Tax Section, Report on Legislative Grants of Regulatory Authority 2–6 (2006), https://nysba.org/wp-content/uploads/2020/03/1121-Report.pdf [https://perma.cc/5N3E-EGS5].

65 *See* 26 U.S.C. § 1501.

66 *Id.* § 1502.

67 *Id.*

68 *See, e.g.*, Rite Aid Corp. v. United States, 255 F.3d 1357, 1359 (Fed. Cir. 2001); Am. Standard, Inc. v. United States, 602 F.2d 256, 261 (Ct. Cl. 1979).

69 *See* 16 U.S.C. § 1533.

70 *Id.* § 1532(16).

71 *Id.* § 1532(6).

72 *Id.* § 1532(20).

73 *Id.* § 1533(a)(1).

species lists.[74] The statute further instructs that decisions must be made "in accordance with subsection (b)," which requires, among other things, that the Secretary make listing decisions "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account" other potential conservation efforts.[75] Finally, in order to list the species, there must be a showing that the listing is "because of" any one of the following: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence."[76]

Although the ESA's language is broad, leading to different versions of how to define certain terms, such as what it means to be "in danger of extinction,"[77] the specific statutory gap to fill and the criteria guiding agency discretion in how to fill it are clear. A species must be listed if, based on the "best scientific and commercial data available" and other efforts to protect the species, the Secretary determines that a species fits either in the endangered or threatened category "because of" one of the five listed factors.[78]

Specific authority delegations are identifiable as such not only because they expressly authorize agencies to adopt regulations for statutory purposes, but also because they specify the topic of those regulations within the broader subject matter of the statutory scheme. Even where specific authority delegations include obviously constraining language—e.g., listing criteria to be considered, cross-referencing other provisions, or specifying rules of construction—they may also use open-ended and subjective terms like "reasonable,"[79]

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[74] *Id.* § 1533(c); *see In re* Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig., 794 F. Supp. 2d 65, 71 (D.D.C. 2011) ("The ESA requires the Secretary of the Interior to publish and maintain a list of all species that have been designated as threatened or endangered.").

[75] 16 U.S.C. § 1533(a)(1).

[76] *Id.* § 1533(a)(1).

[77] *See* Center for Biological Diversity v. Everson, 435 F. Supp. 3d 69, 83–86 (D.D.C. 2020) (discussing several interpretations of the phrase).

[78] 16 U.S.C. § 1533(a)(1); *see* Defenders of Wildlife v. Norton, 258 F.3d 1136, 1137–38 (9th Cir. 2001); *In re* Polar Bear Endangered Species Act Listing, 794 F. Supp. 2d at 71–72.

[79] *See, e.g.*, 16 U.S.C. § 620f(a)(4)(A) (providing for "regulations that impose reasonable painting, branding, or other forms of marking or tracking requirements on unprocessed timber" given specified circumstances); 47 U.S.C. § 205(a) (authorizing the FCC to prescribe "just and reasonable" rates that common carriers of communication services may charge their customers).

"necessary,"[80] "feasible,"[81] "appropriate,"[82] or "in the public interest."[83] Using such language expands the administering agency's policymaking discretion. Nevertheless, Congress has specifically identified the topic to be addressed by the agency through regulations, hence the label of specific authority for these delegations.

B. General Authority/Housekeeping Delegations

Whether they contain one, several, dozens, or hundreds of specific authority delegations, many regulatory statutes also contain at least one—and often only one—additional delegation of rulemaking authority. This additional delegation allows the agency to adopt rules and regulations as the administering agency finds needful, efficient, or necessary to carry out, effectuate, or enforce the statute's terms without further elaboration as to subject matter.[84] Tax attorneys refer to the

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[80] *See, e.g.*, 21 U.S.C. § 463(a) (authorizing regulations prescribing conditions for the handling of poultry products used as human food "whenever the Secretary [of Agriculture] deems such action necessary to ensure that such articles will not be adulterated or misbranded when delivered to the consumer"); 47 U.S.C. § 251(c)–(d) (instructing the FCC to adopt regulations declaring which network elements local exchange carriers must make available to other telecommunications carriers, based on a determination that "access to such network elements as are propriety in nature is necessary").

[81] *See, e.g.*, 42 U.S.C. § 4905(a) (authorizing regulations establishing noise emission standards for certain types of products to the extent the products are "a major source of noise" and the standards are "feasible" in the EPA Administrator's judgment); 42 U.S.C. § 6294 (requiring the FTC to "prescribe labeling rules" regarding the energy efficiency of various consumer products "except to the extent that . . . the Commission determines . . . that labeling . . . is not technologically or economically feasible").

[82] *See, e.g.*, 21 U.S.C. § 364b(a)–(b) (providing that regulations establishing "good manufacturing practices" for cosmetics companies "shall include simplified good manufacturing practice requirements for smaller businesses, as appropriate, to ensure that such regulations do not impose undue economic hardship for smaller businesses"); 23 U.S.C. § 112(g)(1) (requiring regulations "establishing the conditions for the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations" when state transportation departments oversee construction of federally-funded road projects).

[83] *See, e.g.*, 15 U.S.C. § 80a-24(a) (providing for the filing by issuers of securities of registration statements containing "information and documents . . . as the [SEC] shall prescribe by rules and regulations as necessary and appropriate in the public interest or for the protection of investors"); 47 U.S.C. § 357 (authorizing radio stations to "render free service in connection with situations involving the safety of life and property" subject to limitations "to the extent the [FCC] finds desirable in the public interest").

[84] *See, e.g.*, 21 U.S.C. § 371(a) (authorizing the Secretary and Health and Human Services "[t]he authority to promulgate regulations for the efficient enforcement of" the Federal Food, Drug, and Cosmetic Act); 29 U.S.C. § 156 (giving the National Labor Relations Board the power "to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of" the National Labor Relations Act); 47 U.S.C. § 201(b) (authorizing the Federal Communications Commission to "prescribe such rules and

IRC's version of this sort of delegation as "general authority."[85] Tom Merrill and Kathryn Watts used the term "housekeeping" delegations when identifying them in other statutes.[86]

What sets these provisions apart from specific authority delegations is not their use of open-ended and subjective terms alone. As noted above, many specific authority delegations use such words. Rather, general authority/housekeeping delegations are distinguishable in a few key ways. One is their placement in a statute's organizational structure: They are typically in a separate section of the statute, apart from the statute's more substantive provisions, most likely within the statute's administrative sections.[87] Another is that these provisions do not identify a particular topic for the agency to address. They are linguistically unlimited within the four corners of the statute and the administering agency's imagination. One might, then, fairly ask: If a statute contains multiple specific authority delegations, what purpose is served by these general authority/housekeeping ones? The obvious answer is that they allow agencies to adopt interpretations to resolve statutory ambiguities that Congress did not anticipate.

Statutes often leave terms either undefined or underdefined with regard to particular facts or circumstances. When Congress does not identify that the agency should write regulations to define or elaborate on those terms, a general authority/housekeeping delegation may allow the agency to fill in the gap with binding regulations. Or, in applying statutes to various facts and circumstances, agencies often discover potential tensions between statutory provisions that Congress did not flag and likely did not anticipate. In 1989, Justice Scalia observed that, in most court cases involving questions of statutory meaning, "Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion

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regulations as may be necessary in the public interest to carry out the provisions of" the Communications Act).

[85] *See, e.g.*, N.Y. State Bar Ass'n Tax Section, *supra* note 64, at 2 (describing 26 U.S.C. § 7805(a) as a "general grant of regulatory authority"); Hickman, *The Need for* Mead, *supra* note 43, at 1545 (drawing the same terminology from tax literature).

[86] Merrill & Watts, *supra* note 36, at 484 (defining and using this terminology and providing examples). Merrill and Watts considered the IRC's general authority/housekeeping provision, 26 U.S.C. § 7805(a), to be different from similar provisions in other statutes. *See id.* at 570-75. Professor Hickman has explained in other work her view that they erred in their assessment of this example. *See, e.g.*, Hickman, *The Need for* Mead, *supra* note 43, at 1603–11. In 2011, the Supreme Court held that general authority Treasury regulations carry the force and effect of law, making them legislative rules. *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55–57 (2011) (holding that both specific and general authority regulations carry "the force of law" in the tax context, and analogizing the Internal Revenue Code to other statutes in this regard).

[87] *See id.* at 484.

upon the agency, but rather (3) didn't think about the matter at all."[88] General authority/housekeeping delegations typically permit agencies to address these sorts of questions through legally binding regulations.[89]

For example, in addition to its hundreds of specific authority delegations, section 7805(a) of the IRC authorizes the Treasury Secretary to "prescribe all needful rules and regulations for the enforcement of" Title 26 of the U.S. Code.[90] Section 7805(a) offers no specificity, nor even hints, regarding the anticipated or potential substantive content of rules and regulations promulgated thereunder. Unlike other tax rulemaking delegations, section 7805(a) is not in a section (or even subchapter, chapter, or subtitle) of the IRC substantively related to imposing a tax, defining someone's tax liability, or establishing eligibility requirements for tax benefits. Rather, lodged in Subtitle F regarding Procedure and Administration, in Chapter 80 entitled "General Rules," and Subchapter A addressing the "Application of Internal Revenue Laws," section 7805 merely authorizes rules and regulations, provides a few circumstances in which they may be applied retroactively, and imposes procedural requirements for their promulgation and distribution.[91] Surrounding provisions in the same subchapter outline the general powers and responsibilities of various Treasury and IRS officials,[92] provide instructions for construing the statute's other provisions,[93] and address other administrative topics.[94]

Many statutes addressing a variety of other regulatory subjects contain general authority/housekeeping delegations. The Communications Act of 1934,[95] in a provision otherwise establishing the FCC, contains language, untethered to any substantive statutory requirement or program, authorizing that agency to "make such rules and regulations . . . as may be necessary in the execution of its

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88 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

89 Although it is generally settled law that agencies may rely on general authority/housekeeping delegations to adopt regulations with the force of law, such was not always so. *See infra* Section II.A. (detailing the history of general authority/housekeeping grants); *see also* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 509–29 (2013) (addressing more contemporary analysis of this question). Moreover, at least some courts have signaled interest in revisiting this question with respect to some statutes. *See* Ryan, LLC v. FTC, 746 F. Supp. 3d 369, 387 (N.D. Tex. 2024) (invalidating the FTC's noncompete rule because the general authority/housekeeping delegation on which the FTC relied did not authorize legally binding substantive regulations).

90 26 U.S.C. § 7805(a).

91 *See id.* § 7805(a)–(f).

92 *See id.* §§ 7801–7804.

93 *See id.* § 7806.

94 *See id.* §§ 7807–7811.

95 47 U.S.C. §§ 151–664.

functions."[96] The subchapter and part of the Federal Food, Drug, and Cosmetic Act[97] containing general administrative provisions vests "[t]he authority to promulgate regulations for the efficient enforcement of" that statute in the Secretary of Health and Human Services.[98]

Many environmental statutes also contain such a provision. For example, the Clean Water Act, in addition to many substantive provisions that contain specific delegations of rulemaking authority across subchapters concerning research, construction grants, standards development, and permitting and licensing,[99] also includes section 1361, titled "Administration." Section 1361(a) reads simply, "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter," with the rest of the provision dedicated to other procedural matters.[100] Section 1361 imposes no substantive requirements, nor does it offer any guidance regarding what the authorized regulations might contain, other than by reference to the statute at large.[101]

C. Hybrid Delegations

Perhaps because, as discussed below, contemporary courts have not distinguished between specific authority delegations and general authority/housekeeping delegations, interesting hybrids of the two have emerged in some statutes. Typically, these hybrid delegations use the language of general authority/housekeeping delegations, granting the agency the power to adopt rules and regulations as needed. Alternatively, hybrid delegations may simply be less clear regarding their intent to convey rulemaking power than specific authority delegations. Importantly, however, these delegations are embedded within statutory provisions with substantive, rather than merely procedural or administrative, content. Consequently, the textual proximity of these delegations to substantive statutory requirements or specifications makes them easier to define and cabin notwithstanding their own breadth. For this reason, we suggest treating hybrid delegations like specific authority delegations, rather than like general authority/housekeeping ones or disregarding them altogether as grants of rulemaking power.

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96 *Id.* § 154(i).
97 21 U.S.C. §§ 301–399f.
98 *Id.* § 371(a).
99 *See* 33 U.S.C. §§ 1251–1387.
100 *Id.* § 1361.
101 Merrill & Watts, *supra* note 36, at 584.

Section 338 of the Internal Revenue Code provides one example.[102] The section allows a taxpayer that purchases stock of a corporation, in certain circumstances, to treat the transaction instead as an acquisition of the corporation's assets.[103] The section is long, detailed, and includes several specific delegations of authority to the Treasury Secretary to adopt regulations. One subsection provides a general rule for determining the tax basis of the assets deemed acquired, then instructs the Secretary to prescribe regulations for adjustments to be made to that tax basis to account for target corporation liabilities "and other relevant items."[104] Another subsection authorizes the Secretary to prescribe the manner in which the taxpayer acquiring the corporate shares makes the election permitted by section 338, although the statute itself specifies the timing and irrevocability of the election.[105] The very last subsection of section 338 contains what we would consider the hybrid delegation, instructing the Treasury Secretary to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section" before going on to "include[]" two particular topics that the Secretary might address.[106] Other provisions of the Internal Revenue Code follow a similar pattern.[107] Because section 7805(a) of the Internal Revenue Code also authorizes the Treasury Secretary to adopt "all needful rules and regulations for the enforcement of" the entire title,[108] some tax experts have wondered how to read the overlap between the general authority language of section 7805(a) and similar language in provisions like section 338.[109]

The Clean Air Act likewise contains hybrid delegations.[110] Among many other tasks and requirements, section 7547 calls upon the EPA's Administrator to study and then adopt regulations with emission standards for "nonroad engines and nonroad vehicles"—e.g., airplanes, boats, heavy equipment, and small tools with engines.[111] The provision includes qualifiers like "significantly contribute to" and "reasonably . . .

