FOREWORD

Nondelegation as Constitutional Symbolism

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ABSTRACT

The divided Supreme Court in Gundy v. United States *and subsequent events have given rise to an expectation that the Court will soon revitalize the nondelegation doctrine by replacing the intelligible principle standard. Some have greeted the prospect of this doctrinal shift with cheers of exaltation, others with cries of impending doom, anticipating the demise of the administrative state. This Foreword contends that these predictions are overblown.*

Statutory delegations of rulemaking authority and policymaking discretion are more deeply embedded in American law, and are more complicated and variable, than proponents of the doctrine seem willing to acknowledge. The alternatives to the intelligible principle standard proposed by Justices Gorsuch and Kavanaugh are piecemeal—case by case, statute by statute, delegation by delegation. Consequently, should the Court replace the intelligible

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October 2021 Vol. 89 No. 5

principle standard, the most likely outcome is doctrinal change that is more incremental and symbolic than substantial.

More categorical and sweeping alternatives are available. Among them, this Foreword particularly documents the common understanding in the first half of the twentieth century that regulations adopted under statutory delegations of general rulemaking authority (as opposed to specific authority grants) could not be legally binding without violating the nondelegation doctrine. But the Court has expressed little interest in a broad, categorical standard.

The decision whether to replace the intelligible principle standard should be evaluated in terms of incremental and symbolic doctrinal change, rather than as the dramatic alteration to the administrative state that some Court observers anticipate. This Foreword offers thoughts in this regard.

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Introduction

We are at yet another moment of judges and scholars debating whether and to what extent the Supreme Court ought to revitalize the nondelegation doctrine for the purpose of curtailing the modern administrative state. We have been here before, but this time seems different.

For the uninitiated (if there are any), the nondelegation doctrine holds that Article I, Section 1 of the Constitution vests in Congress the legislative powers "herein granted," and that Congress may not delegate those legislative powers to the executive branch (or anyone

else).[1] The Court embraces the nondelegation doctrine in principle as a valid and longstanding interpretation of the Constitution.[2] But the doctrine has been largely moribund for decades.[3] Time and time again, Congress has adopted statutes giving federal government agencies tremendous policymaking discretion as they implement and administer statutes.[4] With only two exceptions in 1935,[5] the Supreme Court has repeatedly rejected nondelegation challenges and upheld such statutes as constitutional.[6]

Dissatisfied with this state of affairs, in the 1970s and early 1980s, prominent judges and scholars like J. Skelly Wright,[7] Carl McGowan,[8] and John Hart Ely[9] argued for reinvigorating the nondelegation doctrine and curtailing agency discretionary power. Since then, other legal scholars from across the political and ideological spectrum periodically have done the same.[10] And on a few occasions over the

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1 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers." (alteration in original) (quoting U.S. CONST. art. I, § 1)); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2098-99 (2004) (describing the doctrine). *But see* Gary Lawson, *Discretion* as *Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 237 (2005) (alternatively rooting the nondelegation doctrine in the Necessary and Proper Clause of Article I, Section 8, clause 18, also known as the Sweeping Clause).

2 *See infra* notes 37–42 and accompanying text (documenting examples).

3 *See* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2, at 150 (2d ed. 1978) (describing nondelegation as a failed legal doctrine); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 12, at 34 (1976) (contending that the nondelegation doctrine "can not be taken literally").

4 *See infra* Parts I–II (documenting examples).

5 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 433 (1935).

6 *See*, *e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2121 (2019); *Am. Trucking*, 531 U.S. at 474–76; Mistretta v. United States, 488 U.S. 361, 374 (1989); *see also infra* Part I (documenting other examples).

7 J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582–83 (1972) (reviewing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)).

8 Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1129 (1977).

9 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–34 (1980).

10 *See, e.g.*, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1512-13 (2015); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 809 (1999); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 13–14 (1993); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63-67 (1982).

past fifty years—most notably in The *Benzene*[11] and *Cotton Dust*[12] Cases in 1980 and 1981, respectively, and in the *American Trucking* case in 2001[13]—individual Justices signaled an interest in resurrecting the doctrine. But those suggestions have gone nowhere.

When the Supreme Court granted certiorari in *Gundy v. United States*[14] in 2018 to consider whether the Sex Offender Registration and Notification Act ("SORNA")[15] improperly delegated legislative authority to the Attorney General,[16] many wondered whether this time, perhaps, the Court would breathe new life into the nondelegation doctrine.[17] Instead, an eight-Justice Court narrowly upheld the statute as constitutional.[18]

Nevertheless, in *Gundy*, three Justices led by Justice Gorsuch called for replacing the intelligible principle standard with a narrower alternative that distinguished policy questions from mere details, thereby revitalizing the nondelegation doctrine.[19] Justice Alito voted to uphold SORNA, but signaled his inclination to follow the dissenters if only a fifth vote could be found.[20]

A few months later, Justice Kavanaugh—who did not participate in *Gundy*—wrote his own statement respecting the Court's denial of certiorari in *Paul v. United States*,[21] in which he too expressed a willingness to reconsider the Court's nondelegation jurisprudence.[22] Justice Kavanaugh's statement in *Paul* neither precisely embraced nor rejected Justice Gorsuch's proposed alternative standard, but it briefly sketched a somewhat different approach.[23] In short, for the first time,

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11 Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 673–75 (1980) (Rehnquist, J., concurring in the judgment).

12 Am. Textile Mfrs. Inst. v. Donovan (*The Cotton Dust Case*), 452 U.S. 490, 544 (1981) (Rehnquist, J., dissenting).

13 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring).

14 139 S. Ct. 2116 (2019).

15 Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of U.S.C.).

16 *Gundy*, 139 S. Ct. at 2121.

17 *See, e.g.*, Trish McCubbin, Gundy v. U.S.*: Will the Supreme Court Revitalize the Nondelegation Doctrine?*, TRENDS, Nov./Dec. 2018, at 9, https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/november-december-2018/gundy-vs-us/ [https://perma.cc/H8UP-FL64]; Matthew Cavedon & Jonathan Skrmetti, *Party Like It's 1935?:* Gundy v. United States *and the Future of the Non-Delegation Doctrine*, 19 FEDERALIST SOC'Y REV., 2018, at 42, https://fedsoc.org/commentary/publications/party-like-it-s-1935-gundy-v-united-states-and-the-future-of-the-non-delegation-doctrine [https://perma.cc/2K6E-XF2Z].

18 *Gundy*, 139 S. Ct. at 2121.

19 *Id.* at 2135-37 (Gorsuch, J., dissenting) (identifying a three-part alternative standard).

20 *Id.* at 2130-31 (Alito, J., concurring in the judgment).

21 140 S. Ct. 342 (2019) (mem.).

22 *See id.* at 342 (Kavanaugh, J., respecting the denial of certiorari).

23 *See id.*

a majority of the Supreme Court's members have publicly supported reconsidering the intelligible principle standard with an eye toward bringing new life to the nondelegation doctrine—and that was before Justice Amy Coney Barrett joined the Court.[24]

Moreover, other recent cases suggest the Court's willingness to reconsider and reshape other lines of jurisprudence in ways that, at least in theory, could constrain the administrative state. The Roberts Court is notably more formalist in its separation of powers analysis than its predecessors.[25] In decisions reflecting that orientation, the Court has stricken statutory restrictions on the President's ability to remove agency officials from office.[26] Also, the Court has become markedly less deferential to agency interpretations of law[27] and exercises of policymaking discretion.[28]

Thus, critics of the contemporary administrative state have cheered *Gundy* and *Paul* as signs that the Court will soon act to revitalize the nondelegation doctrine, rein in the administrative state, and substantially curtail Congress's reliance on an unelected executive bureaucracy to make law and policy.[29] Meanwhile, defenders of the mod-

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24 *See, e.g.*, Lorenzo d'Aubert & Eric Halliday, *Amy Coney Barrett on National Security Law*, LAWFARE (Oct. 20, 2020, 4:16 PM), https://www.lawfareblog.com/amy-coney-barrett-national-security-law [https://perma.cc/G88X-W5BP] (speculating about Justice Barrett's position on the nondelegation doctrine); Jonathan H. Adler, *Amy Coney Barrett's "Suspension and Delegation,"* REASON: VOLOKH CONSPIRACY (Oct. 18, 2020, 7:32 PM), https://reason.com/volokh/2020/10/18/amy-coney-barretts-suspension-and-delegation/ [https://perma.cc/KU99-AKGB] (same).

25 *See, e.g.*, Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 40–48 (recognizing the formalist strand in Roberts Court separation of powers jurisprudence); Ronald J. Krotoszynski, Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 951 (2015) ("[T]he Roberts Court consistently has issued strongly formalist separation of powers decisions. . . . [in] a "sharp break with the approach of the Burger and Rehnquist Courts").

26 *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020); Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 508–10 (2010).

27 *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2414–18 (2019) (narrowing the scope of *Auer* deference by describing five separate predicates); Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (observing that several Justices have called into question and might wish "to reconsider . . . the premises that underlie *Chevron* and how courts have implemented that decision").

28 *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1907–15 (2020); Dep't of Com. v. New York, 139 S. Ct. 2551, 2574–76 (2019).

29 *See, e.g.*, Justin Walker, *The Kavanaugh Court and the* Schechter-*To*-Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 938 (2020) ("*Gundy* thus confirmed what should have been clear even before it was decided: the pre-*Gundy* opinions of five Justices of the Court show an eagerness to revisit the Court's nondelegation precedents."); Gary Lawson, *"I'm Leavin' It (All) Up To You":*

ern administrative state have vociferously decried the same, concerned that the Court will gut the federal government's ability to protect consumers, workers, public health, and the environment.[30] Even Justice Kagan, usually so restrained in her rhetoric, declared in *Gundy* that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional."[31]

Upon consideration, I do not think either of these outcomes is especially likely. In the interest of full disclosure, I will concede that I come to this Foreword convinced that Article I, Section 1 vests the legislative powers conferred by the Constitution in the Congress alone and that our current system of administrative governance is to some degree inconsistent with that instruction. Although defining and distinguishing legislative power from executive power is obviously hard, the Supreme Court grapples with difficult line drawing questions all the time and undoubtedly could do the same in the nondelegation context if it chose to do so. On the other hand, delegations of broad agency rulemaking authority are deeply entrenched in American law. Federal agencies have adopted reams of regulations based on those delegations. Millions of people, private enterprises, and state and local governments have relied on those regulations in organizing their lives, livelihoods, and operations. The legal stability established by adherence to stare decisis norms counsels strongly against using a reformed nondelegation doctrine to impose sweeping changes on the administrative state.

Yet, notwithstanding the rhetoric of many commenters and even some Justices, I am unconvinced that the members of the Court who seek to reform the nondelegation doctrine really intend such sweeping

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Gundy *and the (Sort-of) Resurrection of the Subdelegation Doctrine*, CATO SUP. CT. REV., 2018–2019, at 31, 33 ("[I]t is very hard to read *Gundy* and not count to five under your breath."); David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 218 (2020) ("The Court's recent disposition of *Gundy v. United States* suggests five Justices might be willing to revive judicial enforcement of the consent-of-the-governed norm." (footnote omitted)).

30 *See, e.g.*, Hannah Mullen & Sejal Singh, *The Supreme Court Wants to Revive a Doctrine that Would Paralyze Biden's Administration*, SLATE (Dec. 1, 2020, 12:56 PM), https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html [https://perma.cc/K4J8-Y6JM] (contending that reviving the nondelegation doctrine would "bring virtually any regulation to a halt"); Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141, 146 ("If a majority of the Supreme Court embraces [Gorsuch's] approach, it will cast a pall over thousands upon thousands of federal statutory provisions."); Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 47 (2017) ("If a majority of the Court were to reject the constitutionality of broad delegations . . . , much of the national administrative state would be in immediate jeopardy.").