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102 *See* 26 U.S.C. § 338.

103 *Id.*

104 *Id.* § 338(b)(2).

105 *Id.* § 338(g).

106 *Id.* § 338(i).

107 *See, e.g.*, *Id.* §§ 42(n), 168(h)(8), 382(m), 743(e)(6).

108 *Id.* § 7805(a).

109 *See, e.g.*, N.Y. State Bar Ass'n Tax Section, *supra* note 64, at 3 (raising this question in connection with this type of delegation).

110 42 U.S.C. §§ 7401–7671q.

111 *Id.* § 7547; *see also Regulations for Emissions from Nonroad Vehicles and Engines*, U.S. Env't Prot. Agency, https://www.epa.gov/regulations-emissions-vehicles-and-engines/regulations-emissions-nonroad-vehicles-and-engines [https://perma.cc/F8DP-MVEX] (listing the various categories of nonroad engines and vehicles addressed by regulations under this provision) (Feb. 14, 2025).

anticipated to endanger public health or welfare."[112] Section 7547 also lists particular pollutants to be studied and regulated: "carbon monoxide, oxides of nitrogen, and volatile organic compounds."[113] It instructs the Administrator to take into account various factors, including "technological feasibility, costs, safety, noise, and energy."[114] At the end of the provision, in connection with enforcement, section 7547 requires the Administrator more generally to "revise or promulgate regulations as may be necessary to determine compliance with, and enforce, standards in effect under this section."[115] And, like the IRC and the Clean Water Act, the Clean Air Act also contains a statute-wide general authority/housekeeping delegation to the Administrator "to prescribe such regulations as are necessary to carry out his functions under" the statute.[116]

The Aviation and Transportation Security Act reflects another hybrid pattern.[117] The entirety of the Act is contained in a single section of the U.S. Code that both establishes the Transportation Safety Administration (TSA) and confers various responsibilities and powers upon it. The language of subsection (d) resembles that of a general authority/housekeeping delegation, providing that that the TSA's Administrator "is authorized to issue, rescind, and revise such regulations as are necessary to carry out the functions of" the agency without further identifying what those functions entail.[118] Yet, other subsections in the same provision articulate security responsibilities,[119] screening operations responsibilities,[120] and an extended list of fifteen other specific duties and powers of the Administrator.[121] In the final subsection (f), following the list of fifteen responsibilities, the Administrator is empowered to "carry out such other duties, and exercise such other powers, relating to transportation security as the Administrator considers appropriate, to the extent authorized by law."[122] The scope of both the arguable general authority/housekeeping language in subsection (d) and the delegation in subsection (f) is unclear. Nevertheless, reading both subsections in their textual context and relying upon the intervening subsections to limit their application

112 42 U.S.C. § 7547(a)(1).
113 *Id.* § 7547(a)(2).
114 *Id.* § 7547(a)(3).
115 *Id.* § 7547(d).
116 *Id.* § 7601(a)(1).
117 *See* 49 U.S.C. § 114.
118 *Id.* § 114(l)(1).
119 *See id.* § 114(d).
120 *See id.* § 114(e).
121 *See id.* § 114(f)(1)–(15).
122 *Id.* § 114(f)(16).

seems obvious. Accordingly, we are inclined to label both as hybrid delegations.

Until very recently, the moribund status of the nondelegation doctrine has exempted these sorts of hybrid delegations from extensive judicial and scholarly analysis of their constitutionality. Since *Chevron* deference extended to regulations adopted under both specific authority and general authority/housekeeping delegations, no one questioned the application of *Chevron* deference to regulations issued under hybrid grants as a category. With no distinction made between delegation types, resolving exactly how general authority/housekeeping-type language in specific provisions might interact with statute-wide general authority/housekeeping delegations has been unnecessary. But one wonders about the purpose of simultaneously including the language of general/housekeeping authority in specific, substantive provisions where a statute also contains a separate general authority/housekeeping delegation. Perhaps these hybrid delegations are mere suggestions that Congress more readily anticipates ambiguities in the substantive sections that will necessitate clarifying regulations. Or perhaps the hybrid delegations signal a belt-and-suspenders drafting approach when Congress itself was uncertain of how courts will construe general authority/housekeeping delegations. Or maybe the inclusion of both in the same statute supports a conclusion, as we suggest below, that hybrid delegations should be treated differently under *Loper Bright* than general authority/housekeeping delegations.

D. Implied and Absent Delegations

The Supreme Court's 1984 *Chevron* decision introduced a final category of agency policymaking discretion in the form of "implicit," also known as "implied," delegations.[123] "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

[123] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). The *Chevron* decision itself referred to "implicit" delegations, but the broader *Chevron* jurisprudence and scholarship has often substituted the word "implied" in describing the delegations recognized by *Chevron* as worthy of judicial deference. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2287 (2024) (Gorsuch, J., concurring) ("*Chevron* depends on a judicially implied, rather than a legislatively expressed, delegation of interpretive authority . . . ."); Gun Owners of Am., Inc. v. Garland, 19 F.4th 890, 899 (6th Cir. 2021) (en banc) ("Drawing a distinction between explicit and implied delegations to an agency . . . ."); Cary Coglianese, Chevron*'s Interstitial Steps*, 85 Geo. Wash. L. Rev. 1339, 1349 (2017) ("[A] delegation of authority could also sometimes be implied."); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. Rev. 1271, 1284 (2008) ("*Chevron* provided greater depth to the congressional delegation thesis, however, by distinguishing 'express' from 'implied' delegations . . . .").

of a statutory provision for a reasonable interpretation made by the administrator of an agency."[124]

For forty years, the Court's *Chevron* jurisprudence counseled judicial deference to agencies' reasonable interpretations of statutes pursuant to implied delegations. Some legal scholars believe that *Loper Bright* maintained the possibility of implied delegations of policymaking discretion to agencies.[125] We disagree. Our conclusion is that *Loper Bright* functionally eliminates the possibility of implied delegations as a category apart from the three already described of specific authority, general authority/housekeeping, and hybrid delegations. Much of the language in *Loper Bright* indicates that the Court regards implied delegations, however one might define them, as a "fiction."[126] But even if the Court retained something like what it previously recognized as an implied delegation, we see the concept now as subsumed within the other categories of express delegations, at least in the context of agency rulemaking.[127]

The Court was never precise regarding how to determine whether a statute contained an implied delegation. *Chevron* itself was plain enough in tying implied delegations to statutory ambiguity. When statutory meaning was clear, courts and agencies could do nothing

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124 *Chevron*, 467 U.S. at 844 (emphasis added) (footnote omitted).

125 *See, e.g.*, Thomas W. Merrill, *The Demise of Deference—And the Rise of Delegation to Interpret?*, 138 Harv. L. Rev. 227, 257 (2024) (concluding that *Loper Bright* "did not reject the idea that Congress may . . . implicitly delegate to an agency the authority to interpret . . . including a statute's assignment of broad discretionary authority to the agency"); Adrian Vermeule, *The Old Regime and the* Loper Bright *Revolution*, 2024 Sup. Ct. Rev. 235 (2025) (arguing that "even after *Loper Bright*, implied delegations have the same status as express ones"); Matthew C. Stephenson, *The* Gray *Area: Finding Implicit Delegation to Agencies After* Loper Bright (June 28, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5328964 [https://perma.cc/7A4E-UUZV] (arguning that *Gray v. Powell*, 314 U.S. 402 (1941), provides a framework for determining which implicit delegations to agencies are for the courts to decide without deference and which are not); Jack Jones, Loper Bright*, "Fill Up the Details," and the Future of Agency Discretion* 22 (unpublished manuscript) (on file with author) (allowing for the possibility that courts could conclude under *Loper Bright* "that Congress implicitly but intentionally delegated [an] issue to [an] agency").

126 *Loper Bright*, 144 S. Ct. at 2268.

127 The relationship between *Loper Bright*, delegations, and agency adjudications is more complicated. The application of *Chevron* deference in the adjudication context similarly was more complex. *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 Duke L.J. 931, 964–80 (2021) (describing reasons why *Chevron* deference was more awkward for adjudications than for rulemaking). Meanwhile, the interaction between the Supreme Court's decisions in *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947), giving many agencies the choice to exercise policymaking discretion through adjudication rather than rulemaking, and in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), requiring reconsideration of whether some agency adjudications are required to be heard in an Article III court, adds further complexity to how *Loper Bright* might apply in the adjudication context.

but follow and enforce it.[128] Discerning statutory clarity was a task for courts "employing traditional tools of statutory construction."[129] Statutory ambiguity, by contrast, was an opportunity for agency gap filling, and thus agency policymaking.[130] How clear was clear, and how ambiguous was ambiguous enough to require deference, were perennial questions.[131]

Some years later, in *United States v. Mead Corp.*, the Court emphasized that eligibility for *Chevron* deference also depended upon whether Congress had delegated authority to act with "the force of law" to an agency.[132] *Mead* also held that, absent such authority, agency efforts to resolve statutory ambiguities were reviewable under the *Skidmore* standard.[133] In other words, with *Mead*, the Court seemed to embrace an "ambiguity plus" definition for implied delegations, with statutory authority to act with legal force as the plus factor.[134] In rejecting *Chevron* deference, *Loper Bright* declared expressly that statutory ambiguity alone is not a delegation of policymaking discretion.[135]

The force of law itself has always been a murky concept, whether as a plus factor for identifying implicit delegations or otherwise.[136] *Mead* and cases applying it acknowledged that, not only do some agency

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128 *See Chevron*, 467 U.S. at 842–43 ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

129 *Id.* at 843 n.9.

130 *See id.* at 845 (acknowledging that the Court has deferred to agency interpretations "'[i]f this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute'" (quoting United States v. Shimer, 367 U.S. 374, 382–83 (1961))).

131 *See* Bednar & Hickman, *supra* note 12, at 1419–21 (describing various iterations of these questions in *Chevron* cases).

132 533 U.S. 218, 226–27 (2001).

133 *See id.* at 234–35.

134 In *Barnhart v. Walton*, 535 U.S. 212 (2002), the Court suggested that other circumstances might result in eligibility for *Chevron* deference, raising the question of whether the authority to act with the force of law was an essential component of implicit delegations. Unlike the force of law requirement first embraced in *Christensen v. Harris County*, 529 U.S. 576 (2000), and later more fully developed in *Mead*, the factors listed in *Barnhart* failed to achieve much traction in subsequent jurisprudence. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 69–70 (2017).

135 *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024) ("[A]n ambiguity is simply not a delegation of law-interpreting power." (quoting Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989))); *id.* at 2267–68 ("The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken . . . .").

136 *See* Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 23 (describing "force of law" as "one of the more pernicious phrases in American administrative law" for its lack of clarity).

actions lack legal force,[137] but some *agencies* simply lack the requisite congressionally-delegated authority to act with legal force at all. For example, some agencies possess only statutory enforcement or other responsibilities leading them to advance interpretations of statutes that may seem to implicate policy choice, even in the absence of statutory language authorizing those agencies to adopt legally binding rules and regulations.[138]

Regardless, efforts to elaborate *Mead*'s force of law inquiry focused principally on statutory text. In *Mead*, the Court identified statutory authorization to engage in notice-and-comment rulemaking and formal adjudication as "a very good indicator" of delegated authority to act with the force of law.[139] Another school of thought held that, in general, agency actions only carry legal force when failing to comply with them carries statutory penalties.[140] In *Gonzales v. Oregon*, the Court made clear that it would only find an implied delegation where a statute used the sort of delegation language we have labeled above as specific authority, general/housekeeping authority, or hybrid authority. In declining to extend *Chevron* deference to an Attorney General interpretation of the Controlled Substances Act, the Court emphasized that the statute gave the Attorney General neither specific authority to adopt the interpretation in question nor general/housekeeping authority to adopt regulations to implement the statute.[141]

The Court's reasoning in *Loper Bright* appears to be the final step in rejecting whatever might have remained of implied delegations as separate from explicit ones. The Court criticized *Chevron* for "forcing courts to . . . pretend that ambiguities are necessarily delegations,"[142] and repeated that "statutory ambiguity . . . is not a reliable indicator

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137 *See* United States v. Mead Corp., 533 U.S. 218, 232 (2001) (acknowledging that the agency in that case possessed authority to adopt regulations carrying legal force, but rejecting *Chevron* deference for the particular action by which the agency interpreted the statute in the case at bar).

138 The Wage & Hour Division of the Department of Labor, which possesses certain implementation responsibilities over the Fair Labor Standards Act, is an example. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 137–38 (1944) (noting that Congress gave courts rather than the Wage and Hour Division responsibility for resolving legal questions regarding the FLSA's applicability).

139 *Mead*, 533 U.S. at 229.

140 *See, e.g.*, Mann Construction, Inc. v. United States, 27 F.4th 1138, 1143 (6th Cir. 2022) (identifying "the risk of penalties and criminal sanctions" as leading to a determination that an agency pronouncement carries the force of law); Merrill & Watts, *supra* note 36, at 472 ("If Congress specified in the statute that a violation of agency rules would subject the offending party to some sanction . . . then the grant conferred power to make rules with the force of law."). *But see* Einer Elhauge, Statutory Default Rules 92 (2008) (questioning Merrill & Watts' theory).

141 *See* Gonzales v. Oregon, 546 U.S. 243, 258–59 (2006).