31 Gundy v. United States, 139 S. Ct. 2116, 2120 (2019).

change. Leave aside for a moment that five Justices have yet to agree on an alternative to the intelligible principle standard.[32] Even if the Court replaces the intelligible principle standard, the alternatives proposed by Justices Gorsuch and Kavanaugh are quite limited in their scope—operating case by case, statute by statute, provision by provision—rather than categorical, making it likely that doctrinal change will be more incremental and symbolic than sweeping.[33] Constitutional symbolism can be both useful and powerful and may be warranted with respect to nondelegation, even if it comes at the expense of some small amount of legal uncertainty. In deciding whether to replace the intelligible principle standard, the Court should contemplate the costs as well as the benefits of that particular symbolic gesture. Regardless, scholars and judges who either hope or fear that a new nondelegation doctrine will topple the modern administrative state ought to temper their anticipation and perhaps some of their rhetoric.

This Foreword proceeds in four Parts. Part I reviews the nondelegation doctrine's status quo, partly for context but also to observe that modern nondelegation analysis is as much a statutory question as it is a constitutional one. Part II explains how that analysis is complicated by the reality of contemporary statutory delegations, which are more sweeping, variable, and entrenched than their most ardent defenders and critics, respectively, seem willing to concede. Although most nondelegation challenges (and discussions of alternative standards) have concerned specific statutory delegations of authority to adopt rules and regulations to fill congressionally-identified gaps, contemporary statutes also include an array of general authority, hybrid, and implicit delegations of rulemaking power and policymaking discretion. Part II also documents the interaction of these different types of delegations with nondelegation analysis—including the common understanding in the first half of the twentieth century, since discarded by the Court, that legally-binding regulations could not be adopted pursuant to general authority without violating the Constitution.

Assuming that five votes exist for reforming the Court's nondelegation jurisprudence, Part III explores the alternatives on offer. Categorical approaches are available that could substantially alter

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32 Although only briefly stated, Justice Kavanaugh's vision in *Paul* is not quite the same as Justice Gorsuch's in *Gundy*, and Justice Alito has yet to endorse a particular path. *See infra* Part III. *Compare Gundy*, 139 S. Ct. at 2135–37, *with* Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.). Justice Barrett's views on replacing the intelligible principle standard are not publicly known.

33 *See infra* Part III (analyzing the opinions of Justices Gorsuch and Kavanaugh).

contemporary governance. Yet, lofty rhetoric notwithstanding, the Court seems inclined toward symbolic and (at most) incremental change rather than the dramatic shock to the administrative state that some judges and commenters seem to expect. Finally, Part IV explains why symbolic change to the nondelegation doctrine may be desirable but also may be costly and not worth the potential fallout. In the end, pro-nondelegation Justices might decide other existing alternatives for constraining agency power are preferable to a seemingly grand but practically limited and politically divisive constitutional gesture.

I. NONDELEGATION STATUS QUO

The nondelegation doctrine has been the subject of extensive judicial analysis and exhaustive scholarly debate.[34] It is not the point of this Foreword to relitigate either the validity of the nondelegation doctrine as a question of constitutional interpretation or the history and application of the intelligible principle standard. Nevertheless, some background and a few observations related thereto are warranted for context.

Disagreement over the nondelegation doctrine falls loosely into two categories. The first is whether the Constitution incorporates the principle of nondelegation in the first instance. Debate rages over whether the framers intended for Congress to be able to delegate legislative power.[35] Other arguments have been more pragmatic, with scholars from across the political spectrum asking whether the nondelegation doctrine promotes or impedes effective government.[36]

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34 For just a few examples of the more recent contributions to this debate, see CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN 119–25 (2020); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 378-86 (2014); Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. U. CHI. L.J. 363 (2019); Metzger, *supra* note 30, at 3.

35 For just a few recent articles rejecting the nondelegation doctrine based on originalist reasoning, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (presenting evidence against the nondelegation doctrine); 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) (same). *Compare* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GA. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564 [https://perma.cc/L8YZ-JG7J] (same), *with* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (rebutting the Mortenson and Bagley, Parrillo, and Chabot articles and defending the nondelegation doctrine), *and* Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019) (supporting the nondelegation doctrine).

36 *See, e.g.*, SCHOENBROD, *supra* note 10, at 8–12 (arguing that delegation allows Congress to avoid responsibility and undermines good governance); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 288–90 (1982)

Regardless of the academic debate, the Supreme Court's interpretation of the Article I Vesting Clause as imposing at least some limitation on Congress's authority to delegate legislative power is longstanding and consistent. Some scholars peg the relevant case as *The Cargo of the Brig Aurora v. United States*[37] in 1813, in which a litigant first asserted the concept of nondelegation.[38] Others focus instead on *Wayman v. Southard*[39] in 1825, in which Chief Justice John Marshall wrote for the Court:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[40]

Either way, although the Court has routinely upheld statutes against nondelegation claims, it has consistently and repeatedly—for roughly two centuries[41] and in recent decades[42]—embraced the basic premise

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(offering "a practical justification" for courts to allow congressional delegation of legislative power to agencies); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63–67 (1982) (urging reinvigoration of the nondelegation doctrine based on public choice analysis).

37 11 U.S. (7 Cranch) 382 (1813).

38 *Id.* at 387 (responding to a claim that Congress delegated too much authority to the President that "[t]he legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect."); *see also, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 363–64 (2002) (associating the nondelegation doctrine with *The Brig Aurora*); Gordon, *supra* note 35, at 751 (identifying *The Brig Aurora* as the first nondelegation case).

39 23 U.S. (10 Wheat.) 1 (1825).

40 *Id.* at 43; *see also, e.g.*, Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1011 (2015) ("The central premise of the nondelegation doctrine . . . was first articulated clearly by the Supreme Court in *Wayman v. Southard* . . . .").

41 For older examples, see St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203, 210 (1902) ("While it is undoubtedly true that legislative power cannot be delegated to the courts or to the executive, there are some exceptions to the rule under which it is held that Congress may leave to the President the power of determining the time when or exigency upon the happening of which a certain act shall take effect."); Field v. Clark, 143 U.S. 649, 693–94 (1892) ("The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." (quoting Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton Cnty., 1 Ohio St. 77, 88–89 (1852))).

42 For recent examples, see Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (observing that Article I, Section 1 "permits no delegation" of legislative powers vested in Congress); Mistretta v. United States, 488 U.S. 361, 371–72 (1989) ("[W]e long have insisted that 'the integrity and

that Congress cannot delegate the legislative powers vested in it by Article I of the Constitution to other parties.

The second area of disagreement assumes that Congress cannot delegate the legislative power, so considers how to differentiate between legislative power that cannot be delegated and mere discretion that can,[43] or whether a meaningful standard for distinguishing the two can be found.[44] The governing standard for the last eighty-five years, that "Congress shall lay down by legislative act an intelligible principle," is one attempt to draw that line.[45]

The intelligible principle standard as such was articulated for the first time in *J.W. Hampton, Jr., & Co. v. United States*.[46] The case concerned the Tariff Act of 1922,[47] a statute that was both longer and more detailed than most of the era, it established the tariff rates for hundreds of imported goods by name.[48] The statute also contained a "flexible tariff" provision authorizing the President, with the assistance of the United States Tariff Commission, to alter statutory tariffs in order to equalize differences in the costs of production of imported goods as compared to those of similar goods produced by domestic competitors.[49] In *J.W. Hampton*, the Court recognized the complexity of the task and permitted Congress to create "a rate-making body" to fill in the details.[50] "If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, [Congress] may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed

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maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting *Field*, 143 U.S. at 692)).

43 *See, e.g.*, MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 136–37 (1995) (describing and advocating a standard that legislation contain a "meaningful level of normative political commitment" and distinguishing "implementational" or "interpretive" statutes from "wholly creative and discretionary" ones); Schoenbrod, *supra* note 29, at 256–65 (suggesting that courts use a threshold of $100 million of economic impact).

44 *See, e.g.*, Antonin Scalia, *A Note on* The Benzene Case, REGULATION, July/Aug. 1980, at 25, 27–28 (suggesting that the difficulty of articulating a meaningful standard could make the doctrine judicially unenforceable).

45 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

46 276 U.S. 394, 409 (1928).

47 Pub. L. No. 67-318, 42 Stat. 858.

48 *Id.* § 1.

49 *J.W. Hampton*, 276 U.S. at 400–02; § 315, 42 Stat. at 941–43. Traditionally, Congress itself established the tariff rates for individual goods in lengthy statutory lists. *See, e.g.*, Tariff Act of 1883, ch. 121, § 6, 22 Stat. 488, 489–523 (replacing one tariff schedule with another).

50 *J.W. Hampton*, 276 U.S. at 409.

under congressional authority."[51] The only requirement, according to the Court, was that Congress provide some degree of guidance to cabin executive branch discretion.[52] "If Congress shall lay down by legislative act *an intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[53]

The intelligible principle standard has never been a very high bar. Famously, the Supreme Court has only declared a single statute unconstitutional under the intelligible principle standard: the National Industrial Recovery Act,[54] in back-to-back cases in 1935.[55] In *Panama Refining Co. v. Ryan*,[56] the problem was a provision authorizing the President to prohibit the transportation of petroleum and petroleum products that exceeded state-level quotas,[57] with the Court troubled by the lack of qualifications, criteria, required findings, or specific policy goal "to govern the President's course."[58] In *A.L.A. Schechter Poultry Corp. v. United States*,[59] the Court's concern was the inherent subjectivity of a provision authorizing industry "codes of fair competition" without a more specific definition of said fairness, as well as the delegation of authority to develop the codes to nongovernmental industry participants.[60]

Even by contemporary standards, Title I of the National Industrial Recovery Act is truly breathtaking, and arguably truly unique, in the scope of its delegations of authority to the President and others. Beyond the petroleum and fair competition provisions addressed in *Panama Refining* and *Schechter Poultry*, the statute also authorizes the President "to establish such agencies . . . as he may find necessary, [and] to prescribe their authorities, duties, responsibilities, and tenure"[61] and "to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associa-

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51 *Id.*

52 *See id.*

53 *Id.* (emphasis added).

54 Pub. L. No. 73-67, 48 Stat. 195 (1933).

55 *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

56 293 U.S. 388 (1935).

57 § 9(c), 48 Stat. at 200.

58 *Pan. Refin.*, 293 U.S. at 414–15.

59 295 U.S. 495 (1935).

60 *Id.* at 530.

61 § 2(a), 48 Stat. at 195.

tions, or groups, relating to any trade or industry."[62] The statute does not, however, specify particular industries or sectors to be targeted nor provide additional guidance for the exercise of that authority beyond a broad list of general policy aspirations in the statute's first section.[63] Perhaps the sheer breadth and open-endedness of that statute is enough to explain why a Supreme Court that had never previously and has never since invalidated a single statute on nondelegation grounds did so in that instance.

Regardless, since 1935, the Supreme Court has repeatedly rejected nondelegation challenges to a variety of statutory provisions that, at first blush, are difficult to distinguish from those of the National Industrial Recovery Act. In *Zemel v. Rusk*,[64] the Court considered the constitutionality of the Passport Act of 1926,[65] which granted the Secretary of State the authority "to grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States."[66] Despite the absence of required findings or specific policy goals to guide and constrain such rules, the Court upheld the delegation because Congress, when it legislates on foreign affairs, "must of necessity paint with a brush broader than that it customarily wields in domestic areas."[67] One of the Court's complaints in *Schechter Poultry* was the statute's undefined use of the highly subjective term "fair competition."[68] Yet, in *Yakus v. United States*,[69] the Court said that, as a "war emergency measure," Congress could constitutionally delegate authority to the Administrator of the Office of Price Administration to establish price controls for commodities that "in his judgment" would be "fair and equitable."[70] In *National Broadcasting Co. v. United States*,[71] the Court upheld a delegation of authority to the Federal Communications Commission ("FCC") to regulate broadcasting to further the similarly subjective "public interest, convenience, or necessity."[72] In all of these cases, the Court deemed the intelligible principle standard satisfied.

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62 *Id.* § 4(a).

63 *See id.* § 1.

64 381 U.S. 1 (1965).

65 Pub. L. No. 69-493, 44 Stat. 887 (codified as amended at 22 U.S.C. §§ 211–223).

66 *Id.* § 1.