142 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2268 (2024).

of actual delegation of discretionary authority to agencies."[143] *Loper Bright* clearly and deliberately focuses attention on statutory text to identify whether an agency has policymaking discretion warranting review for reasoned decisionmaking rather than independent judgment review. *Loper Bright* instructs courts to consider the statutory language empowering the agency to act, rather than the procedures an agency uses or the legal force an agency action carries. Finally, the standard for considering agency exercises of policymaking discretion requires defining the boundaries of that delegated power, which is difficult to operationalize outside of express delegation language.

Rules and regulations adopted pursuant to any delegation will entail some amount of statutory interpretation, no matter how much discretion a statute grants the adopting agency. By their very nature, general authority/housekeeping delegations only come into play when an agency identifies and endeavors to resolve some statutory ambiguity or gap, thus leading to the impression that such agency actions represent the exercise of implied delegations instead. Courts should recognize such rules and regulations for what they are—i.e., exercises of general authority/housekeeping delegations—rather than apply *Chevron*'s poorly-defined and now discredited implied delegation label.

Moreover, our focus on different categories of statutory delegations speaks only to the standards by which judges review agency actions, and not to the legal force such actions carry. Whether such rules and regulations carry the force of law for other purposes, such as the applicability of APA notice-and-comment rulemaking procedures, is a different question than the standards of review described in *Loper Bright*.[144] A notice-and-comment regulation adopted pursuant to a general authority/housekeeping delegation may carry the force of law and yet, according to *Loper Bright*, be subject to independent judgment review, potentially influenced by *Skidmore*'s contextual factors.

Likewise, agencies lacking a statutory delegation of policymaking discretion or the authority to act with legal force will continue to articulate statutory interpretations that seem to convey some amount of policy choice. Absent such a delegation, in the language of *Loper Bright*, courts should review such agency actions exercising their independent judgment, potentially giving weight to the agency's views under *Skidmore*, rather than search for implied delegations.

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143 *Id.* at 2272.

144 *See, e.g.*, Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (considering "whether the disputed rule has 'the force of law'" as the relevant inquiry for whether a rule is legislative or interpretative under the APA (quoting Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 787–88 (D.C. Cir. 1987))).

II
Delegation and Line Drawing in Administrative Law

Judicial review of agency actions has always included a fair amount of line-drawing around delegations of discretionary power from Congress to agencies. Statutory interpretation questions arising from agency actions fundamentally are questions about whether Congress gave agencies the power to act as they have and, on some occasions, whether the Constitution allows Congress to delegate that power in the first instance. Less obvious, perhaps, but still an important part of the doctrinal equation, are the ways in which the Supreme Court similarly has shifted power from courts to agencies and back again as it seeks to channel and navigate its own role in light of the ubiquity of statutory delegations.

Also part of the equation, section 706 of the APA calls for reviewing courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action"[145]—language that the Court in *Loper Bright* said requires courts to exercise independent judgment in reviewing agency interpretations of statutes.[146] Yet, that same section of the APA counsels judicial restraint with regard to agency policymaking. At least as interpreted by the Supreme Court, for agency policymaking, the arbitrary and capricious standard of APA section 706(2)(A) is both "narrow"[147] and "deferential."[148] Agency exercises of policymaking discretion must be "reasonable and reasonably explained,"[149] but "a court is not to substitute its judgment for that of the agency."[150] The trick, of course, is to distinguish the two.

As described below, with its two-part test, *Chevron* distinguished between statutory interpretation and agency policymaking based on a theory of congressional delegation.[151] Now *Loper Bright* counsels the same distinction between statutory interpretation and agency

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145 5 U.S.C. § 706.

146 *Loper Bright*, 144 S. Ct. at 2261.

147 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

148 FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021); *see also id.* ("[A] court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.").

149 *Id.* at 1158; *see also* Ohio v. EPA, 144 S. Ct. 2040, 2053 (2024) (reaffirming that agency action may be "'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained'" (quoting *Prometheus Radio*, 141 S. Ct. at 1158)).

150 *State Farm*, 463 U.S. at 42; *see also Ohio*, 144 S. Ct. at 2053 (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009)).

151 *See* discussions *infra* Section II.B.

policymaking, but draws the line in a different place based on a different theory of congressional delegation. The major questions doctrine likewise focuses on delegations of policymaking discretion, but for the purpose of distinguishing between major questions and non-major ones, requiring delegations to be clearer for the former than the latter.[152] The nondelegation doctrine currently requires only an intelligible principle for a delegation of agency policymaking discretion to be constitutional.[153] But after decades of delegations deemed constitutional under that standard, Justice Gorsuch—and likely other justices—would instead make the nondelegation determination turn on drawing a line between policy questions and mere details.[154]

With the obvious exception of proposals to modify the nondelegation doctrine, which have not yet been adopted,[155] all these instances of doctrinal line-drawing have altered the allocation of governmental power among Congress, agencies, and the courts.[156] It is easy as a matter of political rhetoric to label *Chevron* deference an abdication of the judicial role or to call *Loper Bright* or the major questions doctrine a power grab by the Court. Understanding the broader context of those sorts of assertions requires more. We see these doctrinal strands as intertwined and as part of a longer doctrinal arc. We discuss them each in turn.

A. The Nondelegation Doctrine

With *Loper Bright*'s focus on whether policymaking discretion has been delegated to an agency, one might fairly ask how the case relates to the Supreme Court's nondelegation jurisprudence. On the flip side of that question, we suggest that understanding all of *Chevron*,

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152 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) ("[O]ur precedent teaches that there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.").

153 *See* Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) ("[T]his Court has held that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority.").

154 *See id.* at 2136 (Gorsuch, J., dissenting) ("First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'").

155 *See* FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2497 (2025) (applying the intelligible principle standard in evaluating a nondelegation challenge to a federal statute).

156 We recognize that the Vesting Clause of Article II, Section 1 vests the executive power in the President. But Article II also contemplates that the executive branch will include departments and subordinate officers, which we take collectively to mean agencies of some sort. We set aside arguments about the proper constitutional relationship between the President and subordinates within the executive branch as beyond the scope of this paper.

Loper Bright, and the major questions doctrine requires appreciating nondelegation history as it relates to the different types of statutory delegations outlined above.

Since 1928, the Court has relied on the intelligible principle standard of *J.W. Hampton, Jr. & Co. v. United States*[157] in addressing nondelegation disputes[158] and has not invalidated a statutory delegation of policymaking discretion to a federal agency since 1935.[159] The Court could at any time choose to revisit its approach to the nondelegation doctrine, and not long ago seemed poised to do just that.[160] More recently, however, the Court seems to have cooled on replacing the intelligible principle standard in favor of sub-constitutional doctrinal changes like overturning *Chevron* and intensifying the major questions doctrine.[161]

Although the Court has not deviated from the intelligible principle standard since 1928, understandings about how that standard applies particularly to general authority/housekeeping delegations have evolved considerably. The result has been a shift of governmental power from Congress to the executive branch, particularly agencies, with a secondary and corresponding shift from courts to agencies.

Before the New Deal, in contemplating the nondelegation doctrine, the Supreme Court distinguished between the nonbinding effect of regulations adopted in the exercise of general authority/housekeeping delegations and the binding legal force of specific authority delegations. For example, in *United States v. Eaton*, the Court held that regulations adopted under the general authority/housekeeping provision of the Oleomargarine Act could neither carry legal force nor support the imposition of penalties, calling the very idea "a very dangerous principle."[162] A few years later, in *In re Kollock*, the Court distinguished *Eaton* and held that private parties could be punished for violating

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157 276 U.S. 394, 409 (1928).

158 *See, e.g.*, *Gundy*, 139 S. Ct. at 2123 (plurality opinion) (quoting and relying on *Hampton*'s intelligible principle standard); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (same); Mistretta v. United States, 488 U.S. 361, 372 (1989) (same).

159 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (invalidating § 3 of the National Industrial Recovery Act on nondelegation grounds); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (invalidating § 9(c) of the National Industrial Recovery Act similarly).

160 *See, e.g.*, Paul v. United States, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari) (suggesting reconsideration of nondelegation jurisprudence); *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring, and Gorsuch, J., dissenting) (suggesting reconsideration of nondelegation jurisprudence).

161 *See, e.g.*, Brian Chen & Samuel Estreicher, *The New Nondelegation*, 102 Tex. L. Rev. 539, 541 (2024) (describing recent major questions cases as "enforc[ing] otherwise underenforced nondelegation principles").

162 144 U.S. 677, 688 (1892).

agency regulations promulgated in the exercise of a specific authority delegation in the same statute.[163] Congress had "fully and completely defined" the latter offense, the Court said, and those regulations provided a "mere matter of detail . . . in effectuation of" the provision in question.[164]

Building from these and other cases, legal scholars in the first half of the twentieth century likewise distinguished the constitutionality and consequences of regulations adopted under the different types of delegations. Courts and scholars alike agreed that regulations exercising specific authority delegations were legally binding, "similar to statutes,"[165] and carried the "force and effect of law."[166] Accordingly, specific authority delegations had to pass muster with the nondelegation doctrine, which was sparingly applied.[167] By contrast, at least from the 1920s through the 1940s, legal scholars routinely accepted that general authority/housekeeping delegations lacked intelligible principles, and therefore could not authorize legally binding regulations without violating the nondelegation doctrine.[168] Instead, those delegations merely allowed

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163 *See* 165 U.S. 526, 535–37 (1897); *see also* Morris M. Cohn, *To What Extent Have Rules and Regulations of the Federal Departments the Force of Law*, 41 AM. L. REV. 343, 346–48 (1907) (distinguishing *Kollock* and *Eaton* on the basis of specific versus general authority).

164 *Kollock*, 165 U.S. at 533.

165 Fred T. Field, *The Legal Force and Effect of Treasury Interpretation*, *in* THE FEDERAL INCOME TAX 91, 99 (Robert Murray Haig ed., 1921); *see also* John A. Fairlie, *Administrative Legislation*, 18 MICH. L. REV. 181, 196 (1920) (recognizing that "regulations made in pursuance of express authority . . . have the full force of a statute upon private individuals as well as upon public officials").

166 Md. Cas. Co. v. United States, 251 U.S. 342, 349 (1920) (describing such regulations as having "the force and effect of law if [they are] not in conflict with express statutory provision"); *see also, e.g.*, Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 418–19 (1942) (recognizing the legal force of specific authority regulations); 1 F. TROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW § 489 (1942) ("[I]f Congress has exercised its essential legislative function by setting up an appropriate standard . . . and if the regulation fits the standard, . . . legislative regulations have the force of law."); Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 20–22 (1940) (describing the "clear situations" in which Congress intended a regulation to be legislative, that is, to "have the force and effect of law").

167 *See, e.g.*, VOM BAUR, *supra* note 166, §§ 13, 489 (describing the conditions whereby Congress could delegate discretionary authority to agencies and by which agencies exercised such delegations in accordance with the Constitution); Ellsworth C. Alvord, *Treasury Regulations and the* Wilshire Oil Case, 40 COLUM. L. REV. 252, 259–60 (1940) (observing that, for constitutionality, "the specific power to prescribe such regulations must be found in the statute, and should be accompanied by a standard or guide adequate to permit the courts to control the administrative action"); Lee, *supra* note 166, at 21–22 (acknowledging the constitutionality of congressional delegations to agencies to adopt legislative rules with "a force and effect equivalent to" statutes "within a limited field defined by the statute").

168 *See, e.g.*, VOM BAUR, *supra* note 166, § 489 (describing regulations "issued pursuant to a statutory provision of an entirely general nature which does not purport to confine the regulations promulgated thereunder to the implementation of a specific standard" as "interpretative," "rest[ing] on an entirely different constitutional basis," and unable to

agency officials to publicize their own views regarding statutory meaning in the face of ambiguity—an act that did not require any congressional authorization—with courts to decide if those interpretations were correct.[169] In other words, such agency pronouncements might persuade courts but could not bind them. The APA,[170] adopted in 1946 to reform and bring uniformity to federal administrative procedures, implicitly incorporated this perceived difference between specific authority delegations and general authority/housekeeping delegations when it imposed procedural requirements—like public notice and opportunity for comment—for legislative rules but not for interpretative ones.[171]

The first Supreme Court decision to contradict that original assessment of general authority/housekeeping delegations appears to have been *American Trucking Associations v. United States* in 1953.[172] That case involved a nondelegation challenge to rules that were adopted by the Interstate Commerce Commission (ICC) under the Motor Carrier

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"acquire the force of law simply because they seem 'consistent' with the statute"); Alvord, *supra* note 167, at 260 (noting that Treasury Department regulations under "the general rule-making power of Section 62" of the Internal Revenue Code of 1939 lacked congressional standards and were treated by courts as mere statutory interpretations, not binding law, to avoid unconstitutionality); Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. Pa. L. Rev. 556, 557–58 (1940) (arguing that the Internal Revenue Code's general authority to prescribe "needful rules and regulations for the enforcement . . . hardly seem[s] adequate . . . to support a [constitutional] delegation of legislative power"); Field, *supra* note 165 at 100–01 (It is "well settled" that "interpretative regulation has not the force of law.").

169 *See, e.g.*, vom Baur, *supra* note 166, § 489 (describing such regulations as "nothing more substantial than . . . an administrative guess at a judicial question"); Lee, *supra* note 166, at 24–25 ("Such a regulation adds naught to the statutory rule or to the statute construed [and] has no more legal effect than that of the individual unless or until it has been approved by the courts or 'ratified' by Congress."); Surrey, *supra* note 168, at 557–58 (contending that regulations under general authority delegations "remain no more than the Department's construction of the Revenue Act" and "would be equally valid without" any statutory authority).