67 *Zemel*, 381 U.S. at 17.

68 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 531–32 (1935).

69 321 U.S. 414 (1944).

70 *Id.* at 420, 422, 426–27.

71 319 U.S. 190 (1943).

72 *Id*. at 216 (quoting Communications Act of 1934, Pub. L. No. 73-416, §§ 307(a), 307(d), 309(a), 310, 312, 48 Stat. 1064).

By the 1970s, legal scholars were describing nondelegation doctrine as a "failed" legal doctrine[73] that "can not be taken literally."[74]

Partly for reasons of stare decisis, but also reflecting contemporary statutory interpretation norms, more recent Supreme Court cases have demonstrated the near impossibility of any statute failing to satisfy the intelligible principle standard. These cases also follow a consistent pattern of judicial analysis, finding intelligible principles not necessarily in the language of the challenged delegation itself, but rather in the textual details, legislative history, and purpose of the larger statutory scheme of which the delegation is a part.

For example, in *The Benzene Case* in 1980, the Supreme Court considered whether the Occupational Safety and Health Act[75] violated the nondelegation doctrine by allowing the Occupational Safety and Health Administration ("OSHA") to adopt limitations for workplace exposure to harmful chemicals.[76] The statute broadly delegated to OSHA the authority to adopt occupational safety and health standards, which the statute then defined equally broadly as requiring "conditions . . . reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[77] Yet the Court did not limit its evaluation to that language alone. Instead, the Court turned to another provision that gave OSHA more detailed instructions.

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest

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73 DAVIS, *supra* note 3, § 3.2.

74 SCHWARTZ, *supra* note 3, § 12.

75 29 U.S.C. §§ 651–678.

76 Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 646 (1980).

77 29 U.S.C. §§ 652(8), 655(a); *see also The Benzene Case*, 448 U.S. at 611–12 (quoting the definition of "occupational safety and health standard," 29 U.S.C. § 652(8)); Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1407–08 (2008) (noting the breadth of this language).

> available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws.[78]

The Court acknowledged that this language gave OSHA great latitude. The Court also recognized the "pragmatic limitations in the form of specific kinds of information OSHA must consider," as well as cost considerations inherent in the provision's use of the word "feasible," in conjunction with the definitional requirement that standards be "reasonably necessary or appropriate."[79] The Court noted that its resolution of the nondelegation question turned on the interaction of the two statutory provisions, even as the government encouraged the Court to ignore the language of one.[80] Still, the Court pointed to other provisions of the statute as supporting its reasoning,[81] concluding that "the language and structure of the Act, as well as its legislative history" supported the inference that OSHA was to consider costs as well as benefits and find "significant risks of harm" in adopting standards.[82] The Court then invalidated OSHA's regulations for failing to include that finding.[83] In short, the Court employed traditional tools of interpretation to discern statutory constraints on OSHA's discretion (i.e., intelligible principles) from the statute's text, history, and purpose, and the Court then invalidated the agency's actions for exceeding those limitations. Writing in concurrence, Justice Rehnquist suggested instead that the statute violated the nondelegation doctrine.[84]

The Court was similarly thorough in its statutory analysis in *Mistretta v. United States*,[85] in which it upheld a delegation of power to the U.S. Sentencing Commission to adopt sentencing guidelines that, it was thought at that time, would bind the courts.[86] Taken on its own, the statute[87] that authorized the Sentencing Commission to adopt guidelines was sweeping in its scope and limited in its guidance, merely instructing the Sentencing Commission to "promulgate and

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78 *The Benzene Case*, 448 U.S. at 612 (quoting 29 U.S.C. § 655(b)(5)).

79 *Id.* at 614 n.4.

80 *See id.* at 639.

81 *See id.* at 643–44.

82 *Id.* at 641; *see also id.* at 646–49 (examining legislative history at greater length).

83 *See id.* at 653.

84 *See id.* at 673–75 (Rehnquist, J., concurring).

85 488 U.S. 361 (1989).

86 *See id.* at 367–68. *But see* United States v. Booker, 543 U.S. 220 (2005) (declaring the sentencing guidelines to be advisory only in future cases).

87 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

distribute . . . guidelines" for courts to use to make several listed sentencing determinations.[88] But the Court did not limit its examination to that single provision. Instead, the Court undertook an extensive survey of the entire statutory scheme.[89] The Court documented at length the history and circumstances that prompted Congress to act[90] and the Sentencing Commission's several responsibilities under the statute.[91] The Court also noted from the statute's text that "Congress prescribed the specific tool—the guidelines system—for the Commission to use in regulating sentencing,"[92] as well as three goals, seven factors for categorizing offenses, eleven factors for categorizing defendants, and other detailed instructions to both guide and constrain the Sentencing Commission's work.[93]

In 1999, the D.C. Circuit surprised many lawyers by declaring in *American Trucking*[94] that the Environmental Protection Agency ("EPA"), in revising National Ambient Air Quality Standards ("NAAQS") for particulate matter and ozone,[95] violated the nondelegation doctrine by construing the Clean Air Act[96] in a manner that failed to articulate an intelligible principle.[97] The Clean Air Act is long and notoriously complex, with plenty of detailed requirements.[98] Yet in calling for the EPA to establish NAAQS, the statute imposed only fuzzy limitations like "requisite to protect the public health" and "allowing an adequate margin of safety."[99] Given such open-ended statutory criteria, the D.C. Circuit said that the EPA was required to provide for itself a more "determinate criterion for drawing lines" to

88 *Id.* § 994(a).

89 *See Mistretta*, 488 U.S. at 363–69.

90 *See id.* at 363–67.

91 *Id.* at 369–70.

92 *Id.* at 374.

93 *Id.* at 374–77 (citing several statutory provisions).

94 Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999).

95 National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997) (codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 C.F.R. pt. 50).

96 Pub. L. No. 91-604, 81 Stat. 486 (1970) (codified as amended at 42 U.S.C. §§ 7401–7671).

97 *Am. Trucking*, 175 F.3d at 1034.

98 *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 848 (1984) (recognizing the Clean Air Act as "a lengthy, detailed, technical, complex, and comprehensive response to a major social issue"); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 367 (1987) ("The Clean Air Act, like most delegating statutes, does not simply pass the buck but rather passes it along with complicated instructions.").

99 42 U.S.C. § 7409(b)(1).

satisfy constitutional expectations.[100] Reversing that decision, Justice Scalia for the Supreme Court rejected the idea that an agency can "cure an unconstitutionally standardless delegation of power."[101] He also found the statute's broad terms "well within the outer limits of . . . nondelegation precedents," and suggested that the Court would only rarely be qualified to second guess Congress's decision to give agencies policymaking discretion.[102] In this instance, three Justices questioned the Court's nondelegation jurisprudence; Justice Thomas suggested the Court reconsider the intelligible principle standard,[103] while Justices Stevens and Souter were prepared simply to concede that Congress delegates legislative power.[104]

The Supreme Court's evaluation of SORNA § 20913(d)[105] in *Gundy v. United States* follows this pattern as well.[106] In many respects, SORNA is an entirely run-of-the-mill regulatory statute. Adopted to fill a perceived gap in state efforts to monitor the whereabouts of sex offenders, SORNA establishes a fairly detailed registration and notification system for sex offenders, to be administered by the Attorney General.[107] It includes a declaration of the statute's purpose, "to protect the public from sex offenders and offenders against children, and . . . establish[] a comprehensive national system for the registration of those offenders."[108] The statute creates a national sex offender registry,[109] categorizes sex offenders into three tiers and imposes registration requirements for each tier,[110] and imposes penalties for noncompliance.[111] SORNA also calls upon the Attorney General to administer the national registry and fulfill various functions under its provisions with varying degrees of discretion.[112]

SORNA § 20913(b) provides explicitly for the initial registration of sex offenders "(1) before completing a sentence of imprisonment

100 *Am. Trucking*, 175 F.3d at 1034.

101 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

102 *Id*. at 474–75.

103 *See id.* at 487 (Thomas, J., concurring).

104 *See id.* at 488 (Stevens, J., concurring in part and concurring in the judgment).

105 34 U.S.C. § 20913(d).

106 *See* Gundy v. United States, 139 S. Ct. 2116, 2129–30 (2019).

107 *See* Reynolds v. United States, 565 U.S. 432, 435 (2012) (describing SORNA as making "a patchwork of federal and 50 individual state registration systems . . . more uniform and effective").

108 34 U.S.C. § 20901.

109 *Id.* § 20921.

110 *Id.* §§ 20911, 20915(a).

111 18 U.S.C. § 2250.

112 *See, e.g.*, 34 U.S.C. § 20903(1) (tasking the Attorney General with working with Indian tribes and tribal organizations toward specified ends).

with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment."[113] But the statute does not expressly provide for the registration of individuals who had completed their term of incarceration or otherwise were sentenced prior to SORNA's enactment—commonly referred to in the litigation as pre-Act offenders.[114] Instead, § 20913(d) merely authorizes the Attorney General

> to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).[115]

The provision gives the Attorney General a lot of latitude in drafting regulations for the registration of pre-Act offenders. In the years after SORNA was enacted, as Justice Gorsuch noted, the Attorney General adopted a few different sets of regulations to govern this group.[116]

Applying the intelligible principle standard, Justice Kagan, writing for the Court in *Gundy*, did not dispute the lack of constraints in the text of § 20913(d) alone.[117] Rather, she read the statute more holistically as requiring the Attorney General to "apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment," and as limiting the Attorney General's discretion "only to considering and addressing feasibility issues."[118] As quoted above, the relevant statutory provision did not actually include the word "feasible."[119] Instead, Justice Kagan inferred this feasibility constraint from SORNA's statutory declaration of purpose and its legislative history, as well as the Court's 2012 decision in *Reynolds v. United States*,[120] which she characterized as holding that Congress intended SORNA's registration requirements to apply to pre-Act offenders, albeit only after the Attorney General adopted regulations.[121]

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113 *Id.* § 20913(b).

114 *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2122 (2019).

115 34 U.S.C. § 20913(d).

116 *Gundy*, 139 S. Ct. at 2132 (Gorsuch, J., dissenting) (describing regulatory history with multiple Federal Register citations).

117 *See id.* at 2121, 2124. Justice Kagan's opinion for the Court represented a plurality of four of the eight justices who participated in the *Gundy* decision.

118 *Id.*

119 *See* 34 U.S.C. § 20913(d).

120 565 U.S. 432 (2012).

121 *Gundy*, 139 S. Ct. at 2124–29.

In short, just as the Court did in *The Benzene Case* and *Mistretta*, Justice Kagan evaluated the scope of the Attorney General's authority under SORNA by considering the delegation language in the context of the larger statute as well as the statute's history and purpose, in addition to Court precedent interpreting the statute. On that basis, she concluded that the statute as a whole required the Attorney General to adopt regulations adapting and applying the rest of SORNA's registration scheme in full to pre-Act offenders, with only a little latitude for an assessment of feasibility.[122] Of course, as Justice Gorsuch noted in his dissenting opinion, "'feasible' can have many possible meanings: It might refer to 'technological' feasibility, 'economic' feasibility, 'administrative' feasibility, or even 'political' feasibility."[123] True enough; feasible is a broad term when taken in isolation. But feasibility is not limitless, especially when constrained by the context of a long and detailed statute.[124]

II. Unpacking Contemporary Delegations

As alluded to in Part I, one way that contemporary statutes satisfy the intelligible principle standard, and thus the nondelegation doctrine, comes from the Court's willingness to consider not only the delegating language in question but also the context of the larger statutory scheme of which it is a part. In other words, nondelegation analysis under the intelligible principle standard is not just about interpreting Article I, Section 1 of the Constitution, but also is about statutory interpretation. Therefore, how one approaches the application of the intelligible principle standard is, to a great extent, intertwined with how one approaches the exercise of statutory interpretation[125]—e.g., which tools of statutory interpretation a Justice is more inclined to use, or in our more textualist era, whether a Justice embraces a more formalist or more flexible textualism.[126] Whether the

122 *Id.* at 2128–30.

123 *Id.* at 2145 (Gorsuch, J., dissenting).