170 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706); *cf.* vom Baur, *supra* note 166, § 489 (linking specific authority delegations to "legislative regulations" and general authority/housekeeping delegations to "interpretative regulations" a few years prior to the APA's enactment).

171 The APA itself merely mentions an exemption from notice-and-comment procedures for "interpretative rules," among other exceptions, without labeling the rules for which such procedures are required. *See* 5 U.S.C. § 553(b). The Attorney General's Manual on the Administrative Procedure Act, generally considered part of the authoritative history of that statute, juxtaposed interpretative rules and legislative rules, which it termed "substantive rules," and defined the latter as "rules . . . issued by an agency pursuant to statutory authority and which implement the statute," and notes that such regulations carry legal force. U.S. Dep't of Just., Attorney General's Manual on the Administrative Procedure Act 22, 30 n.3 (1947).

172 344 U.S. 298 (1953); *see* 1 Kenneth Culp Davis, Administrative Law Treatise, § 2.04, at 93–94 (1958) [hereinafter Davis, Administrative Law Treatise 1958] (recognizing this case as the point when the Court moved away from requiring specific authority as necessary toward including general authority as sufficient to satisfy the nondelegation doctrine).

Act[173] and targeted equipment leasing practices common in the trucking industry.[174] Although the ICC identified several provisions of the Act as supporting its action,[175] the Court acknowledged that the statute lacked "an express delegation of power to control, regulate or affect leasing practices."[176] The Court also agreed, however, with the ICC's claim that the targeted leasing practices would frustrate congressional purposes.[177] Thus, in upholding the regulations, the Court turned to the ICC's general/housekeeping authority "[t]o administer, execute, and enforce all other provisions of [the Act], to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration," contending that "[t]he grant of general rule-making power necessary for enforcement" compelled it to side with the agency.[178] The Court rejected the trucking companies' claim that the statute's general authority/housekeeping provision merely authorized procedural rules or was "solely administrative" based on its reference to enforcement.[179] Finally, in two short sentences, the Court concluded that its interpretation of the Act's general authority was constitutional "as exercised" because it was "bounded by the limits of the regulatory system of the Act which it supplements."[180]

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173 Pub. L. No. 74-255, 49 Stat. 543 (1935).

174 *See Am. Trucking*, 344 U.S. at 300–01.

175 *See, e.g.*, Lease and Interchange of Vehicles by Motor Carriers, 13 Fed. Reg. 369 (proposed Jan. 27, 1948) (to be codified at 49 C.F.R. pt. 207) (citing several sections of the Interstate Commerce Act, as amended by the Motor Carrier Act, in the Notice of Proposed Rulemaking).

176 *Am. Trucking*, 344 U.S. at 309.

177 *Id.* at 311 ("So the rules in question are aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress.").

178 *Id.* at 311–12. The Court also indicated that section 204(a)(6) general authority under the statute would "extend to the 'transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation,' regulation of which is vested in the Commission by" another, more specific provision of the Act, but that provision was part of the statute's declaration of policy, not a specific grant of rulemaking authority. *Id.* at 311 (quoting § 202(b), 49 Stat. 543, 543). The Court also cited the ICC's specific authority to regulate permit transfers "pursuant to such rules and regulations as the Commission may prescribe," contending that "[i]t does not strain logic or experience" to consider equipment leasing a temporary transfer. *Id.* (quoting § 212(b), 49 Stat. 543, 555). But the Court was clear that the principal basis for its conclusion was the ICC's section 204(a)(6) general authority.

179 *Am. Trucking*, 344 U.S. at 311.

180 *Id.* at 313. The Court cited its decision in *United States v. Pennsylvania Railroad Co.*, 323 U.S. 612 (1945), as "foreshadow[ing]" its interpretation of the Motor Carrier Act's general authority provision. *Am. Trucking*, 344 U.S. at 312. But although that case concerned regulations that were not specifically commanded by the statute, the Court in that case cited several provisions that were broad but nevertheless specific in mentioning the target of the regulations and otherwise supporting the ICC's action. *See Pa. R.R. Co.*, 323 U.S. at 619.

With the explosion of agency rulemaking in the 1960s and 70s,[181] agencies sought to achieve more policy objectives through regulations pegged to general authority/housekeeping delegations.[182] Agencies increasingly relied on general/housekeeping rulemaking grants as legal authority for adopting legally binding rules and regulations, even where they previously had disclaimed the authority to do so. For example, Thomas Merrill and Kathryn Watts have documented efforts by the Federal Trade Commission, Food and Drug Administration, and National Labor Relations Board to claim previously unasserted power to adopt legally binding regulations based on general/housekeeping authority, with judicial support.[183]

Kenneth Culp Davis captured the shift in the constitutional character and legal weight of general authority/housekeeping regulations. Davis was no fan of the nondelegation doctrine, deriding it in his 1951 *Handbook on Administrative Law* as "a judge-made corollary of laissez-faire, inconsistent with positive government."[184] In that same work, he acknowledged the claims of prior scholarship "that authority to make legislative rules must be specifically delegated," but he suggested that courts should interpret statutory provisions allowing agencies to announce new policies through adjudication as giving agencies latitude to adopt legally binding regulations as well.[185] Nevertheless, even Davis acknowledged that general authority/housekeeping delegations of rulemaking power could only support nonbinding interpretative regulations, which did not actually require statutory authority.[186]

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[181] *See, e.g.*, 1 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 1.6, at 21–22 (3d ed. 1994) ("Rulemaking began to emerge as the dominant form of regulation in the 1970s. A whole cluster of new federal statutes since about 1965 have accentuated rulemaking."); Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Admin. L. Rev. 1139, 1143–55 (2001) (documenting reasons for this history); Clark Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1823, 1823 (1978) (documenting the rising rate of rulemaking in the 1970s).

[182] *See* Merrill & Watts, *supra* note 36, at 549–70 (documenting examples of the trend).

[183] *See id*.

[184] Kenneth Culp Davis, Handbook on Administrative Law § 16, at 58 (1951) [hereinafter Davis, Handbook].

[185] *Id.* § 55, at 195; *see also* Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 Yale L.J. 919, 929 (1948) (making the same argument) [hereinafter Davis, *Administrative Rules*].

[186] *See* Davis, Handbook, *supra* note 184, § 55, at 196–97 (stating that, "[a]lthough the power to issue interpretative regulations is commonly inherent or implied, it may be expressly conferred," and offering examples); Davis, *Administrative Rules*, *supra* note 185, at 930–32 (noting that general delegations supported only nonbinding interpretative regulations, and that interpretative rules required no statutory authority at all, as shown by agencies issuing such rules even when explicitly lacking regulatory power).

A few years later, in 1958, in the first edition of his *Administrative Law Treatise*, Davis documented how the distinction between specific authority and general authority/housekeeping delegations was starting to break down.[187] He acknowledged the *American Trucking* case as an example of the Supreme Court rejecting a nondelegation challenge against regulations premised on a general authority/housekeeping delegation.[188] He also argued that judicial deference to agency regulations was collapsing the traditional distinction, albeit under different theories and for different reasons in different cases.[189] Consequently, he contended that it was no longer quite right to say that legislative rules carried legal force and interpretative rules, as historically understood, did not. "More accurate is a statement that valid legislative rules have force of law and that interpretative rules sometimes do."[190] Accordingly, he declared that "[t]he question whether a rule is legislative or interpretative thus depends upon whether or not it is issued pursuant to a grant of law-making power," without defining closely what that meant.[191]

By 1969, Davis maintained that the nondelegation doctrine was "almost a complete failure"[192] and advocated that courts replace it with several "principal steps" to protect private parties from agency exercises of "unnecessary and uncontrolled discretionary power."[193] In the second edition of his treatise in 1978, Davis declared the nondelegation doctrine had simply "failed."[194] He reflected that the Supreme Court's distinction in *Batterton v. Francis* between specific authority delegations and general authority/housekeeping delegations for judicial deference purposes meant that "the old law continues."[195] But he also recognized that courts and scholars otherwise had moved in a different direction.[196]

The breakdown of the distinction between specific authority delegations and general authority/housekeeping delegations substantially shifted governmental power away from Congress and

187 *See* Davis, Administrative Law Treatise 1958, *supra* note 172, §§ 5.03–.06, at 248–64.

188 *See id.* § 2.04, at 93 ("The Supreme Court's main reliance in upholding the rules was the provision . . . granting power to 'administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration.'").

189 *See id.*

190 *Id.* at 314.

191 *Id.* § 5.03, at 302.

192 Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713, 713 (1969).

193 *Id.* at 725.

194 *See* 1 Kenneth Culp Davis, Administrative Law Treatise § 3.2, at 150 (2d ed. 1978).

195 2 Kenneth Culp Davis, Administrative Law Treatise § 7.8, at 41 (2d ed. 1979).

196 *Id.*

courts to agencies. Agencies that previously enjoyed policymaking discretion only where Congress specifically authorized it began to assert the power to interpret broadly and now could, as one author described it, "literally roam at will through the general or ambiguous terms of an entire statute."[197] Agencies that previously questioned whether they possessed the authority to adopt legally binding regulations at all now claimed that power.[198] The nondelegation doctrine thus lost whatever teeth it once might have had. The courts lost a potential tool for limiting the excesses of agency policymaking discretion. Particularly when combined with the Court's extension of judicial deference to agency regulations adopted pursuant to general authority/housekeeping delegations discussed below, the result was a reallocation of governmental power not only from Congress to agencies, but secondarily from courts to agencies as well.

Given this history, it is not surprising that two recent cases, taken together, signaled the inclination of several justices to replace the intelligible principle standard and reinvigorate the nondelegation doctrine. In *Gundy v. United States*, in which an eight-justice Court upheld the Sex Offender Registration and Notification Act (SORNA)[199] as constitutional,[200] Justice Gorsuch advocated reinvigorating the nondelegation doctrine by replacing the intelligible principle standard with a new approach focused principally on allowing agencies to "fill up the details" so long as Congress "makes the policy decisions when regulating private conduct."[201] He was joined in that proposal by the Chief Justice and Justice Thomas. Justice Alito concurred in *Gundy* only because the Court lacked five justices to replace the intelligible principle standard, and he expressed interest in reconsidering the Court's nondelegation approach.[202] Later, Justice Kavanaugh—who had not participated in *Gundy*—suggested in *Paul v. United States* that he too was inclined to reconsider the doctrine and endorsed a slightly

197 VOM BAUR, *supra* note 166, § 489 (describing interpretative regulations adopted under general authority/housekeeping delegations).

198 Merrill & Watts, *supra* note 36, at 545 ("As agencies and commentators began to perceive the advantages of rulemaking over adjudication, they began to rely on the language in several of the Court's opinions . . . as support for the proposition that agencies previously thought not to have legislative rulemaking authority . . . had enjoyed such power from their inception.").

199 34 U.S.C. § 20913(d).

200 *See* 139 S. Ct. 2116, 2129 (2019) (plurality opinion).

201 *Id.* at 2136–37 (Gorsuch, J., dissenting) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

202 *Id.* at 2131 (Alito, J., concurring in the judgment).

different approach focusing on whether Congress had answered the major versus non-major policy questions.[203]

In short, five justices expressed interest in a more robust nondelegation doctrine, but without consensus regarding what might replace the current standard. The alternatives suggested by Justices Gorsuch and Kavanaugh, while framed slightly differently, still would allow some delegations of discretion to agencies. Justice Gorsuch even acknowledged that "[a]t least some" of the delegations that the Court had previously held constitutional under the intelligible principle standard would survive his proposed standard as well.[204] Regardless, as described below, *Loper Bright* is best understood at least in part as an effort by the Court to break its impasse over congressional delegations and the nondelegation doctrine subconstitutionally.[205]

B. Delegation and Deference

For at least 100 years, judicial deference doctrine has been rooted in assumptions about congressional delegations of policymaking discretion to agencies. For example, in 1936, in an era in which the *Loper Bright* Court maintained that judges exercised independent judgment in evaluating agency interpretations of statutes,[206] the Supreme Court in *AT&T Co. v. United States* counseled judicial restraint toward FCC regulations that established accounting standards for ratemaking pursuant to a special authority delegation.[207] The statute authorized the FCC to, "in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by" regulated parties and instructed the agency to, "by rule, prescribe a uniform system of accounts for use by telephone companies."[208] When a telephone company challenged the resulting accounting rules, the Court sided with the agency based on a theory of delegation and judicial restraint. "This court is not at liberty

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203 *See* 140 S. Ct. 342 (2019) (Kavanaugh, J., statement regarding the denial of certiorari); *see also* Hickman, *Nondelegation*, *supra* note 36 at 1121–25 (contrasting the Gorsuch and Kavanaugh approaches).

204 *Gundy*, 139 S. Ct. at 2140 (Gorsuch, J., dissenting).

205 *See* FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2515 (2025) (Kavanaugh, J., concurring) (observing that overturning *Chevron* deference, together with applications of the major questions doctrine, has "substantially mitigated" "many of the broader structural concerns about expansive delegations"). In *Consumers' Research*, the Court again retained the intelligible principle standard for evaluating a nondelegation challenge to a federal statute, thereby illustrating Kavanaugh's point. *See id.* at 2497; *see also id.* at 2524–26 (Gorsuch, J., dissenting) (concluding that delegations of authority to prescribe tax rates violate the intelligible principle standard).

206 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024).

207 *See* 299 U.S. 232, 236–37 (1936).