124 *Cf.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 387–90 (1999) (discussing the limitations of the similarly broad term "necessary").

125 *See, e.g.*, Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 Harv. L. Rev. 393, 413–14 (1981) ("The federal courts have . . . not revive[d] the nondelegation doctrine as a tool for invalidating generous statutory grants of authority, [b]ut they have invoked the doctrine explicitly on several recent occasions to limit severely a statute's interpretation . . . ." (footnote omitted)).

126 *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265, 271–90 (2020) (describing differences between purposivism and textualism as well as formalist versus flexible textualism).

same would be true under a new nondelegation doctrine presumably would depend upon the alternative standard the Court adopts.

Regardless, particularly given the past interrelationship between constitutional and statutory interpretation in nondelegation analysis, any reevaluation of the nondelegation doctrine ought to recognize and take into account the different ways in which both statutes and statutory delegations of agency rulemaking power have changed since the founding era. In fact, they have changed a lot.

Irrespective of the degree of discretion they afforded the executive branch, statutes at the founding typically were quite short and limited in their coverage.[127] By comparison, modern federal regulatory statutes are complicated creatures, often running dozens or even hundreds of pages.[128] In their length, they often address multiple, albeit related, issues simultaneously.[129] They contain mandates, prohibitions, or both; exceptions from the same; and sometimes, exceptions from the exceptions.[130] When providing benefits to individuals or entities, they contain eligibility requirements.[131] They are populated by terms of art and definitions that may or may not correspond precisely to common understandings of the same or similar terms.[132] In short, modern federal regulatory statutes do not merely establish legal rules and standards, but comprehensive and interactive statutory and regulatory schemes. It is tempting sometimes to compare federal regula-

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127 To illustrate this point, one need only to examine Volume 1 of the U.S. Statutes at Large, documenting legislation adopted by Congress between 1789 and 1799—i.e., ten years of legislation in a single volume. *See generally* 1 Stat. 1; *see also infra* notes 143–47 and accompanying text (offering examples of early delegating statutes).

128 *See generally, e.g.*, Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585 (2012) (discussing the existence of and problems associated with "hyperlexis" in contemporary federal statutory and regulatory law).

129 *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 104 (2005) ("Yet Congress's complex statutory schemes regulating the workplace—ERISA, Title VII, the ADEA, and others—typically reflect an accretion of multiple enactments, addressing both discrete and overlapping issues over a period of years if not decades.").

130 *See, e.g.*, Jeffrey I.D. Lewis & Maggie Wittlin, *Entering the Innovation Twilight Zone: How Patent and Antitrust Law Must Work Together*, 17 VAND. J. ENT. & TECH. L. 517, 551 (2015) ("[B]oth the patent and antitrust statutes are long and complicated; they contain both general rights and prohibitions as well as specific provisions and exceptions.").

131 *See, e.g.*, Alcaraz v. Block, 746 F.2d 593, 606–07 (9th Cir. 1984) ("Treating the various [federal food assistance] programs as independent would therefore be artificial: not only do they share income eligibility guidelines, but the language of the various statutes includes a multitude of cross-references encompassing a complex, unified statutory scheme.").

132 *See, e.g.*, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1211 (2021) (Thomas, J., dissenting) ("To save space and time, legislatures define terms and then use those definitions as a shorthand. For example, the legal definition for 'refugee' is more than 300 words long.").

tory statutes to Rube Goldberg machines.[133] But life and the world are complicated, so a Congress intent upon legislating to resolve real-world problems in the twenty-first century probably cannot avoid statutory complexity.

As statutes have grown more complicated, the provisions delegating discretionary authority to the executive branch have become both more numerous and more varied. The Final Report of the Attorney General's Committee on Administrative Procedure observed in 1941 that agency rulemaking had increased as a consequence not only of "the expansion of the field of Federal control" but also from "[t]he increasing use by Congress of 'skeleton legislation,' to be amplified by executive regulations."[134] Dating back at least to the New Deal and perhaps earlier, modern federal regulatory statutes contain different types of delegations of rulemaking power. Some delegations are specific, with Congress identifying a particular statutory gap for an administering agency to fill with rules and regulations.[135] Others are general, conferring the authority to adopt rules and regulations when agency officials themselves identify a need, albeit within the boundaries of the statutory scheme.[136] Still other delegations are a hybrid, combining the language of both specific and general authority in the context of a particular substantive provision, and thus raising questions about how to interpret them in conjunction with statute-wide general authority grants.[137] Courts and scholars tend to regard these types of delegations as equivalent, although such has not always been the case. Finally, the Supreme Court's *Chevron* decision introduced a concept of implicit delegations that overlaps with but is not necessarily limited by statutory text.[138]

A. Specific Authority

The delegations that tend to give rise to nondelegation challenges in the first place are of the specific variety: Congress identifies a par-

133 *See* Gerald W. Grumet, *America's Health Care Crisis: An Overview from the Trenches*, 3 STAN. L. & POL'Y REV. 42, 50 (1991) (quoting Nicholas E. Davies & Louis H. Felder, *Applying Brakes to the Runaway American Health Care System: A Proposed Agenda*, 263 JAMA 73, 75 (1990), in comparing the Medicaid regime to a Rube Goldberg machine).

134 FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 98–99 (1941).

135 *See infra* Section II.A.

136 *See infra* Section II.B.

137 *See infra* Section II.C.

138 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."); *infra* Section II.D.

ticular statutory gap that it wants filled and instructs one executive branch agency or another to adopt rules and regulations to fill the gap. Some statutes authorize agencies to resolve whether particular facts and circumstances comply with broad terms using adjudication procedures as well.[139] The jurisprudence and literature respecting both judicial deference doctrine[140] and administrative procedure[141] recognize that agencies can exercise delegated power to adopt legal rules and pursue policymaking through adjudication as well as through rulemaking. Nevertheless, the most obvious grants of what might be considered legislative power are specific grants of rulemaking authority.

In a certain sense, Congress has been giving the executive branch the authority to adopt rules and regulations in the course of implementing and administering statutes since the founding era.[142] Many early statutes expressly included language granting the President the power to adopt rules and regulations to accomplish statutory goals, or at least seemed to. For example, one statute required a license to engage in "trade or intercourse with the Indian tribes" and authorized "such rules and regulations as the President shall prescribe" to govern "all things touching the said trade and intercourse."[143] Another required federal customs officials to enforce quarantines imposed by state health laws on foreign ships, but also authorized them to allow the offloading of cargo from such vessels elsewhere "upon the conditions and restrictions which shall be directed by the Secretary of the

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139 *See, e.g.*, 15 U.S.C. § 45(a)–(b) (authorizing the Federal Trade Commission to use adjudication procedures to determine whether private parties have engaged in "unfair methods of competition" or "unfair or deceptive acts or practices," and in doing so define what is meant by "unfair" in those contexts).

140 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."); Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 947–50 (2017) (discussing the implications of agency policymaking through adjudication for judicial deference doctrine); David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 223–24 (recognizing agency policymaking through adjudication in analyzing the *Mead* decision).

141 *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 903 (2004) ("Administrative agencies are thus free to flesh out a delegation either in the manner of a legislature (rulemaking) or in the manner of a common law court (case-by-case adjudication).").

142 *See, e.g.*, Mortenson & Bagley, *supra* note 35, at 289–349 (making this argument with examples from the First Congress); Parrillo, *supra* note 35, at 1327–45 (analyzing the delegations and administrative discretion of a 1798 federal real estate tax).

143 Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137.

Treasury, or which such collector may, for the time, reasonably judge expedient for the security of the public revenue."[144] Yet another early statute provided simply,

> That the President of the United States be, and he hereby is authorized and empowered, whenever, in his opinion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper.[145]

Although the language authorizing the President to adopt rules and regulations was quite broad in these early statutes, the statutes themselves typically were very short, running from a few paragraphs to a few pages at most. For example, the legislation banning trade with Indian tribes without a license was a mere seven paragraphs long, covering perhaps a page-and-a-half.[146] The nation's first patent statute was slightly longer, running seven paragraphs that extended over roughly two-and-a-half pages.[147] Also, the statutes themselves typically were sufficiently confined as to what they attempted to accomplish that perhaps Congress saw little need to be more explicit in cabining presidential discretion.

Over time, statutes became more complicated. The history of congressional efforts to regulate steamship safety, documented by Jerry Mashaw, illustrates the point.[148] Congress started by enacting the Steamboat Inspection Act of 1838.[149] Spanning three pages and thirteen sections, that statute established a system of registration and inspection by part-time, "skilled and competent" inspectors appointed by federal judges to ensure that steamboats were "seaworthy" and had boilers that were "sound and fit for use,"[150] plus fines, liability in tort, and criminal penalties to deter misconduct.[151] Judges and inspec-

144 Act of Feb. 25, 1799, ch. 12, § 2, 1 Stat. 619, 619–20.

145 Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372.

146 Act of July 22, 1970, ch. 33, 1 Stat. 137.

147 Act of Apr. 10, 1790, ch. 7, 1 Stat. 109.

148 Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1628–66 (2008).

149 Act of July 7, 1838, ch. 191, 5 Stat. 304. Although the legislation is entitled "An Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," *see id.*, Mashaw and others have used the shorter "Steamboat Safety Act of 1838." *See, e.g.*, Mashaw, *supra* note 148, at 1633.

150 §§ 3–5, 5 Stat. at 304–05.

151 *Id.* §§ 7–13.

tors had some amount of discretion in fulfilling their roles, as the statute did not define what it meant for an inspector to be skilled and competent, a steamboat to be seaworthy, or a boiler to be sound and fit for use. But the 1838 Act is notable otherwise for its relative lack of language specifically delegating authority to adopt rules and regulations to elaborate those concepts.

Regardless, Congress eventually deemed the 1838 Act a failure and replaced it with the longer and substantially more detailed (at fourteen pages and forty-four sections) Steamboat Safety Act of 1852.[152] The new statute contained more extensive requirements regarding the equipment that each steamship must have and safety practices steamboat operators must follow.[153] The 1852 Act also established a full-time, salaried Board of Supervising Inspectors to appoint and supervise local steamship inspectors, taking care that inspectors' "character, habits of life, knowledge, and experience in the duties of an engineer, are all such as to authorize the belief that the applicant is a suitable and safe person to be intrusted [sic] with the powers and duties of such a station."[154] The Board was also authorized to establish rules and regulations to direct the actions of inspectors[155] and, further, "to establish such rules and regulations to be observed by all [steamboats] in passing each other, as they shall from time to time deem necessary for safety."[156]

Progressive and New Deal-era statutes were at least as sweeping, if not more so, in the language they used to delegate rulemaking authority. But the statutes themselves were also much longer and more complicated. For example, the Securities Act of 1933[157] and the Securities Exchange Act of 1934,[158] established the Securities and Exchange Commission and charged it with regulating several different aspects of securities transactions and exchanges, in most instances as "necessary or appropriate in the public interest or for the protection of inves-

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152 *See generally* Act of Aug. 30, 1852, ch. 106, 10 Stat. 61; *see also* Mashaw, *supra* note 148, at 1634–38 (documenting the 1838 Act's flaws and its replacement, and using the Steamboat Safety Act label for the 1852 legislation).

153 §§ 2–8, 10 Stat. at 61–63 (imposing requirements for the storage of combustible materials; the number, placement, and dimensions of "double-acting forcing pumps"; and the inclusion of adequate lifeboats and life preservers for all passengers, among other requirements and limitations).

154 *Id.* § 9 (Eighth), 10 Stat. at 67.

155 *Id.* § 18, 10 Stat. at 70.

156 *Id.* § 29, 10 Stat. at 72.