208 Communications Act of 1934 § 220, codified at 47 U.S.C. § 220(a)(1)–(2).

to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers."[209]

Even into the late 1970s and early 1980s, the Supreme Court continued at least sometimes to define eligibility for judicial deference by reference to specific authority versus general authority/housekeeping delegations, which it also aligned with the distinction between legislative and interpretative rules for APA purposes.[210] For example, in *Batterton v. Francis*, cited approvingly in *Loper Bright*,[211] the Court considered regulations issued under specific authority in section 407(a) of the Social Security Act.[212] The statute called upon the Secretary of Health, Education, and Welfare to prescribe standards for defining "unemployment."[213] Because Congress had "expressly delegated" responsibility for defining the relevant term to the Secretary using legislative rules, the Court said that judicial deference was appropriate.[214] The Court drew a contrast with interpretative regulations lacking legal force and entitled only to "deference" under *Skidmore v. Swift & Co.* and like cases.[215]

Subsequently, in *Rowan Cos. v. United States* and *United States v. Vogel Fertilizer Co.*, the Court again said expressly that it owed less deference to general authority/housekeeping regulations under the Internal Revenue Code than it did to specific authority regulations under the same statute.[216] It took until 2011, in *Mayo Foundation for Medical Education and Research v. United States*, for the Court to expressly reject the distinction between specific authority delegations and general authority/housekeeping delegations for *Chevron* purposes.[217] But the

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209 AT&T Co. v. United States, 299 U.S. 232, 236–37 (1936).

210 *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 315–16 (1979) (concluding the relevant regulations were not substantive rules with the "binding effect of law" because they lacked specific statutory authorization); Batterton v. Francis, 432 U.S. 416, 425 & n.9 (1977) (distinguishing "expressly delegated . . . power to prescribe standards" supporting legislative rules with "the force and effect of law" from interpretative regulations eligible for only "[v]arying degrees of deference" based on factors like timing, consistency, and agency expertise); *see also* Arthur Earl Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 ADMIN. L. REV. 101, 108–17 (1971) (citing earlier cases and scholarship for the same dichotomy).

211 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

212 432 U.S. 416 (1977).

213 *Id.* at 425.

214 *Id.*

215 *Id.* at 425 & n.9 (quoting U.S. DEP'T OF JUST., *supra* note 171, at 30 n.3).

216 United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (offering "less deference" for a general authority/housekeeping regulation "than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision" (quoting Rowan Cos. v. United States, 452 U.S. 247, 253 (1981))).

217 562 U.S. 44, 56–57 (2011).

Court arguably did so in practice many years earlier in the *Chevron* decision itself.[218]

Chevron's core issue was whether the Clean Air Act's "new source review" process for areas that failed to meet air quality standards applied to any significant addition or modification of a power plant or only those additions or modifications that would lead to a net increase in plant-wide emissions above a certain threshold.[219] The statute required permits for "new or modified major stationary sources" of air pollution.[220] The operative statutory term, "stationary source," defined as "any building, structure, facility, or installation which emits or may emit any air pollutant," did not on its face answer the question.[221] Faced with questions about when to apply program requirements, the Reagan EPA used notice-and-comment rulemaking to replace a stricter, Carter-era standard with a more permissive plant-wide definition of stationary source.[222]

The Clean Air Act is a complicated statute with many provisions. The preamble to the regulation at issue in *Chevron* did not clearly outline the EPA's legal authority for promulgating the regulation. Instead, without further explanation, the preamble simply listed several substantive provisions of that statute, none of which directly mentions authority to adopt regulations, and section 7601(a), which does.[223] As noted above, Section 7601(a) gives the EPA Administrator general/housekeeping authority to "prescribe such regulations as are necessary to carry out his functions under" the Act.[224] Indeed, in its brief before the Supreme Court in *Chevron*, the government pointed to section 7601(a) as giving it "broad power" to regulate and made that provision the basis for its assertion that the courts were "not at liberty to intrude upon the Administrator's authority."[225]

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218 *See* Hickman, *The Need for* Mead, *supra* note 43, at 1578–79 (making this observation); Merrill & Watts, *supra* note 36, at 587–90 (same).

219 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

220 42 U.S.C. § 7502(b)(5) (1977).

221 *Chevron*, 467 U.S. at 846 (citing statutory definition).

222 *Id.* at 853–59.

223 *See* 46 Fed. Reg. 50766, 50771 (Oct. 14, 1981) (citing, inter alia, 42 U.S.C. § 7601(a) (1976)).

224 42 U.S.C. § 7601(a)(1); *see also supra* notes 110–16 and accompanying text (describing Clean Air Act delegations).

225 Brief for the Administrator of the Environmental Protection Agency, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., No. 82-1005 (1983), https://www.justice.gov/d9/osg/briefs/1983/01/01/sg830187.txt [https://perma.cc/Y69D-M89Y]. The consensus among administrative law scholars seems to be that statutory delegation supporting the regulation at issue in *Chevron* was the general authority/housekeeping delegation contained in § 7601(a). *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 199–200 (1998) (observing that the Solicitor General began his argument in the *Chevron*

After considering both the text and the legislative history of the Clean Air Act, the *Chevron* Court reasoned that Congress had not chosen among the different possible meanings of "stationary source" and that the choice was a question of policy.[226] Congress might have "consciously desired the Administrator to strike the balance," failed to "consider the question" at all, or considered the question and simply not resolved it.[227] Regardless, the statute broadly "delegated policy-making responsibilities" to the EPA.[228] Accordingly, the Court labeled the agency's plant-wide source definition to be a policy decision within that delegated discretion.[229]

The *Chevron* Court did not suggest that all agency regulations reflected an exercise of delegated policymaking discretion. Instead, the Court said that, first, a reviewing court must ascertain "whether Congress has directly spoken to the precise question at issue" or "the intent of Congress is clear" using "traditional tools of statutory construction."[230] In other words, in contemplating its approach to judicial review, the question for the Court was the same as it had always been: distinguishing mere statutory interpretation from exercises of policymaking discretion. As it had always done, the *Chevron* Court recognized that judicial restraint was appropriate when statutes expressly delegate policymaking discretion, citing *Batterton v. Francis* among other cases.[231]

The *Chevron* Court did not identify, however, a specific authority delegation on which the agency based its regulation, nor could it have, for the agency itself did not specify one. The Court also did not directly acknowledge the old specific authority versus general authority/housekeeping dichotomy, except perhaps obliquely by citing *Batterton v. Francis*. Instead, as previously noted, the Court rhetorically introduced the new category of implied delegations, couched in terms

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case by quoting in full the Clean Air Act's general authority provision); Merrill & Watts, *supra* note 36, at 473 ("[T]he Supreme Court's *Chevron* decision treated as legally binding a rule adopted by the [EPA] pursuant to its general rulemaking powers under the Clean Air Act.").

226 *See Chevron*, 467 U.S. at 864 ("The arguments . . . 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.").

227 *Id.* at 865.

228 *Id.*

229 *Id.*

230 *Id.* at 843 & n.9 (citations omitted).

231 *Id.* at 843–44 ("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.").

of statutory ambiguity.[232] Yet, the Court did not say that ambiguity alone was sufficient for deference, but rather predicated deference on a delegation of policymaking discretion from Congress to the EPA,[233] which in this instance came from the Clean Air Act's general authority/housekeeping language in section 7601(a). The ambiguity-plus approach to *Chevron* deference embraced by the Supreme Court in *United States v. Mead Corp.* and subsequent cases—reserving *Chevron* deference for those instances in which an agency resolved statutory ambiguities by exercising congressionally-delegated authority to act with the force of law, and leaving all other agency actions to *Skidmore*'s arguably less deferential contextual factors[234]—confirmed that implied delegations were largely synonymous with general authority/housekeeping delegations.[235]

By extending judicial deference from specific authority delegations to general authority/housekeeping delegations in this way, the Court's *Chevron* jurisprudence dramatically increased the availability of judicial deference to agency actions, and thus reallocated power substantially from courts to agencies.[236] If *Mead* reined in *Chevron* by requiring actual evidence of delegated authority to act with legal force, *Loper Bright* represents a much more substantial power shift from agencies back to courts.

Loper Bright concerned the validity of a notice-and-comment regulation adopted by the Department of Commerce and the National Marine Fisheries Service under the Magnuson-Stevens Fishery Conservation and Management Act, a statute aimed at reducing overfishing.[237] Under the statute, fishing industry participants must abide by fishery management plans,[238] which to ensure compliance potentially

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232 *Id.* at 844; *see also supra* notes 123–24 (detailing *Chevron*'s adoption of the implied delegations category).

233 *Chevron*, 467 U.S. at 844.

234 533 U.S. 218, 226–27 (2001); *see also supra* notes 132–41 and accompanying text (discussing *Mead*'s ambiguity-plus approach and its relationship to both implied and general authority/housekeeping delegations).

235 *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 307 (2013) ("[T]he preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 57 (2011) (noting that the application of *Chevron* deference "does not turn on whether Congress's delegation of authority . . . was general or specific").

236 *See, e.g.*, Davis, 1989 Supplement, *supra* note 16, at 508 (making this point); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 834 (2001) (same); Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2075 (1990) (same).

237 *Loper Bright*, 144 S. Ct. at 2254–55.

238 *Id.*

means that "one or more observers be carried on board."[239] The statute lists in different sections three circumstances in which a specific group must cover the costs of these observers, none of which include fishing for Atlantic herring.[240] After several years of the federal government funding observers for Atlantic herring fishing vessels,[241] government policy changed in 2020 with a new regulation that expected fishing vessel owners to hire and pay for approved observers.[242] As authority for the new regulation, the National Marine Fisheries Service simply cited the statute in its entirety rather than a particular delegation.[243] The D.C. Circuit in *Loper Bright*[244] and the First Circuit in *Relentless, Inc. v. Department of Commerce*[245] both relied on *Chevron* deference in rejecting industry challenges to the new regulation. The Supreme Court granted certiorari in both cases for the specific purpose of reconsidering *Chevron*.[246]

In overruling *Chevron* deference, the opinion of the Court by Chief Justice Roberts occasionally spoke in sweeping terms about judicial power, Article III of the Constitution, *Marbury v. Madison*,[247] and the importance of judges exercising "independent judgment."[248] The basis for the Court's holding was statutory, however, rather than constitutional—that *Chevron* deference was inconsistent with the APA.[249] Characterizing *Chevron* as "demand[ing] that courts *mechanically* afford *binding* deference to agency interpretations," the Court concluded that "*Chevron* defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'"[250] In other words, according to the Court, the APA section 706 requires courts to use independent judgment in reviewing agency interpretations

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239 16 U.S.C. § 1853(b)(8) (2024).

240 *Loper Bright*, 144 S. Ct. at 2255.

241 *Id.*

242 *See* Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry Funded Monitoring, 85 Fed. Reg. 7414, 7417–18 (Feb. 7, 2020) (codified at 50 C.F.R. § 648).

243 *See id.* at 7430 (citing 16 U.S.C. 1801 *et seq.*).

244 45 F.4th 359 (D.C. Cir. 2022).

245 62 F.4th 621 (1st Cir. 2023).

246 Because Justice Jackson was recused from *Loper Bright*, the Court also granted *Relentless*, which raised the same question with very similar facts. *See* Amy Howe, *Justices Grant Four New Cases, Including* Chevron *Companion Case*, SCOTUSBlog (Oct. 13, 2023), https://www.scotusblog.com/2023/10/justices-grant-four-new-cases-including-chevron-companion-case [https://perma.cc/C8YD-DL6L]. In both cases, the courts also held that the agency action was not arbitrary or capricious.

247 5 U.S. 137 (1803).

248 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2256–60 (2024).

249 *Id.* at 2262.

250 *Id.* at 2265 (emphasis added) (quoting 5 U.S.C. § 706).

of statutes,[251] possibly influenced by *Skidmore* factors like consistency or contemporaneity.[252]

In overturning *Chevron* deference, the Court was particularly explicit in rejecting as "especially mistaken" the argument "that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts."[253] According to the Court, "even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency."[254] The Court insisted that, "[b]y forcing courts to . . . pretend that ambiguities are necessarily delegations, *Chevron* [did] not prevent judges from making policy" but rather "prevent[ed] them from judging."[255]

Notwithstanding its emphasis on the need for courts to exercise independent judgment, the *Loper Bright* Court also acknowledged that Congress sometimes authorizes an agency "to exercise a degree of discretion."[256] And, in such cases, the Court limited the judiciary's role to ascertaining the constitutionality and the parameters of such delegations and to ensure that the agency had indeed "engaged in reasoned decisionmaking within those boundaries."[257] For this proposition, the *Loper Bright* opinion cited the Court's landmark *State Farm* decision[258] as well as *Michigan v. EPA*, which cited and applied *State Farm*,[259] as providing the relevant review standard.[260]

Interpreting the arbitrary and capricious standard of APA section 706(2)(A),[261] *State Farm* requires agencies to demonstrate reasoned decisionmaking when exercising policymaking discretion, for example by "articulat[ing] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[262] But although *State Farm*-style arbitrary and capricious review is sometimes called "hard look review,"[263] the Court consistently describes the judicial posture under that standard as deferential.

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251 *Id.* at 2265.

252 *See id.* at 2262.

253 *Id.* at 2267–68.

254 *Id.* at 2267.

255 *Id.* at 2268.

256 *Id.* at 2263.

257 *Id.* (internal quotation marks omitted).

258 *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

259 *See* 576 U.S. 743, 750 (2015).

260 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

261 5 U.S.C. § 706(2)(A).

262 *State Farm*, 463 U.S. at 42–43.

263 *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 16 (2009).