157 Pub. L. No. 73-22, 48 Stat. 74 (current version at 15 U.S.C. §§ 77a–77mm).

158 Pub. L. No. 73–291, 48 Stat. 881 (current version at 15 U.S.C. §§ 78a–78qq).

tors."[159] Together, those two pieces of legislation also included fifty-two pages of definitions, requirements, prohibitions, exemptions, and other details.[160] The Communications Act of 1934,[161] created the FCC and delegated to it extensive authority, among other tasks, to ensure that common carriers of communication services acted as "necessary or desirable in the public interest"[162] and charged rates that were "just and reasonable."[163] The Communications Act also was forty-two pages long, with a statement of purposes, definitions of key terms, procedural requirements, special provisions for different types of regulated entities, and other details,[164] as well as a provision giving the FCC general authority to adopt rules and regulations "from time to time, as public convenience, interest or necessity requires" and "as it may deem necessary . . . to carry out the provisions of" the Act.[165] The Social Security Act of 1935,[166] which established one of the government's largest social welfare programs, divided administrative responsibility—including rulemaking authority—among the Secretary of the Treasury, the Secretary of Labor, and a newly-created Social Security Board, and also included a host of other details within its sixty-nine provisions, eleven titles, and twenty-nine pages.[167] As already noted, the Attorney General's Committee on Administrative Procedure described statutes like these as "skeleton legislation" for their express reliance on agency regulations to set standards, prescribe rules governing private conduct, and otherwise augment statutory terms.[168]

Contemporary statutes are even longer and more detailed than their Progressive and New Deal counterparts. The Patient Protection

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159 A search of the Securities Act finds several grants of rulemaking authority to the Securities and Exchange Commission using these or similar terms. *See, e.g.*, Securities Act of 1933 § 7, 48 Stat. at 79. A similar search of the Securities Exchange Act finds almost two dozen such grants, as well as one to the Department of the Treasury and one to the Federal Reserve Board. *See, e.g.*, Securities Exchange Act of 1934 §§ 3(a)(11)–(12), 6(a)(2), 8(b), 48 Stat. at 884, 886, 889.

160 48 Stat. at 74–95; 48 Stat. at 881–909.

161 Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

162 *Id.* § 201(a).

163 *Id.* §§ 201–205.

164 *Id.* §§ 201–609, 48 Stat. at 1064–1105.

165 *Id.* § 303; *see also infra* Section II.B (discussing general authority delegations).

166 Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

167 *Id.*

168 FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 134, at 98–99.

and Affordable Care Act ("ACA"),[169] enacted in 2010, is a good example. More than 900 pages in length, the ACA contained dozens of specific calls for the Secretary of Health and Human Services ("HHS") or another federal official,[170] sometimes in coordination with state government agencies[171] or private parties,[172] to develop rules,[173] regulations,[174] standards,[175] and guidelines,[176] or otherwise just to resolve the details of specific requirements.[177]

In some instances, ACA delegations of rulemaking authority and policymaking discretion are part of the same provision that contains further instructions to guide and constrain the agency's 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."[178] The same provision, in the very next sentence, proceeds to list eight different criteria that "at a minimum" must be

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169 Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

170 Although most of the delegations in the ACA appear to be to HHS, the ACA also included delegations to other federal government agencies. For example, the ACA added provisions to the Internal Revenue Code and delegated rulemaking authority to the Secretary of the Treasury. *See, e.g.*, *id.* § 1421(a), 124 Stat. at 237 (adding new § 45R and a tax credit for small business employers to the Internal Revenue Code). The ACA also amended provisions of the Fair Labor Standards Act, and thus the rulemaking power of the Secretary of Labor. *See id.* § 1512, 124 Stat. at 252 (adding a new § 18B).

171 *See, e.g.*, *id.* § 2706(c)(1), 124 Stat. at 325 (requiring HHS to consult with the States as well as pediatricians in establishing quality of care guidelines for accountable care organizations).

172 *See, e.g.*, *id.* § 2715, 124 Stat. at 132 (amending the Public Health Service Act and requiring HHS to consult with the National Association of Insurance Commissioners ("NAIC"), a "working group" consisting of various private experts in developing standards for health insurance plans); *id.* § 1323(b)(8), 124 Stat. at 195 (requiring HHS collaboration with the NAIC in developing community health insurance option requirements).

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

174 *See, e.g.*, *id.* § 1321(a)(1), 124 Stat. at 186 (calling upon HHS to "issue regulations setting standards for meeting the requirements under this title, and the amendments made by this title, with respect to" listed ACA requirements and programs as well as "such other requirements as the Secretary determines appropriate").

175 *See, e.g.*, *id.* § 2703(b), 124 Stat. at 319 (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").

176 *See, e.g.*, *id.* § 1302(d)(3), 124 Stat. at 167 (instructing HHS to "develop guidelines to provide for a de minimis variation in the actuarial valuations used in determining the level of coverage of a plan to account for differences in actuarial estimates").

177 *See, e.g.*, *id.* § 1302(b)(1), 124 Stat. at 163 (providing simply that HHS "shall define the essential health benefits" to be covered by health plans, without labeling the format to be used).

178 *Id.* § 1311(c)(1), 124 Stat. at 174.

satisfied.[179] Other specific delegation provisions include cross-references to nearby provisions that both elaborate and limit the delegation's scope.[180] In other cases, however, the delegation provisions themselves lack this guidance; yet, one need not look far within the surrounding statutory provisions to find it.

In all of these statutes, and others like them, Congress has expressly identified gaps that it wanted administrators to fill by adopting regulations. Even where they include obviously constraining language—e.g., listing criteria to be considered, cross-referencing other provisions, or specifying rules of construction—many of those delegations also use open-ended and subjective terms like "reasonable," "necessary," "feasible," "appropriate," or "in the public interest," and thus expand the administering agency's policymaking discretion. But even those specific delegations that lack immediately proximate limitations nevertheless can be interpreted, and thus limited, by reference to the details contained in other statutory provisions. A 900-page statute includes a lot of details that courts can call upon to cabin agency discretion.

B. General Authority

General authority rulemaking grants are different. Instead of Congress identifying the subject matter to be addressed by the agency as delegee, general authority rulemaking grants confer upon agencies an open-ended authority to adopt rules and regulations as such agencies find "needful," "efficient," or "necessary" to "carry out," "effectuate," or "enforce" a statute without further elaboration.[181] In other

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179 *Id.* § 1311(c)(1)(A)–(H), 124 Stat. at 174.

180 *See, e.g.*, *id.* § 1104(b)(2), 124 Stat. at 146-53 (amending § 1173(a) of the Social Security Act by adding, among other provisions, 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 subparagraph (3)(E) and having ensured consultation with providers").

181 *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); 26 U.S.C. § 7805(a) (authorizing the Treasury Secretary to "prescribe all needful rules and regulations for the enforcement of" the Internal Revenue Code); 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); 42 U.S.C. § 7601(a)(1) (granting the EPA Administrator the authority "to prescribe such regulations as are necessary to carry out his functions under" the Clean Air Act); 47 U.S.C. § 201(b) (authorizing the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Communications Act, as amended).

words, general authority rulemaking grants are not just broadly phrased; they also leave to the agency the role of identifying the topics of its rulemaking, limited only by the four corners of the statute and the agency's imagination.

General authority rulemaking grants have been around for a long time. The Oleomargarine Act of 1886,[182] in addition to including several specific grants of rulemaking authority,[183] also authorized the Commissioner of Internal Revenue generally, with the Treasury Secretary's approval, to "make all needful regulations for the carrying into effect of [the] act."[184] The general authority provision of the current Internal Revenue Code, which authorizes the Treasury Secretary to "prescribe all needful rules and regulations for the enforcement of" that statute,[185] finds precursors in the War Revenue Act of 1917[186] and the codification of revenue as the Internal Revenue Code of 1939.[187] The Communications Act of 1934 contained similar language authorizing the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[188] The same is true of the Federal Food, Drug, and Cosmetic Act,[189] adopted in 1938.

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182 Ch. 840, 24 Stat. 209. Although formally titled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," the legislation is commonly referred to as the Oleomargarine Act. *See, e.g.*, Miller v. Standard Nut Margarine Co. of Fla., 284 U.S. 498, 502 (1932); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 83–84 (1989).

183 *See, e.g.*, §§ 5–6, 24 Stat. at 210.

184 § 20, 24 Stat. at 212.

185 26 U.S.C § 7805(a).

186 Pub. L. No. 65–50, § 1005, 40 Stat. 300, 326 (authorizing the Commissioner of Internal Revenue, with the Treasury Secretary's approval, to "make all needful rules and regulations for the enforcement of the provisions of [the] Act"). Although formally titled "An Act To provide revenue to defray war expenses, and for other purposes," the legislation is commonly referred to as the War Revenue Act of 1917. *See, e.g.*, Provost v. United States, 269 U.S. 443, 450 (1926).

187 Ch. 38, § 3791(a)(1)–(2), 53 Stat. 1, 467 (authorizing the Commissioner of Internal Revenue to "prescribe and publish all needful rules and regulations for the enforcement of" the title containing the Internal Revenue Code as well as "all such regulations, not otherwise provided for, as may have become necessary by reason of any alteration of law in relation to internal revenue").

188 Communications Act of 1934, Pub. L. No. 73–416, § 4(i), 48 Stat. 1064, 1068 (codified as amended in scattered sections of 47 U.S.C.).

189 Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399i). *Compare id.* § 701(a), 52 Stat. at 1055 (authorizing the Secretary of Agriculture "to promulgate regulations for the efficient enforcement of this Act"), *with* 21 U.S.C. § 371(a) (giving the same power to the Secretary of Health and Human Services, under whose jurisdiction the statute now falls).

Perceptions have changed substantially over the past century, however, regarding exactly what sort of authority such language confers. Prior to the New Deal, although the Supreme Court had always upheld delegations of rulemaking authority against nondelegation challenges, it also distinguished the legal force of regulations adopted pursuant to specific and general authority. For example, in *United States v. Eaton*,[190] the Court held that regulations adopted under the general authority provision of the Oleomargarine Act could not support the imposition of penalties, calling the very idea "a very dangerous principle."[191] A few years later, in *In re Kollock*,[192] the Court distinguished *Eaton* and held that private parties could be punished for violating regulations adopted under a different, specific authority delegation in the same statute.[193] Congress had "fully and completely defined" the latter offense, the Court said, and the regulations adopted pursuant to specific authority provided a "mere matter of detail . . . in effectuation of" the provision in question.[194]

Building from these and other cases, legal scholars in the first half of the twentieth century likewise distinguished specific and general authority regulations, both in terms of their legal force and constitutionally. Scholars acknowledged that specific authority regulations were legally binding, "similar to statutes";[195] that they carried the "force and effect of law";[196] and, thus, that the delegations under which they were promulgated were subject to the limitations of the nondelegation doctrine.[197] In the language of *J.W. Hampton*, the specificity typically provided by Congress describing particular statutory

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190 144 U.S. 677 (1892).

191 *Id.* at 688.

192 165 U.S. 526 (1897).

193 *Id.* at 535–37. *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).

194 *In re Kollock*, 165 U.S. at 533.

195 Fred T. Field, *The Legal Force and Effect of Treasury Interpretation*, *in* THE FEDERAL INCOME TAX 91, 99 (Robert Murray Haig ed., 1921).

196 Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 21 (1940); *see also* 1 F. TROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW § 489 (1942) (defining "legislative regulations" in terms of specific authority and declaring that they "have the force of law"); 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"); Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 418–19 (1942) (recognizing the legal force of specific authority regulations); 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] be not in conflict with express statutory provision").

197 *See, e.g.*, VOM BAUR, *supra* note 196, § 489; Ellsworth C. Alvord, *Treasury Regulations and the* Wilshire Oil Case, 40 COLUM. L. REV. 252, 259–60 (1940); Lee, *supra* note 196, at 22–23.

gaps to be filled by regulations provided the requisite intelligible principles.[198] By contrast, from the 1920s through the 1940s, legal scholars routinely accepted that general authority rulemaking grants could not authorize rules and regulations with legal force without violating the nondelegation doctrine.[199] Instead, general authority rulemaking grants merely allowed agency officials to publicize their own views regarding statutory meaning—an act that did not require congressional authorization in any event.[200] Thus, general authority regulations were legally nonbinding, although courts might find them persuasive.[201] In other words, using contemporary administrative law parlance, specific authority delegations could support legally-binding legislative regulations so long as those delegations contained intelligible principles (as they typically were found to do), but general authority delegations lacked intelligible principles, so regulations issued under general authority were nonbinding interpretative rules.

The Administrative Procedure Act ("APA"),[202] adopted in 1946 to reform and bring uniformity to federal administrative procedures, implicitly incorporated this perceived difference between specific and general regulatory authority when it imposed procedural requirements, including public notice and opportunity for comment, for legislative rules but not for interpretative ones.[203] Into the late 1970s and early 1980s, in discussing judicial deference doctrine with reference to delegated power, the Supreme Court distinguished legislative regula-

198 *See, e.g.*, Alvord, *supra* note 197, at 259–60 (citing to *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), and other nondelegation cases and observing that "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" (footnote omitted)).

199 *See, e.g.*, VOM BAUR, *supra* note 196, § 489; Alvord, *supra* note 197, at 260; 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); Field, *supra* note 195, at 100–01.

200 *See, e.g.*, VOM BAUR, *supra* note 196, § 489; Lee, *supra* note 196, at 24–25; Surrey, *supra* note 199, at 557–58.

201 *See, e.g.*, Alvord, *supra* note 197, at 260–61; Lee, *supra* note 196, at 25–26; Surrey, *supra* note 199, at 557–58; Field, *supra* note 195, at 100–01.

202 5 U.S.C. §§ 551–559, 701–706.

203 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 id.* § 553(b). Administrative law experts typically refer to notice-and-comment regulations as legislative rules. 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 23, 30 n.3 (1947).

tions from interpretative ones by reference to specific versus general authority.[204] In *Batterton v. Francis*,[205] for example, the Court described a specific delegation of statutory authority to prescribe standards as reflecting a decision by Congress to rely on the agency rather than the courts, and the resulting regulations as legislative rules that carry the force of law, but said that interpretative regulations were not entitled to the same deference.[206] In *Rowan Companies, Inc. v. United States*[207] and *United States v. Vogel Fertilizer Co.*,[208] the Court said expressly that it owed regulations issued pursuant to the Internal Revenue Code's general authority less deference than specific authority regulations under the same statute.[209] Nevertheless, long before the Court decided those cases, the Court and agencies began whittling away at the distinction to the point that it no longer exists.

The first case to contradict the old assessment of general authority seems to have been *American Trucking Ass'ns v. United States* in 1953.[210] That case involved a nondelegation challenge to rules that were adopted by the Interstate Commerce Commission ("ICC") under the Motor Carrier Act[211] and targeted equipment leasing practices common in the trucking industry.[212] Although the ICC in its rulemaking claimed that several provisions of the Act supported its action,[213] the Court acknowledged that no specific delegation authorized the rules in question.[214] The Court also agreed, however, with the ICC's claim that the targeted leasing practices would frustrate con-

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204 *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 315–16 (1979); Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); *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 (1970) (citing earlier cases for the same dichotomy).

205 432 U.S. 416 (1977).

206 *Id.* at 425 & n.9 (quoting U.S. DEP'T OF JUST., *supra* note 203, at 30 n.3).

207 452 U.S. 247 (1981).

208 455 U.S. 16 (1982).

209 *Id.* at 24; *Rowan Cos.*, 452 U.S. at 252–53.

210 344 U.S. 298 (1953); *see* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2.04 (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).

211 Pub. L. No. 74-255, 49 Stat. 543 (1935) (current version at 49 U.S.C. §§ 31501–31504).

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

213 *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).

214 *Am. Trucking*, 344 U.S. at 312 (upholding the regulations as "within the Commission's power, despite the absence of specific reference to leasing practices in the Act").

gressional purposes.[215] Thus, in upholding the regulations, the Court turned to the ICC's general 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 compels this result."[216] The Court rejected the trucking companies' claim that the statute's general authority provision merely authorized procedural rules or was "solely administrative," based on its reference to enforcement.[217] 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."[218]

The 1960s and 1970s saw a virtual explosion of agency rulemaking, with agencies seeking to achieve more policy objectives through regulations pegged to general authority.[219] The dramatic rise in rulemaking activity during this period was attributable to several factors. New federal statutes and amendments to older statutes enacted in the mid- to late-1960s delegated additional rulemaking authority to

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

216 *Id.* at 311–12 (quoting § 204(a)(6), 49 Stat. at 546). 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, *id.* (quoting § 202(a), 49 Stat. at 543), but that provision was part of the statute's declaration of policy, not a specific grant of rulemaking authority. *See* § 202(a), 49 Stat. at 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. *Am. Trucking*, 344 U.S. at 311 (quoting § 212(b), 49 Stat. at 555). But the Court was clear that the principal basis for its conclusion was the ICC's section 204(a)(6) general authority.

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

218 *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.

219 *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.6 (3d ed. 1994); Clark Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1823 (1978); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 546–49 (2002).

new or existing agencies.[220] Key Supreme Court decisions contributed as well. For example, *United States v. Florida East Coast Railway Co.*[221] by and large replaced formal rulemaking procedures with informal ones as the norm.[222] Also, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[223] precluded judges from requiring agencies to use procedures beyond those expressly required by statute.[224] Finally, the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[225] disregarded any distinction between specific and general authority regulations in concluding that regulations issued by the EPA based on general authority represented an exercise of delegated power and were entitled to the same judicial deference as regulations adopted pursuant to an express delegation.[226] Regardless of the reason, beginning in the 1960s, agencies increasingly relied on general authority rulemaking grants as legal authority for adopting legally binding rules and regulations, even where they previously had disclaimed the authority to do so. 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 authority, with judicial support.[227] In at least one of these cases, *National Petroleum Refiners*

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220 *See* DAVIS & PIERCE, *supra* note 219, § 1.6.

221 410 U.S. 224 (1973).

222 *See id.* at 234–35.

223 435 U.S. 519 (1978).

224 *Id.* at 525.

225 467 U.S. 837 (1984). At least, the consensus among administrative law scholars seems to be that the regulations at issue in *Chevron* were adopted under general authority. *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199–200 (1998); Merrill & Watts, *supra* note 219, at 473. The preamble to the regulations at issue in *Chevron* cited four sections of the Clean Air Act, only one of which was the general authority provision. Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766, 50,771 (Oct. 14, 1981) (codified at 40 C.F.R. pts. 51–52).

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

227 *See* Merrill & Watts, *supra* note 219, at 475–76. Merrill and Watts downplayed the role of the nondelegation doctrine and emphasized instead the importance of penalties as evidence of congressional intent that regulations carry the force of law. *See id.* at 488–92. They acknowledged, however, that Progressive- and New Deal-era courts and commentators did not recognize that convention. *See id.* at 503. Moreover, their goal was to guide Congress and contemporary courts in applying the Supreme Court's decision in *United States v. Mead Corp.* rather than exploring nondelegation analysis. *See id.* at 470–74. Accordingly, their analysis is not inconsistent with my claim that, at one time, common understanding held that general authority delegations could not support legally binding regulations without violating the nondelegation doctrine.

Ass'n v. FTC,[228] the challengers to agency action did raise a nondelegation challenge, but the courts more or less ignored it.[229] Instead, the courts focused on whether, as a matter of statutory interpretation, the relevant statutory provision only authorized procedural rules and did not authorize legislative ones.[230] The challengers lost.

The work of Kenneth Culp Davis reflects the shift in scholarly thought regarding the constitutional character and legal weight of general authority regulations resulting from these developments. 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."[231] In that same volume, he recognized the claims of prior scholarship "that authority to make legislative rules must be specifically delegated," but suggested more broadly that the authority to adopt legally binding regulations could be found in statutory authority to announce policies through adjudication.[232] He also contended that the Supreme Court had upheld as valid several delegations that lacked congressionally prescribed standards—i.e., intelligible principles.[233] Nevertheless, at least at that point, even Davis acknowledged that general authority rulemaking grants could only support interpretative regulations, and that interpretative regulations did not require a statutory grant of rulemaking power.[234]

A few years later, in the first edition of his renowned *Administrative Law Treatise*, Davis recognized that this distinction was starting to break down.[235] He acknowledged the *American Trucking* case as an example of the Supreme Court rejecting a nondelegation challenge against regulations premised on a general authority delegation that lacked intelligible principles.[236] He identified certain specific and general authority delegations as exemplifying the distinction between legislative and interpretative rules, consistent with his 1951 characterization.[237] Yet, he documented that judicial deference to agency rules and regulations, albeit under different theories and for different reasons in different cases, was breaking down the traditional

228 482 F.2d 672 (D.C. Cir. 1973).

229 *See id.* at 674 n.2.

230 *See id.* at 673–74.

231 KENNETH CULP DAVIS, HANDBOOK ON ADMINISTRATIVE LAW § 16, at 58 (1951).

232 *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).

233 DAVIS, *supra* note 231, § 14.

234 *Id.* § 55; *see* Davis, *supra* note 232, at 930–32.

235 *See* DAVIS, *supra* note 210, §§ 5.03-.06.

236 *See id.* § 2.04.

237 *See id.* § 5.03.

distinction.[238] Consequently, he contended that it was no longer quite right to say that legislative rules carried the force of law and interpretative rules, historically understood, did not. "More accurate is a statement that valid legislative rules have force of law and that interpretative rules sometimes do."[239] 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 lawmaking power," without defining closely what that meant.[240]

In 1969, Davis maintained that the nondelegation doctrine was "almost a complete failure"[241] and advocated that courts replace it with several "principal steps" to protect private parties from the exercise of "unnecessary and uncontrolled discretionary power" by government agencies.[242] By the second edition of his treatise in 1979, Davis declared the nondelegation doctrine had simply "failed."[243] He acknowledged the Court's distinction between specific and general authority in *Batterton v. Francis* as reflecting that "the old law continues," but also recognized that courts and scholars otherwise had moved in a different direction.[244] And he again predicated the distinction between legislative rules and interpretative rules as based in delegated power.[245]

> The conclusion, very solidly based, is that rules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them. When an agency has no granted power to make law through rules, the rules it issues are necessarily interpretative; when an agency has such granted power, the rules are interpretative unless it intends to exercise the granted power. The statutory grant of power may be specific and clear, or it may be broad, general, vague, and uncertain.[246]

If there were any doubt, the Supreme Court pounded the final nail into the coffin of the distinction between specific and general authority in 2011. In *Mayo Foundation for Medical Education and Re-*

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238 *See id.* § 5.05.

239 *Id.* § 5.05, at 314.

240 *Id.* § 5.03, at 302.

241 Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969).

242 *Id.* at 725.

243 *See* DAVIS, *supra* note 3, § 3.2.

244 *Id.* § 7.8, at 41.

245 *Id.* § 7.10.

246 *Id.* § 7.10, at 54.

search v. United States,[247] responding to an argument that it ought to extend less deference to a general authority regulation interpreting the Internal Revenue Code based on the *Rowan Companies* and *Vogel Fertilizer* cases, the Court observed that, "[s]ince [those cases] were decided, . . . the administrative landscape has changed significantly," and that regulations adopted under general authority represent the exercise of a delegation from Congress and carry the force of law.[248]

C. Hybrid Delegation Provisions

Perhaps because contemporary courts do not distinguish between specific authority and general authority rulemaking grants, and both types of delegations now are perceived as authorizing legislative regulations that carry legal force, an interesting hybrid of the two has emerged in some statutes. These delegations use the language of general authority, granting the agency the power to adopt rules and regulations as needed. But they are embedded within particular substantive sections.

Consider, for example, § 42 of the Internal Revenue Code, which provides a tax credit for the owners of residential buildings who rent units to individuals with low incomes.[249] The section is long, with many detailed requirements for credit eligibility and various grants of rulemaking power.[250] Blending the language of specific and general authority, one provision defines a term—"qualified contract"—in connection with conditions for preserving credit eligibility upon the sale of the building, and then authorizes the Treasury Secretary to "prescribe such regulations as may be necessary or appropriate to carry out this paragraph, including regulations to prevent the manipulation of the amount determined under the preceding sentence."[251] The very last part of § 42 generally authorizes the Treasury Secretary to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section," but then goes on to "includ[e]" a few particular topics to be addressed.[252] Other provisions of the Internal Revenue Code follow a similar pattern.[253] Because § 7805(a) of the Internal Revenue Code also grants the Treasury Secretary general au-

247 562 U.S. 44 (2011).