Echoing the Court's 1936 decision in *AT&T Co. v. United States*,[264] *State Farm* advises that "[a] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute."[265]

The Court's rejection of statutory ambiguities as congressional delegations of agency discretion and its emphasis on judges' independent judgment appear to call for more robust judicial review—at least moreso than the narrow and mechanical version of *Chevron* described by the Court in *Loper Bright*. By referencing that particular subset of *Chevron* jurisprudence,[266] the Court reclaimed some of the power it surrendered to agencies when *Chevron* expanded the range of judicial deference to a broader range of agency interpretations of statutes. Yet, for all of *Loper Bright*'s emphasis on independent judgment, it still retained a sphere of deferential judicial review of agency actions tied to delegations of agency discretion, giving rise to uncertainty about the details of the Court's intentions. That uncertainty leaves the Court's reclamation project unfinished and opens the door for the lower courts to undo some or all of what the Court is trying to achieve.

C. The Major Questions Doctrine

Loper Bright's rejection of *Chevron* deference is not the Court's only subconstitutional doctrinal move to rebalance power between courts and agencies. For nearly a decade prior to *Loper Bright*, the Supreme Court did not defer to agency interpretations of statutes under *Chevron*[267] and only rarely cited *Chevron* as even relevant,[268] while several Justices openly questioned *Chevron*'s validity.[269] The

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264 *See supra* notes 206–09 and accompanying text (summarizing the *AT&T* decision).

265 *State Farm*, 463 U.S. at 42.

266 Whether the *Loper Bright* Court's characterization of *Chevron* accurately reflects all or even most of *Chevron*'s applications is highly debatable. *See, e.g.*, Bednar & Hickman, *supra* note 12, at 1419–41 (documenting different versions of and approaches to *Chevron* reflected in case law as well as academic literature summarizing it).

267 Cuozzo Speed Tech. v. Lee, 579 U.S. 261 (2016) is the last case in which the Court deferred to the agency's interpretation under *Chevron*. *See id.* at 280. Justice Thomas reframed the holding in his concurrence in terms very close to *Loper Bright*'s delegation of discretions paragraphs by noting, first, the delegation to the agency, and then describing the Court's task as "effectively ask[ing] whether the rulemaking was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' in conformity with the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)." *Id.* at 286–87 (Thomas, J., concurring) (quoting 5 U.S.C. § 706(2)(A)).

268 *See* Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 Rutgers U. L. Rev. 441, 489–90 (2021) (documenting Supreme Court decisions that could have applied *Chevron*).

269 *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2143 (2015) (highlighting the clash over clarity versus ambiguity in the *Chevron* analysis and

Court bypassed *Chevron* most often simply by employing traditional tools of statutory interpretation to find statutory meaning on its own, even when the agency asked for deference.[270] Justice Gorsuch's dissent in *Gundy* said directly,[271] and Justice Kavanaugh's statement in *Paul* hinted,[272] that nondelegation doctrine concerns are also reflected in the Court's major questions doctrine jurisprudence. Loosely speaking, at least in its most recent incarnation, the major questions doctrine holds that, under certain conditions, most notably regarding questions of "vast economic and political significance" Congress must speak clearly if it wants to delegate policymaking discretion to an agency.[273]

The roots of the major questions doctrine can be found at least as early as 1994 in *MCI Telecommunications Corporation v. AT&T*,[274] and perhaps even as early as 1980 in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[275] commonly called the "Benzene Case."[276] In both of these cases, the Court questioned whether Congress could have intended the kind of big regulatory action the agency had taken without something more in the statute to support it.[277] The Court invoked the major questions doctrine again in 2000 in *FDA v. Brown & Williamson Tobacco Corporation* in rejecting the FDA's authority to regulate tobacco advertising by suggesting in conjunction with *Chevron* step one analysis that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so crypic a fashion."[278] At that point, what would come

concluding "[t]his kind of decisionmaking threatens to undermine the stability of the law and the neutrality (actual and perceived) of the judiciary"); Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting) ("We should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts. Someday soon I hope we might."); *see also* City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) (advocating for restricting *Chevron*'s scope).

270 *See, e.g.*, Biden v. Texas, 142 S. Ct. 2528 (2022); Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022); BNSF Ry. Co. v. Loos, 139 S. Ct. 893 (2019).

271 Gundy v. United States, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting).

272 Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari).

273 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)). Beyond this narrow description, even the justices seem to disagree about the contours of the major questions doctrine. *Compare* Biden v. Nebraska, 143 S. Ct. 2355, 2380–81 (2023) (Barrett, J., concurring), *with* West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring).

274 512 U.S. 218 (1994).

275 448 U.S. 607 (1980).

276 *See Biden v. Nebraska*, 143 S. Ct. at 2381 (Barrett, J., concurring); *West Virginia v. EPA*, 142 S. Ct. at 2612; Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

277 *MCI Telecomms.*, 512 U.S. at 231; *Indus. Union Dep't., AFL–CIO*, 448 U. S. at 645.

278 529 U.S. 120, 160 (2000).

to be known as the major questions doctrine was firmly embedded in *Chevron*'s first step.

In more recent cases, the Court has extracted the major questions doctrine from *Chevron* analysis and relied on the doctrine more heavily as an independent basis for rejecting agency regulations on delegation grounds.[279] In *King v. Burwell*, the Court held Congress could not have intended for the IRS to decide a politically and economically significant question that involved "crafting health insurance policy," about which the IRS holds no special expertise.[280] On that basis, the Court declined to evaluate the IRS's action using *Chevron*'s two steps and instead resolved the statute's meaning for itself, albeit siding with the agency. In two COVID-era per curiam opinions, without ever mentioning *Chevron*, the Court noted the novelty and magnitude of the agencies' actions in deciding the actions were too significant for the agencies to pursue without clearer delegations from Congress.[281]

With perhaps the most thorough description of the major questions doctrine yet, the Court held in *West Virginia v. EPA* that agencies could not use new (and arguably aggressive) readings of statutes to claim new authority to address significant problems that previously were thought to be outside the agency's purview.[282] In so concluding, the Court emphasized (1) the history and practice of the authority that the agency had claimed under the statute, (2) the significance, political and economic, of the action, and (3) the extent to which the agency has relied on explicit delegating language from Congress or more "'modest words,' 'vague terms,' or 'subtle device[s].'"[283]

Even with a more detailed application of the doctrine in *West Virginia*, questions have remained regarding the major question doctrine's origin and application, or, as Justice Barrett describes it, "its source and status."[284] Is the major questions doctrine a variation of the constitutional avoidance canon that is designed to avoid separation of

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279 *See, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262 (2022) (observing that the Court's most recent major questions decisions have "unhitched the major questions exception from *Chevron*").

280 576 U.S. 473, 486 (2015).

281 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666 (2022) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("This claim of expansive authority under § 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.").

282 *See* 142 S. Ct. 2587, 2608–10 (2022).

283 *Id.* at 2609.

284 Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J. concurring). *See generally* Sohoni, *The Major Questions Quartet*, *supra* note 279.

powers problems?[285] Is it a substantive canon and, more specifically, a clear statement rule grounded in separation of powers principles as Justice Gorsuch has framed it?[286] Or is it a "common sense" "interpretive tool" that "situates text in context" as Justice Barrett has described it?[287]

Regardless, the major questions doctrine has become another subconstitutional means by which courts cabin agency policymaking discretion. As such, like *Loper Bright*, the more robust major questions doctrine represents a reclamation by the courts of some of the governmental power that the Court surrendered by extending first the intelligible principle standard and then *Chevron* deference to agency interpretations of statutes pursuant to general authority/housekeeping delegations. Also like *Loper Bright*, however, uncertainty surrounding when and how the major questions doctrine should apply, heightened by disagreements among the justices who otherwise support it, threatens the Court's reclamation project in the long term.

III
Delegations After *Loper Bright*, Unified and Simplified

As written, and particularly if taken in isolation, how courts should apply *Loper Bright* in the ordinary course across a wide range of agency actions is unclear. The major questions doctrine suffers from the same problem. For that matter, uncertainty abounds regarding what the Supreme Court might do with the nondelegation doctrine. The Court's efforts are aimed at reallocating power from agencies to the courts, and perhaps to Congess as well, undoing at least some of the shifts in the other direction from the twentieth century. Yet, uncertainty on all these fronts threatens to undermine the Court's efforts. Clarifying, reconciling, and operationalizing these jurisprudential strands is essential.

Loper Bright, by better defining the boundary between statutory interpretation and exercises of administrative discretion, is the lynchpin, as courts are often asked to resolve such challenges to agency actions. Focusing on the different types of delegations outlined in this

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285 *See, e.g.*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 223–24 (characterizing the Supreme Court's major questions analysis in *FDA v. Brown & Williamson Tobacco* as reflecting the nondelegation doctrine operating through the constitutional avoidance canon).

286 *West Virginia v. EPA*, 142 S. Ct. at 2616–17 (Gorsuch, J., concurring); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1012 (2023) (suggesting that "the 'new' major questions doctrine operates as a clear statement rule").

287 *Biden v. Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring); *see also* Ilan Wurman, *Importance and Interpretive Questions*, 110 Va. L. Rev. 909, 916–17 (2024) (developing a similar characterization of the major questions doctrine).

Article would resolve many, and likely even most, of the challenges of applying *Loper Bright* to evaluate agency actions while staying true to the Court's guidance. This same emphasis has the potential to diminish the difficulty of applying the major questions doctrine and to substantially limit the value of reforming the nondelegation doctrine by replacing the intelligible principle standard. The following takes each of these in turn.

A. Loper Bright

Again, a key dilemma after *Loper Bright* is how to identify and draw that line between exercises of delegated policymaking discretion eligible for reasoned decisionmaking review versus mere statutory interpretation subject to independent judgment review. In deciding when deference was appropriate, *Chevron* focused laser-like on the statutory term, phrase, or interaction that the agency's regulation sought to define, clarify, or otherwise implement, such as the word "stationary source." So long as the statute somewhere, somehow delegated policymaking discretion to the agency promulgating the regulation, *Chevron*'s delegation requirement was satisfied once a court determined that ambiguity existed.[288] In its critical two paragraphs, by contrast, *Loper Bright* requires courts to consider the language of the delegation itself in deciding whether to review an agency action using independent judgment or for reasoned decisionmaking. *Loper Bright* anticipates that courts will identify and evaluate the particular language of the statute that empowers the agency to do what it did. The question left open by *Loper Bright* is how to discern when an agency action falls into the reasoned decisionmaking bucket and which fall into the independent judgment bucket.

Examining the examples of delegated discretion that *Loper Bright* provides, it appears to us that the Court carefully cited only certain kinds of delegations—specific and hybrid—presumably because of their relatively limited nature. As a result, so long as those delegations survive *Loper Bright*'s other hurdles—i.e., the assessment of their constitutionality and ascertainment of their boundaries[289]—courts are to evaluate actions taken under specific authority and hybrid delegations for reasoned decisionmaking. On the other hand, for reasons we explain below, courts should review agency actions premised on general authority/housekeeping authority using independent judgment,

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[288] *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 306–07 (2013) (describing the "preconditions" of *Chevron* deference with respect to statutory delegations).

[289] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

although perhaps giving the agency certain respect or weight based on *Skidmore*'s contextual factors.

This two-pronged approach has the advantage of being descriptively consistent with the Court's language and specific examples of delegations. It also offers a more cohesive framework within which to better locate the Court's nondelegation doctrine and major questions cases.

1. Exercises of Specific Authority and Hybrid Delegations

The critical two paragraphs of *Loper Bright* emphasize that Congress may expressly delegate to agencies the ability to define a term, "fill up the details" of specific statutory scheme, and even regulate within the meaning of broad terms or phrases like "appropriate" and "reasonable."[290] Specific authority delegations reflect this category, as do, we contend, hybrid delegations. The Supreme Court seems to agree, at least by way of the several examples it offered in *Loper Bright*.

First, as examples of statutes that delegate "the authority to give meaning to a particular statutory term,"[291] the Court provided a footnote in which it cited a provision of the Fair Labor Standards Act (FLSA) and a provision of the Atomic Energy Act (AEA).[292] Both are narrow specific authority delegations to define certain terms or phrases.

Section 213(a)(15) of FLSA directs the Labor Secretary to "define[] and delimit[]" the terms of an exemption for employees who are employed "on a casual basis in domestic service employment to provide . . . companionship services for individuals who (because of age or infirmity) are unable to care for themselves."[293] Likewise, the AEA specifically requires the Nuclear Regulatory Commission to define the phrase "contains a defect which could create a substantial safety hazard" for the purposes of requiring notification to the Commission when such a defect arises.[294] As is evident from their plain language, both provisions are examples of Congress clearly and expressly delineating a gap and giving the agency a certain amount of latitude to fill it.

A second set of statutory examples in *Loper Bright*, also by way of a footnote, demonstrates the Court's understanding of Congress using broad language to allow agencies the flexibility to regulate and provide details to a statutory scheme.[295] One citation is to the Clean Water Act,

290 *Id.* at 2263.
291 *Id.*
292 *See id.* at 2263 n.5.
293 29 U.S.C. § 213(a)(15) (2025).
294 42 U.S.C. § 5846(a)(2) (2025).
295 *See Loper Bright*, 144 S. Ct. at 2263 n.6.

33 U.S.C. § 1312(a).[296] If nationwide effluent limits are insufficient to ensure that water quality will be maintained in a certain part of a body of water, the statute tasks the EPA, by notice and a public hearing, with establishing additional "effluent limitations" for the "attainment or maintenance of [] water quality in [that] specific portion of the navigable waters."[297] Both the provision cited by the Court, section 1312(a), and section 1313(c) of the Clean Water Act explain that water quality is set through a process that considers several different factors,[298] a point recognized by the Court in citing the example.[299] The instructions to the EPA under section 1312 are therefore clear: Once a water quality standard has been set considering the factors listed in the statute, if there is a part of the waterbody that does not meet that standard, the agency is required to set a limit—i.e., to reduce discharges—to achieve it. The Clean Water Act uses passive voice in more than one section of the statute in instructing the EPA to act and providing factors to guide its decisionmaking,[300] so identifying and defining the parameters of EPA's delegated authority in this instance may not be as straightforward as other *Loper Bright* examples. Nevertheless, the statute's explicit description of the problem to be solved, charge to the EPA to resolve it, and imposition of constraints for doing so make this example a clear specific authority delegation.