248 *Id.* at 56–58.

249 26 U.S.C. § 42.

250 *See id.*

251 *Id.* § 42(h)(6)(F).

252 *Id.* § 42(n).

253 *See, e.g.*, 26 U.S.C. §§ 168(h)(8), 382(m), 743(e)(6).

thority to adopt "all needful rules and regulations for the enforcement of" the entire title,[254] some have wondered how to read the overlap between the general authority language of § 7805(a) and the language contained in provisions like § 42.[255]

Hybrid delegations are not limited to the tax code. The Clean Air Act[256] provides another example. Among many other tasks and requirements, § 7547 of that statute calls upon the Administrator of the EPA to study and then to adopt regulations with emission standards for "nonroad engines and nonroad vehicles"—i.e., for such diverse items as airplanes, boats, heavy equipment, and small tools with engines.[257] The provision includes qualifiers like "significantly contribute to" and "reasonably . . . anticipated to endanger public health or welfare."[258] Section 7547 also lists particular pollutants to be studied and regulated: "carbon monoxide, oxides of nitrogen, and volatile organic compounds."[259] It calls on the Administrator to take into account various factors, including "technological feasibility, costs, safety, noise, and energy."[260] At the end of the provision, in connection with enforcement, § 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."[261] Meanwhile, like the tax code, the Clean Air Act also contains a statute-wide delegation to the Administrator of general authority "to prescribe such regulations as are necessary to carry out his functions under" the statute.[262]

Meanwhile the ACA offers a somewhat unusual example of language that seems to delegate general rulemaking authority by denying the intention to curtail such power. Section 1201 of the ACA amended the Public Health Service Act[263] to add provisions governing different

254 *Id.* § 7805(a).

255 *See, e.g.*, N.Y. STATE BAR ASS'N TAX SECTION, REPORT ON LEGISLATIVE GRANTS OF REGULATORY AUTHORITY 3 (2006), https://nysba.org/app/uploads/2020/03/1121-Report.pdf [https://perma.cc/G8GX-V34J] (raising this question in connection with this type of delegation).

256 42 U.S.C. §§ 7401–7671q.

257 *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] (summarizing the various categories of nonroad engines and vehicles addressed by regulations under this provision).

258 42 U.S.C. § 7547(a)(1).

259 *See id.* § 7547(a)(2).

260 *See id.* § 7547(a)(3).

261 *Id.* § 7547(d).

262 *Id.* § 7601(a)(1).

263 42 U.S.C. §§ 201–300mm-61.

types of "wellness programs" under which employers may offer premium discounts to employees and to require data collection and information reporting to Congress regarding the same.[264] The new provisions are quite detailed in defining the allowable content of wellness programs, establishing a demonstration project, and requiring HHS along with the Secretaries of Treasury and Labor together to collect data and submit a report to Congress regarding wellness program efficacy and affordability.[265] None of these new provisions call upon any of these officials to adopt rules or regulations, although mention is made of allowing preexisting wellness programs "applied with all applicable regulations" to continue "for as long as such regulations remain in effect."[266] Tacked onto the end of these new provisions, however, is a subsection providing that "[n]othing in this section shall be construed as prohibiting the Secretaries of Labor, Health and Human Services, or the Treasury from promulgating regulations in connection with this section."[267] The language seems to presume general authority without saying so explicitly.

Until now, the moribund status of the nondelegation doctrine has exempted these sorts of hybrid delegations from judicial and scholarly analysis. They obviously satisfy the intelligible principle standard as applied in past cases. Also, resolving how general authority language in specific provisions interacts with statute-wide general authority rulemaking provisions has been unnecessary in recent decades because, again, courts and scholars no longer vary their perceptions of the constitutionality and legal effect of regulations based on the type of delegation. Nevertheless, particularly where general authority delegations cover entire statutes, one wonders about the purpose of simultaneously including the language of general authority in specific, substantive provisions as well. Perhaps these provisions are mere suggestions that Congress more readily anticipates ambiguities in those sections necessitating clarifying regulations.

D. Implicit Delegations

The change in the legal weight accorded to rules and regulations based on general authority has been reinforced by the Supreme Court's embrace of the *Chevron* doctrine, which does not distinguish

264 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201, 124 Stat. 119, 156–60 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

265 *Id.*

266 *Id.* § 2705(k).

267 *Id.* § 2705(n).

between general and specific authority.[268] But the Court's *Chevron* jurisprudence has also introduced a new term to the delegation lexicon: implicit delegations.

Since its 1984 decision in *Chevron*, the Court has counseled judicial deference to reasonable interpretations of ambiguous statutory text adopted by administering agencies.[269] According to the *Chevron* Court, if the meaning of a statute is clear after applying traditional tools of statutory interpretation, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[270] But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute," and courts are expected to defer to those agency interpretations that are permissible.[271]

The *Chevron* doctrine of judicial deference to agency interpretations of ambiguous statutes rests upon the notion that ambiguities in statutory meaning in many instances represent implicit delegations from Congress to administering agencies to exercise policymaking discretion in filling statutory gaps.[272]

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, *implicitly or explicitly*, by Congress." If Congress has *explicitly* left a gap for the agency to fill, there is an *express delegation* of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is *implicit rather than explicit*. In such a case, a court may not substitute its own construction of a statutory provision

268 *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 57 (2011) ("Our inquiry in that regard does not turn on whether Congress's delegation of authority was general or specific.").

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

270 *Id.* at 842–43.

271 *Id.* at 843.

272 *See id.*; *see also* United States v. Mead Corp., 533 U.S. 218, 237 (2001) ("*Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference.").

> for a reasonable interpretation made by the administrator of an agency.[273]

What did the Court mean by its reference to implicit delegations? The Court has never been precise on this point. The Court made clear in *Chevron* that implicit delegations are found in statutory ambiguity. When statutory meaning is clear, courts and agencies can do nothing but follow and enforce it.[274] Discerning statutory clarity is a task for courts "employing traditional tools of statutory construction."[275] Statutory ambiguity, by contrast, is an opportunity for agency gap filling, and thus agency policymaking.[276] Many years later, in *United States v. Mead Corp.*,[277] the Court reemphasized that whether an agency's interpretation of a statute is eligible for *Chevron* deference depends upon whether Congress has delegated to the agency the authority to act with legal force,[278] as for example through rulemaking.[279]

The Supreme Court has recognized statutory ambiguity, and thus implicit delegations, in a wide range of circumstances. The *Chevron* case itself concerned an EPA interpretation of an underdefined statutory term in the Clean Air Act, contained in a regulation adopted in reliance on a general authority rulemaking grant.[280] More recently, *City of Arlington v. FCC*[281] confirmed that "the preconditions to deference under *Chevron* are satisfied" for all of an agency's interpretations by the congressional conferral of general authority to administer a statute through rulemaking and adjudication and the exercise of that authority.[282] Questions about how different provisions of a statute interact with one another, coupled with general authority, can represent ambiguities, and thus implicit delegations, as well. For that matter,

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273 *Chevron*, 467 U.S. at 843–44 (emphasis added) (alteration in original) (footnote omitted) (quoting Morton v. Ruiz, 415 U. S. 199, 231 (1974)).

274 *Id.* at 842–43.

275 *Id.* at 843 n.9.

276 *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, 382–383 (1961))).

277 533 U.S. 218 (2001).

278 *Id.* at 226–27.

279 *Id.*

280 *See, e.g.*, Duffy, *supra* note 225, at 199–200 (observing that the Solicitor General began his argument in the *Chevron* case by quoting in full the Clean Air Act's general authority provision); Merrill & Watts, *supra* note 219, 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.").

281 569 U.S. 290 (2013).

282 *Id.* at 307.

specific authority delegations that include vague language, unclear criteria, or other limitations on agency discretion often are susceptible to more than one reasonable interpretation in *Chevron* terms.[283]

III. New Nondelegation Alternatives

Putting together the history of the nondelegation doctrine with the evolution and variation of statutory delegations, it seems obvious that contemporary agencies possess more congressionally delegated power to bind private parties with legal force than they once did. Again, however, the purpose of this Foreword is less to contest claims to the contrary than to evaluate the likelihood that a newly reinvigorated nondelegation doctrine will substantially curtail the contemporary administrative state by requiring Congress to do more and agencies to do less.

Surveying proposed alternatives to the intelligible principle standard, sweeping change via the nondelegation doctrine seems unlikely. The replacement standards under consideration by the Justices are, for the most part, incremental—case by case, statute by statute, provision by provision—rather than categorical.[284] They may open a door for lower courts to invalidate some small fraction of specific authority delegations. But even that outcome assumes the Justices will agree on a particular replacement for the intelligible principle standard, which itself seems uncertain.

A. Justice Gorsuch and Gundy

For all of Justice Gorsuch's criticism of the intelligible principle standard, it is not at all clear that his proposed standard is any more precise. In his blistering and lengthy *Gundy* dissent, Justice Gorsuch described the test that he would apply in lieu of the intelligible princi-

283 *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 387–90 (1999) (applying *Chevron* in rejecting the agency's interpretation of the word "necessary" in the context of a specific statutory mandate to promulgate standards).

284 As discussed further below, the one possible outlier in this regard is Justice Thomas, who has endorsed Philip Hamburger's view that all statutory delegations of authority to adopt legally binding regulations violate the Constitution. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 70–71 (2015) (Thomas, J., concurring in the judgment). Justice Thomas's opinion in that case, however, was for himself alone. He joined Justice Gorsuch's dissenting opinion in *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting). Consequently, Hamburger's more categorical view of the nondelegation doctrine does not appear to be one of the alternatives truly under consideration by the Court.

ple standard to evaluate congressional delegations.[285] He outlined three "important guiding principles" gleaned from the framers.[286]

> 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."
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> . . . .
>
> Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.
>
> . . . .
>
> Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities.[287]

Of course, few doubt the second and third of these three principles. The essence of the prosecutorial function is reaching a conclusion that facts exist to support charging individuals with violating statutory requirements or prohibitions.[288] And prosecution inherently is an exercise of executive power.[289] Likewise, the phrasing of the vesting clauses alone would support a conclusion that the Constitution does not prevent Congress from asking agencies to perform nonlegislative tasks.[290] The meat of Justice Gorsuch's standard, therefore, lies in its first element.

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285 *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) ("Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test?").

286 *Id.* at 2136.

287 *Id.* at 2136–37.

288 *See, e.g.*, Saikrishna Prakash, *The Chief Prosecuto*r, 73 GEO. WASH. L. REV. 521, 536 (2005) (observing that "the judiciary hears cases and controversies about the application of law to facts" and prosecutors "bring[] cases or controversies before the courts to secure a definitive resolution of the dispute").

289 *See, e.g.,* Morrison v. Olson, 487 U.S. 654, 691 (1988) (noting that "[t]here is no real dispute" that prosecution is an executive function); *see also id.* at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."). *But see* Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 129–30 (2014) (contesting this proposition). *See generally* Prakash, *supra* note 288 (developing this argument and debunking contrary arguments).