The last example in *Loper Bright* of a delegation of discretionary authority comes from the Clean Air Act, 42 U.S.C. § 7412, and has the broadest language of the bunch.[301] Arguably, the four-sentence provision might just as easily be characterized a hybrid delegation as a specific authority one. The first sentence of § 7412(n)(1)(A) instructs the EPA to conduct a study of anticipated "hazards to public health" from the emission of a specified list of pollutants by electric utility steam generating units, which are fossil fuel-fired combustion units that produce electricity, like coal-fired power plants.[302] The second sentence imposes a deadline for reporting study results to Congress.[303] The third sentence requires the EPA, in that report, to "develop and describe . . . alternative control strategies for emissions."[304] The fourth sentence instructs the EPA, "after considering the results of [its] study,"

296 *Id.*
297 33 U.S.C. § 1312(a)–(b).
298 *Id.* § 1313(c)(2)(A).
299 *See Loper Bright*, 144 S. Ct. at 2263 n.6.
300 *See* 33 U.S.C. § 1313(b)–(c).
301 *See Loper Bright*, 144 S. Ct. at 2263 n.6 (citing 42 U.S.C. § 7412(n)(1)(A)).
302 42 U.S.C. § 7412(n)(1)(A); *see* Michigan v. EPA, 576 U.S. 743, 748 (2015).
303 42 U.S.C. § 7412(n)(1)(A).
304 *Id.*

to "regulate electric utility steam generating units" if it finds "such regulation is appropriate and necessary."[305]

The "appropriate and necessary" phrasing resembles that of many general authority/housekeeping delegations, which might prompt some to want to characterize section 7412(n)(1)(A) as such. But the embedding of those terms in a substantive section, which tethers them to both the specific subject matter—electric utility steam generating unit emissions—as well as limitations like public health hazards and alternative control strategies, make this provision at the very least hybrid if not a specific authority delegation. Moreover, because this example illustrates the difficulty of distinguishing specific authority delegations from hybrid ones, it supports our conclusion that these sorts of delegations resemble one another more than they are distinguishable. Accordingly, we suggest that both should qualify for the reasoned decisionmaking box described by the Supreme Court in *Loper Bright*.

2. Exercises of General Authority/Housekeeping Delegations

At the other end of the delegation spectrum, general authority/housekeeping delegations do not fit in the Court's framing of delegations to be evaluated for reasoned decisionmaking. We acknowledge that the Court's *Loper Bright* opinion neither recognizes general authority/housekeeping delegations as a category nor hints at their treatment under the *Loper Bright* scheme. Instead, we suggest categorically affording the independent judgment review by reference to history and because they are so readily distinguishable from the other two categories.

Again, by definition, these delegations are typically segregated from substantive statutory provisions. By virtue of that placement, they are limited only by the four corners of the larger statute of which they are a part, allowing an agency virtually unlimited freedom to choose among even potentially competing statutory goals and requirements as the agency sees fit. Citations to general authority/housekeeping delegations are noticeably absent from the examples offered by the *Loper Bright* Court of delegations of discretionary authority warranting reasoned decisionmaking review.

For a Supreme Court looking to acknowledge and retain some amount of judicial restraint for the most apparent instances of congressional delegation of policymaking discretion, yet simultaneously to narrow the range of judicial deference and reassert the judicial role in statutory interpretation, carving away general authority/housekeeping

305 *Id.*

delegations from the sphere of reasoned decisionmaking review makes sense. As detailed above, these delegations were originally understood as supporting only nonbinding expressions of agency views regarding statutory meaning.[306] Although courts later glossed over the distinction between specific authority delegations and general authority/housekeeping delegations, thus allowing agencies broad latitude to rely on the latter to adopt legally binding rules,[307] that history provides a possible explanation for the current Court's discomfort with what it views as agency actions that are untethered from the kind of clear instructions from Congress warranting judicial restraint.

At least at present, virtually no one is suggesting that the Court read either the Constitution or the APA as precluding agencies from relying on general authority/housekeeping delegations to adopt legally binding regulations.[308] But for a Court focused on the meaning of the APA, as was the case in *Loper Bright*, as well as the judicial role under the Constitution, relying on the history and understanding of general authority/housekeeping delegations arguably provides a more concrete anchor and explanation for limiting the scope of the reasoned decisionmaking box than the *Loper Bright* opinion offered.

The upshot is that, after *Loper Bright*, courts will now evaluate agency actions taken under general authority/housekeeping delegations using their independent judgment, perhaps influenced by *Skidmore*'s contextual factors. Whether a regulation carries the force of law arguably is irrelevant for purposes of *Skidmore* review following *Loper Bright*, as an interpretation of a statute's meaning contained in a rule carrying legal force may as easily warrant respect for consistency and contemporaneity as a rule lacking such legal weight.[309] The use of notice-and-comment rulemaking procedures also may increase the likelihood that interpretations issued pursuant to general authority/housekeeping grants will receive some amount of respect or weight under *Skidmore*.[310] As an empirical matter, we may find down the road that general authority/housekeeping regulations survive independent judgment review just as often as specific authority and hybrid regulations are upheld as exercises of reasoned decisionmaking. Nothing about *Loper Bright* suggests, however, that general authority/housekeeping

306 *See* discussion *supra* Section II.A.

307 *See* discussion *supra* Section II.A.

308 *See supra* note 89 and accompanying text (making this observation regarding the APA); Hickman, *Nondelegation*, *supra* note 36, at 1126–27 (observing that no justice has endorsed this approach to reinvigorating the nondelegation doctrine).

309 *See* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, 74 Duke L.J. Online 111, 130–31 (2025).

310 *See id.* at 132.

regulations merit something more than judicial respect based on independent judgment leavened by *Skidmore*.

Some may question whether a framework based on understandings of delegation drafting conventions from the time of the APA is appropriate to employ for statutes crafted after that time, including those after *Chevron*'s implied delegation language, which may have led Congress to believe that statutes could use general/housekeeping authority to delegate certain powers to agencies. We do not suggest that Congress has carefully followed any of these conventions over time. As a descriptive matter, we merely observe that the conventions regarding specific and general authority/housekeeping delegations existed from before the APA was adopted until at least the beginning of the *Chevron* era. So long as one accepts that the Supreme Court intended to curtail judicial deference somehow with its *Loper Bright* opinion, we suggest that falling back on old understandings is both more workable and predictable than the uncertain ad hockery the lower courts are struggling to apply at present.

B. Fitting Nondelegation and Major Questions Into the Loper Bright *Framework*

Dividing the standards for judicial review of agency actions as we have suggested—with specific authority and hybrid delegations meriting the judicial restraint of *State Farm* review for reasoned decisionmaking, and general authority/housekeeping delegations warranting independent judgment review with the potential for *Skidmore* respect or weight as appropriate—would do more than merely clarify *Loper Bright*'s line-drawing efforts. It would also harmonize the Supreme Court's recent pronouncements regarding the nondelegation doctrine and the major questions doctrine with *Loper Bright* and potentially simplify the application of those doctrines. By focusing on the language and character of delegations themselves, *Loper Bright* rebalances power among Congress, courts, and agencies to reflect something more like what existed before modern applications of the intelligible principle standard and *Chevron* deference, which we believe is what the Supreme Court hopes to achieve. Furthermore, we anticipate that limiting reasoned decisionmaking review as we describe will have the effect of cabining the scope of regulations issued pursuant to general authority/housekeeping delegations. Such an outcome should both add an element of concreteness to major questions doctrine analysis by providing a specific place in a court's decisionmaking process for conducting that particular inquiry and also diminish the number of cases in which courts feel compelled to apply the major questions doctrine

in the first instance. Assigning agency actions under general authority/housekeeping delegations to the independent judgment box should also reduce pressure on the Court to reinvigorate the nondelegation doctrine. We discuss all of these consequences below.

1. Specific Authority and Hybrid Delegations

Specific authority and hybrid delegations, by definition, reflect express congressional identification of statutory questions that agencies are asked to resolve. These delegations may use broad terms like "necessary," "appropriate," or "in the public interest." Even those terms are not limitless, however, and the textual proximity of specific authority and hybrid delegations with other substantive statutory requirements and limitations makes it easier for those delegations to satisfy the nondelegation doctrine—certainly under the intelligible principle standard, but likely even under more robust alternatives contemplated by Justices Gorsuch and Kavanaugh. Correspondingly, as we describe further below, the same expectations for inclusion in the specific authority and hybrid delegation categories make it less likely that regulations under such delegations will run afoul of the major questions doctrine.

Unpacking these assertions, beginning with the nondelegation doctrine, in *Gundy*, Justice Kagan's opinion for the Court reflects the typical contemporary approach to the intelligible principle standard, which is difficult for a specific authority or hybrid delegation to fail. Justice Kagan described the judicial task under the intelligible principle standard as "construing the challenged statute to figure out what task it delegates and what instructions it provides."[311] Instead of considering the words of the relevant delegating phrase or section "in a vacuum,"[312] Justice Kagan read SORNA's delegation within the context of surrounding statutory requirements,[313] as well as looking to the statute's "history and purpose."[314] The delegation in *Gundy*, found at 34 U.S.C. § 20913(d), was broad—authorizing the Attorney General "to specify the applicability of the requirements" found in other statutory provisions and "to prescribe rules for the registration of" pre-enactment sex offenders without articulating criteria, limitations, or other guidance within that subsection of the statute regarding what rules to adopt, or even whether to adopt them.[315] But that delegation was in a substantive

311 Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).
312 *Id.* at 2126 (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).
313 *Id.*
314 *Id.* (quoting Maracich v. Spears, 570 U.S. 48, 76 (2013)).
315 34 U.S.C. § 20913(d).

provision of the statute that itself fell in the midst of other substantive provisions, making it a specific authority or hybrid delegation. The result of Justice Kagan's inquiry into SORNA's broader text, history, and purpose was to conclude that the Attorney General's discretion was limited to a specific gap to be filled: determining not *if* but *how* all pre-enactment offenders would be incorporated into the SORNA's regulatory scheme.[316] With that reading, the delegation was declared permissible.[317] Virtually any specific authority or hybrid delegation, as we have described those categories, would seem to satisfy this approach.

Although Justice Gorsuch found the delegation in *Gundy* to be constitutionally inadequate,[318] he did not dismiss outright that the Court might delegate some amount of discretion to agencies to promulgate legally binding regulations to resolve statutory details. To be fair, he rhetorically divided the constitutional from the unconstitutional in terms of "policy decisions" versus "details."[319] That framing, taken alone and to an extreme, would seem to make most delegations of agency discretion unconstitutional. Yet, Justice Gorsuch also distinguished "details" from "important subjects," which seems potentially to allow more in the way of delegation than "policy decisions."[320] Moreover, after complaining about the intelligible principle standard "tak[ing] on a life of its own," Justice Gorsuch conceded that "the scope of the problem can be overstated."[321] He admitted that "[a]t least some of the results the Court has reached" under that standard "may be consistent with more traditional teachings."[322] He also acknowledged that "[m]ore recently [the Court has] sought to tame misunderstandings of the intelligible principle 'test,'" even though the Court has not invalidated a statute on nondelegation grounds since 1935.[323]

Correspondingly, although Justice Kavanaugh's statement in *Paul* framed the matter in terms of major versus nonmajor policy questions, he acknowledged as constitutional statutes wherein Congress has "expressly and specifically decide[d] the major policy question."[324] Somewhat unlike Justice Gorsuch's rhetoric, Justice Kavanaugh's framing more obviously contemplates that some of what Congress

316 *Gundy*, 139 S. Ct. at 2128.
317 *Id.* at 2129.
318 *See id.* at 2143 (Gorsuch, J., dissenting).
319 *Id.* at 2136.
320 *Id.*
321 *Id.* at 2139–40.
322 *Id.* at 2140.
323 *Id.* at 2139–41.
324 Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari).

might constitutionally ask an agency to do reflects policymaking. When Congress has identified the gap to be filled, as is generally the case with specific authority and hybrid delegations, the agency actions are tethered to a specific program, goal, plan, or question.[325] Under such circumstances, a court may more readily say that Congress has provided an answer to the major question of what the agency must accomplish and left only nonmajor items to the agency's discretion.

Because both specific authority and hybrid delegations involve Congress identifying substantively what it wants agencies to accomplish, even when using broad terms, we suggest that courts treat those sorts of delegations as presumptively constitutional for nondelegation doctrine purposes. Of course, a mere presumption would not relieve a reviewing court from having to abide by *Loper Bright*'s instruction to ensure that such delegations are constitutional. Unusual cases may arise that justify skepticism and more careful consideration. Nevertheless, treating specific authority and hybrid delegations as presumptively constitutional seems particularly consistent with the historical understanding that virtually all such delegations would pass constitutional muster.[326]

Specific authority and hybrid delegations also fit neatly with, and arguably make more concrete, the Supreme Court's recent embrace of a more robust major questions doctrine. Recall that *Loper Bright* calls for courts considering agency exercises of delegated policymaking discretion to assess constitutionality and "fix the boundaries" of the delegation before they evaluate agency actions for reasoned decisionmaking against those parameters.[327] To our eye, the "fix the boundaries" aspect of that inquiry provides a specific place within the *Loper Bright*'s analytical framework for applying the major questions doctrine, in a way that directly responds to those who have fairly criticized the Court for its lack of clarity.[328]

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325 *See* discussion *supra* Sections I.A and I.C.

326 *See* discussion *supra* Section II.A.

327 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

328 *See, e.g.*, Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 Calif. L. Rev. 899, 966 (2024) (citing and agreeing with the "frequent[]" and "voluminous" criticisms of "the major questions doctrine for its indeterminacy and the resulting lack of guidance for lower courts and practitioners"); Sohoni, *The Major Questions Quartet*, *supra* note 279, at 316 ("[W]hat the Court has said, and all that it has said, is that in some set of cases, and presumably for some set of reasons, Congress must speak clearly."); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 Iowa L. Rev. 465, 521 (2024) (arguing that the reach of the doctrine is unlimited: "[T]his is the first substantive canon of statutory interpretation that systematically imposes an extralegal substantive criterion in every interpretive exercise.").

As observed above,[329] the major questions doctrine asks whether "Congress in fact meant to confer the power the agency has asserted,"—that is, to authorize the action the agency has taken.[330] Although Justices Gorsuch and Barrett disagree over whether the major questions doctrine is a clear statement rule or a common sense textual canon,[331] they both agree the doctrine applies at the moment when a court is determining what Congress has delegated. In Justice Gorsuch's view, "the Court [has] routinely enforced 'the non-delegation doctrine' through the 'interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'"[332] Justice Barrett describes the doctrine as applicable—and unique to—examining when Congress delegates: "[I]n a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'"[333]

Loper Bright's articulation of a three-part inquiry for evaluating delegations of agency discretion thus provides the natural juncture for applying the major questions doctrine—i.e., when one is determining the nature and extent of the delegation that has been provided as part of "fixing its boundaries." That is, after locating the delegation of authority, *Loper Bright* instructs a court, using its tools of interpretation including the major questions doctrine, to evaluate the scope of that delegation and whether the agency's action remained within it. As Jonathan Adler has argued:

> The question of what power has been delegated to an agency is not meaningfully different from other inquiries courts routinely engage in to determine the scope and extent of power any other principal has delegated to an agent. In all such contexts, the broader, more extensive, more unusual, less precedented, or less expected the power claimed, the more evidence that such power has been delegated one would expect to find.[334]

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329 *See* discussion *supra* Section II.C.

330 West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

331 *See* discussion *supra* notes 286-87 and accompanying text (noting the disagreement between Justices Gorsuch and Barrett regarding the character of the major questions doctrine).

332 *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring) (quoting Mistretta v. United States, 488 U.S. 361, 373, n.7 (1989)).

333 Biden v. Nebraska, 143 S. Ct. 2355, 2380–81 (2023) (Barrett, J., concurring).

334 Jonathan H. Adler, *The Delegation Doctrine*, Harv. J. L. & Pub. Pol'y: Per Curiam, at 17 (June 20, 2024), https://journals.law.harvard.edu/jlpp/the-delegation-doctrine-jonathan-h-adler/#_ftnref14 [https://perma.cc/6DP7-XVSY]. By requiring a broad "boundaries" check, the *Loper Bright* Court seems to have adopted Professor Adler's recommendation to "recognize that it is always the agency's burden to demonstrate that power it seeks to

When understood in this way, the major questions doctrine inquiry seems relatively straightforward when applied to specific authority and hybrid delegations. Specific authority and hybrid delegations, by definition, are lodged in substantive statutory provisions, limited to the substantive topics that Congress has identified, and further limited by whatever associated textual constraints that Congress has proximately imposed within those substantive statutory provisions. Congress has identified substantively what it wants agencies to accomplish in those types of delegations, and it has provided some amount of guidance for accomplishing congressional wishes. The major questions doctrine and *Loper Bright*'s broader "boundaries" check in conjunction with reasoned decisionmaking review both serve to ellucidate the parameters of those congressional instructions.

Furthermore, we anticipate that the natural textual constraints of specific authority or hybrid delegations will make it harder for agencies to stretch the boundaries of their discretionary authority, making it easier for agency actions to pass muster under the major questions doctrine. Even with broad or imprecise terms requiring interpretation, the statutory boundaries of specific authority and hybrid delegations should be clear enough using traditional interpretative tools that, "[i]n the ordinary case,"[335] agency actions exercising these delegations will not have the opportunity to rely upon "'modest words,' 'vague terms,' or 'subtle device[s],'"[336] and thus run afoul of the major questions doctrine.

Of course, there will always be some agency actions that do not fit comfortably and clearly within the the boundaries of an associated specific authority or hybrid delegation. Even in those cases, however, we imagine that the usual tools of statutory interpretation will do most of the work in determining the boundaries of the delegation in

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exercise has been delegated, and that evaluating agency claims of authority requires a broad, context-sensitive inquiry into what Congress enacted." *Id.*; *see also* Wurman, *supra* note 287, at 916 ("[O]rdinarily, lawmakers and private parties tend to speak clearly, and interpreters tend to expect clarity, when those lawmakers or parties authorize others to make important decisions on their behalf."). Others claim the major questions doctrine has no defensible basis. *See, e.g.*, Mike Rappaport, *Against the Major Questions Doctrine*, Originalism Blog (Aug. 15, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html [https://perma.cc/U92U-YQ7E] (asserting that the major questions doctrine "seems like a made up interpretive method for achieving a change in the law that the majority desires"); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1094 (2023) (contending that the major questions doctrine "not only supplies a judicial weapon against regulations and delegations in circumstances where they are practically needed and effective; it may also undermine the conceptual and theoretical bases for administrative governance. And maybe that's the point.").

335 *West Virginia*, 142 S. Ct. at 2608.

336 *Id.* at 2609 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

question. As a result, the major questions doctrine should be needed less often to set those boundaries. Accordingly, while we disagree with those who claim that *Loper Bright* has mooted the major questions doctrine entirely,[337] we nevertheless anticipate that, under our proposed framework, just as the Court has insisted, the major questions doctrine will only be triggered in "extraordinary cases"[338] involving specific authority and hybrid delegations.

2. General Authority/Housekeeping Delegations

Removing agency actions under general authority/housekeeping delegations altogether from the sphere of reasoned decisionmaking review should simplify both nondelegation and major questions doctrine analysis as well. Again, general authority/housekeeping delegations, by definition, are textually untethered from specific, substantive statutory provisions containing legal requirements, adopting government plans and programs, or articulating congressional goals.

If taken literally as grants of agency policymaking discretion, general authority/housekeeping delegations would seem to confer nearly unlimited discretionary power upon agencies to pick and choose the topic, content, and scope of their regulations, bounded only by the four corners of the statute. For courts to consider such delegations as grants of agency discretion makes drawing *Loper Bright*'s line between reasoned decisionmaking review and independent judgment review—i.e., distinguishing exercises of delegated discretionary power from acts of mere statutory interpretation—a relatively ad hoc exercise. The result would be to increase legal uncertainty and the potential for judicial inconsistency in applying *Loper Bright*'s commands.

Conversely, using *Loper Bright*'s independent judgment review categorically to evaluate rules and regulations issued pursuant to general authority/housekeeping delegations limits those delegations' potential scope. Agencies will no longer be able to rely on general authority/housekeeping delegations to invent from whole cloth legal

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337 *See, e.g.*, Richard J. Pierce, Jr., *Two Neglected Effects of* Loper Bright, REGUL. REV. (July 1, 2024), https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright [https://perma.cc/MW4F-W94G]; *cf.* Jamie Conrad, *Looks Like We Don't Need the "Major Questions" Doctrine Any More*, YALE J. REG. (July 3, 2024), https://www.yalejreg.com/nc/looks-like-we-dont-need-the-major-questions-doctrine-any-more-by-jamie-conrad [https://perma.cc/NN55-D6PX] (arguing the doctrine as "the latest in a series of attempts to restrict the scope of *Chevron*" should be eliminated in light of *Chevron*'s demise). *But see, e.g.*, V.O.S. Selections, Inc. v. United States, No. 25-00066, 2025 WL 1514124, at *11 (Ct. Int'l Trade May 28, 2025) (relying on the major questions doctrine post *Loper Bright*).

338 *See West Virginia*, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (internal quotation marks omitted)).

requirements that courts could not impose themselves using traditional tools of statutory interpretation. Rules and regulations adopted under general authority/housekeeping delegations would need to hew more closely to statutory text, history, and purpose.

In other words, applying independent judgment review categorically to agency actions based on general authority/housekeeping delegations seems to provide the kind of brake on agency policymaking discretion that the Supreme Court's jurisprudence, including but not limited to *Loper Bright*, seems to be seeking. This approach will shift the allocation of power between agencies and courts to something more closely resembling the status quo before *Chevron* deference and earlier.

Again, as historically understood, agency actions under general authority/housekeeping delegations were limited to mere statutory interpretation using traditional interpretive tools.[339] In the past, that limitation was a function of the nondelegation doctrine preventing agencies from using these delegations to adopt legally binding regulations—an understanding of the nondelegation doctrine that the courts set aside long ago. As noted above, no one yet is suggesting that the Supreme Court should declare these delegations categorically unconstitutional or incapable of supporting legally binding legislative rules.

But even if agencies continue to adopt legally binding legislative rules using general/housekeeping authority, *Loper Bright*'s emphasis on courts using independent judgment and traditional tools of interpretation to resolve statutory ambiguities has the effect of limiting what agencies can accomplish under those delegations to the same sort of statutory interpretation. Agency actions that attempt to do more would be *ultra vires*, and thus void. In other words, this understanding of *Loper Bright* prohibits agencies from relying on general authority/housekeeping delegations to create entirely new requirements that cannot be ascribed to resolving mere ambiguity.

To be sure, some judges are willing to rely on interpretive tools like broad statutory purposes, legislative history, or the social context of legislation to expand the reach of statutory text.[340] Accordingly, we might expect agencies to attempt the same. Nevertheless, requiring agencies again to explain their reliance on general authority/housekeeping delegations to the terms of other, more substantive statutory provisions based upon traditional interpretive tools represents a narrowing from a conception of such delegations that on occasion has seemed to lack such a requirement.

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339 *See* discussion *supra* Section II.A.

340 *See, e.g.*, Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

Constraining general authority/housekeeping delegations in this way makes nondelegation analysis much more straightforward. As one example, although we characterized the delegation under SORNA at issue in *Gundy* as a specific authority or hybrid delegation, Justice Gorsuch's approach in that case was more consistent with what one might expect regarding a general authority/housekeeping delegation. Justice Gorsuch read SORNA not within the full context of the statute but rather for just what the particular subsection at issue said: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender."[341] He emphasized the lack of restriction on determining the applicability of any requirements in that particular subsection, rather than looking outside its terms for limiting principles.[342] If read in that way—and, more generally, if an agency were to employ the general authority/housekeeping-style language of a hybrid delegation without tying its action to the textual specifications of the associated substantive section of the statute—then treating the delegation as in the general authority/housekeeping camp seems appropriate, with resulting regulations less likely to satisfy constitutional requirements.

Similarly, with respect to the major questions doctrine, because actions taken pursuant to general authority/housekeeping delegations would be left to the independent judgment of the courts, agencies would have less leeway to push the interpretive envelope further than the statute's own terms and traditional methods of statutory interpretation can bear. Again, agencies would continue to have the authority to communicate their preferred resolution of statutory ambiguity by issuing either a legally binding legislative rule or a nonbinding interpretative one.[343] But in line with *Loper Bright*, by limiting agency exercises of general authority/housekeeping delegations to the sorts of statutory interpretations that can be accomplished using traditional interpretive tools, courts would preclude any characterization of those sorts of delegations as conferring policymaking discretion on agencies. As a result, the likelihood that a court would ever need to apply the major questions doctrine to agency actions pursuant to general authority/housekeeping delegations seems infinitesimal. As a result, instead of

341 Gundy v. United States, 139 S. Ct. 2116, 2132 (2019) (Gorsuch, J., dissenting).

342 *Id.* ("Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country—a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration . . . .").

343 *See* Hickman, *Anticipating A New Modern* Skidmore *Standard*, *supra* note 309, at 131.

its current air of unpredictability, the major questions doctrine would be focused on only those cases involving agency actions that are tied to specific authority or hybrid delegations, where again the potential for the doctrine's application would also seem fairly limited.

Conclusion

In an era of blockbuster Supreme Court decisions, *Loper Bright* has garnered an incredible amount of attention. Few doubt that *Loper Bright* represents a recalibration of the allocation of governmental power away from agencies and toward the courts and, to a lesser extent, Congress. In some ways, though by no means entirely, the Court appears to be returning to the power sharing arrangements of the 1940s, a formative period for administrative law. It may well be that *Loper Bright* is merely another step in the Court's ongoing effort to rebalance the allocation of governmental power, rather than the end of that journey.

Nevertheless, despite dire predictions of its consequences, *Loper Bright*'s impact may prove not nearly so extreme and certainly less novel than many assume. The Court's renewed focus first on the nature and scope of delegated power itself not only in *Loper Bright*, but also in nondelegation and major questions cases represents an opportunity to recapture nuances in statutory drafting that had been discarded and lost without much reflection by the courts. Moreover, framing *Loper Bright*, as well as potentially the nondelegation doctrine and the major questions doctrine, by reference to statutory distinctions between specific authority, general authority/housekeeping authority, and hybrid delegations has the virtue not only of grounding those standards more solidly in the Court's jurisprudential history but also of making them more workable. If true, *Loper Bright* will be less of a change than its detractors fear, but perhaps enough of a change to satisfy *Chevron*'s critics on the Court and elsewhere.