290 *See* U.S. CONST. art. I, § 1 (vesting *legislative* powers in Congress); U.S. CONST. art. II, § 2 (vesting the power to execute the law in the President and subordinate executive branch officials); *see also* U.S. CONST. art. II, § 3 (requiring the President to "take Care that the Laws be faithfully executed"); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring in the judgment and opinion of the Court) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

So how does one differentiate "policy decisions" from mere "details"? Justice Gorsuch elaborated on the first category through the use of alternative phrases like "important subjects" and "the controlling general policy."[291] From *Yakus v. United States*, Justice Gorsuch pulled the description, "standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[292] For the second category of mere details, Justice Gorsuch offered the "[subjects] of less interest" and "alterations and additions"—also from *Wayman v. Southard*—as exemplifying details.[293]

Justice Gorsuch's efforts to frame the distinction between policy decisions and mere details only demonstrate the challenge of that task. Which subjects are important, and which are of less interest, often will be subjective. Most people probably do not care very much whether their peanut butter satisfies a peanut threshold of 87% rather than 90% or 95% as long as the product tastes good, but the Food and Drug Administration received more than 1,900 comments from interested persons, spent 12 years, and developed a 100,000-page hearing record in deciding that very question precisely because some people cared a lot.[294] Likewise, seemingly minor alterations or additions to regulatory schemes often yield massive legal or economic liabilities and substantial unintended consequences.[295]

Meanwhile, Justice Gorsuch's *Gundy* analysis leaves a substantial hole in the form of general authority and implicit delegations. As noted in Part II, the Court's *Chevron* jurisprudence characterizes mere statutory ambiguity, combined with general rulemaking authority, as an implicit delegation of policymaking discretion. In other words, *Chevron* deference is a byproduct of congressional delegation. Justice Gorsuch is a notorious critic of *Chevron* deference.[296] Yet the

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291 *Gundy*, 139 S. Ct. at 2136 (quoting Wayman v. Southard, 23 U.S. 1, 43 (1825)).

292 *Id.* (quoting Yakus v. United States, 321 U.S. 414, 426 (1944)).

293 *Id.*

294 Angie M. Boyce, *"When Does It Stop Being Peanut Butter?": FDA Food Standards of Identity, Ruth Desmond, and the Shifting Politics of Consumer Activism, 1960s–1970s*, 57 TECH. & CULTURE 54, 55, 63 (2016).

295 *See, e.g.*, Deborah Fisch, *The Long Gestation of the Law: How Texas Birth Centers Lost Their Medicaid Funding*, 12 J.L. SOC'Y 194, 194 (2010) (offering an example); Susan L. Trevarthen, *Best Practices in First Amendment Land Use Regulations*, 61 PLAN. & ENV'T L. 3, 3–4 (2009) (making this point).

296 *See, e.g.*, BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151–55 (10th Cir. 2016); *see also, e.g.*, Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 950–51 (2018) (documenting Justice Gorsuch's views).

type of delegations he decries most forcefully—e.g., "statute[s] directing an agency to regulate private conduct to the extent 'feasible,'" relying on a term with "many possible meanings"—is the specific authority variety.[297] By comparison, Justice Gorsuch's objection to *Chevron* deference does not contemplate that implicit delegations might violate the nondelegation doctrine as delegations of legislative power. Rather, Justice Gorsuch claims that *Chevron* deference usurps the *judicial* role. In this way, Justice Gorsuch seems perfectly willing to relegate implicit delegations of statutory ambiguity and general rulemaking authority to the category of mere details—notwithstanding their acknowledged policy implications.

B. Justice Kavanaugh and Paul

Within a month of the Supreme Court's decision in *Gundy*, the petitioner filed a petition for rehearing.[298] Perhaps the petitioner hoped that a nine-Justice Court with Justice Kavanaugh participating would reach a different outcome than the eight-Justice Court without him.[299] For some time after the *Gundy* decision issued, scholars and commentators wondered whether the Court might grant a petition for rehearing in that case.[300] The Court denied that petition.[301] On the same day, the Court denied certiorari in another case, *Paul v. United States*, which raised the same question as *Gundy*.[302] Justice Kavanaugh filed a statement respecting the denial of certiorari in *Paul* in which he agreed that the denial was appropriate given the Court's decision in *Gundy*, but he suggested that "Justice Gorsuch's scholarly analysis of

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297 *See, e.g.*, *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) (criticizing the specific authority delegation in SORNA, 34 U.S.C. § 20913(d)).

298 Petition for Rehearing, *Gundy*, 139 S. Ct. 2116 (No. 17-6086).

299 *See id.* at 4 (noting that, of the eight Justices who participated, "four Members voted to uphold SORNA's delegation without reservation, while the other four Members expressed skepticism that SORNA's delegation complied with the nondelegation doctrine, properly understood" and that "[a] new Justice has now joined the Court and his participation in reargument could resolve this division").

300 *Id.* at 1–5; *see, e.g.*, *Litigation Update:* Gundy v. U.S., FEDERALIST SOC'Y, (Oct. 9, 2019, 1:00 PM), https://fedsoc.org/events/litigation-update-gundy-v-u-s [https://perma.cc/R5JA-9XAP]; John Elwood, *Relist Watch*, SCOTUSBLOG (Oct. 9, 2019, 3:38 PM), https://www.scotusblog.com/2019/10/relist-watch-150/ [https://perma.cc/79ZF-WS28]; Allan Gates, *What's Up With* Gundy*?*, ACOEL (Nov. 14, 2019), https://acoel.org/whats-up-with-gundy/ [https://perma.cc/BG3X-VUFT].

301 Gundy v. United States, 140 S. Ct. 579 (2019) (mem.).

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

the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[303]

Justice Kavanaugh's statement in *Paul* is much shorter and less developed than Justice Gorsuch's *Gundy* dissent. Nevertheless, Justice Kavanaugh's statement arguably suggests a different path forward from Justice Gorsuch's proposed standard.

Justice Kavanaugh read the Court's precedents as requiring Congress to either "(i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce."[304] He interpreted Justice Gorsuch's opinion as not allowing that second category of delegations.[305] But then Justice Kavanaugh offered his own very interesting twist on Justice Gorsuch's analysis by invoking the Court's major questions doctrine.[306]

In his *Gundy* opinion, after articulating and supporting his own three-part test for analyzing congressional delegations, Justice Gorsuch sought to suggest his new approach was in fact relatively commonplace by noting that the Court "still regularly rein[s] in Congress's efforts to delegate legislative power; we just call what we're doing by different names."[307] As support for that proposition, Justice Gorsuch offered a few examples, including the Court's "void for vagueness" doctrine and its rejection of line-item vetoes.[308] The very first example he offered, however, was the "major questions" doctrine.[309]

The major questions doctrine derives from a subset of the Court's *Chevron* jurisprudence. The Court generally has declared that legislative rules—i.e., rules or regulations that carry the force and effect of law—are eligible for *Chevron* deference.[310] On a few occasions, however, the Court has held otherwise when those legislative rules address so-called major questions.[311] The doctrine is most closely associated,

303 *Id.*

304 *Id.*

305 *Id.*

306 *Id.*

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

308 *Id.* at 2142.

309 *Id.* at 2141.

310 United States v. Mead Corp., 533 U.S. 218, 226–27, 229–30 (2001) (declaring that only agency actions that carry legal force are *Chevron*-eligible, and recognizing legislative rules adopted using notice-and-comment rulemaking as qualifying).

311 *See, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."

however, with the Supreme Court's 2015 decision in *King v. Burwell*.[312]

In *King*, the Court considered the validity of a general authority regulation interpreting Internal Revenue Code § 36B, which concerned the availability of certain tax credits under the Affordable Care Act.[313] As noted above, the Court's 2011 *Mayo Foundation* decision held that general authority regulations adopted by the Treasury Department and the IRS interpreting the Internal Revenue Code carry the force of law and are eligible for *Chevron* deference.[314] Nevertheless, writing for the Court in *King*, Chief Justice Roberts held that this particular regulatory interpretation was beyond the scope of *Chevron* review because it was "extraordinary."

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.[315]

Although *King* was not the first case in which the Court had suggested the possibility of extraordinary questions falling outside *Chevron*'s scope,[316] this paragraph in particular gave rise to what has come to be known in the *Chevron* lexicon as the major questions doctrine.[317]

(citation omitted) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000))); *Brown & Williamson*, 529 U.S. at 159 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."); *cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

312 576 U.S. 473 (2015). Justice Gorsuch also cited *Util. Air Regul. Grp.*, 573 U.S. 302, for this proposition.

313 *See King*, 576 U.S. at 483; Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378, 30,385 (May 22, 2012) (to be codified at 26 C.F.R. pts. 1, 602) (adopting regulations interpreting § 36B(b)(2)(A) and citing 26 U.S.C. § 7805 general authority to adopt needful rules and regulations as legal basis for doing so).

314 Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55–57 (2011); *see also supra* notes 247–48 and accompanying text (contextualizing this case).

315 *King*, 576 U.S. at 485–86 (citations omitted) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

316 *See* cases cited *supra* note 311.

317 For just a few of the many academic discussions of major questions doctrine, see gener-

According to the Court, some questions of statutory interpretation are too important to leave to agency resolution. It is unclear from *King* and other cases which or what combination of the factors listed by Chief Justice Roberts as relevant—namely, (1) centrality to the statutory scheme, (2) economic and political significance, and (3) implicating the agency's core expertise—puts a particular interpretation outside of *Chevron*'s scope.[318] Courts and commentators disagree over when a court should apply this rule.[319]

In *Gundy*, Justice Gorsuch mentioned major questions doctrine toward the end of his opinion as merely the first of several examples of the Supreme Court reining in the administrative state without expressly saying so.[320] By contrast, with his repeated references to "major policy questions" in *Paul*, Justice Kavanaugh arguably made the major questions doctrine a principal theme.[321] He characterized Justice Rehnquist's opinion in *The Benzene Case* as concluding "that major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch."[322] He even invoked the Court's major questions jurisprudence by name, though citing other cases from that line rather than *King v. Burwell*.

> [T]he Court has not adopted a nondelegation principle for major questions. But the Court has applied a closely related statutory interpretation doctrine: In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to

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ally Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018); Mila Sohoni, King*'s Domain*, 93 NOTRE DAME L. REV. 1419 (2018); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017).

318 *See* Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 61–62 (making this point).

319 *Compare, e.g.*, Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147 (2017) (justifying allowing lower courts to apply and develop major questions doctrine), *with* Coenen & Davis, *supra* note 317, at 779–80 (arguing that only the Supreme Court should apply the major questions doctrine).

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

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

322 *Id.*

> decide the major policy question and to regulate and enforce.[323]

It is always wise to take care against overreading a short passage in a statement respecting the denial of certiorari by a single Justice. Given Justice Kavanaugh's familiarity with and past commentary on the *Chevron* doctrine, however, his use of the major questions phraseology, plucked from an otherwise passing reference in Justice Gorsuch's *Gundy* dissent and accompanied by cases from the major questions line, seems more deliberate. A revised nondelegation doctrine that draws from *King* and other major questions cases would have just a little more clarity right off the bat than Justice Gorsuch's distinction between policy questions and details.

On the other hand, Justice Kavanaugh's invocation and description of major questions doctrine suggest a different emphasis for a revived nondelegation doctrine than Justice Gorsuch's approach. Justice Gorsuch's particular bugaboo with SORNA was the Court's inference of and reliance upon an open-ended and malleable concept like feasibility, to the detriment of the individual rights of a sex offender like Herman Gundy.[324] Although Justice Kagan's feasibility requirement in *Gundy* was inferred from, rather than explicit, in SORNA's text, given all of the statutes that do rely on words like feasible, reasonable, necessary, appropriate, and in the public interest, Justice Gorsuch's approach seems more internally focused on broad and open-ended statutory terms. By comparison, Justice Kavanaugh's reliance on major questions doctrine, with its emphasis on economic and political significance, is potentially more externally focused. Although Justice Kavanaugh did not say so explicitly, one wonders whether SORNA and regulating sex offenders would satisfy a standard that turns on economic and political significance.

C. Categorical Approaches

Irrespective of their differences, the alternatives offered by Justices Gorsuch and Kavanaugh as replacements for the intelligible principle standard share one thing in common: their analysis is very specific to the individual case, delegation provision, and statute at issue. Given the different types and sheer number of statutory delegations on the books, any approach that requires such individualized assessment will be limited in what it can accomplish, even if applied

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323 *Id.*

324 *See Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

aggressively. If the Court truly wants to prompt sweeping change through a new nondelegation doctrine, it certainly could do so, but it would need to act more categorically.

For example, the Court could adopt Philip Hamburger's argument that any statute that authorizes agencies to adopt legally binding rules and regulations unconstitutionally delegates legislative power.[325] According to Hamburger, all agency actions that bind the public, "whether rules, interpretations, adjudications, orders, or warrants," are exercises of either legislative or judicial power.[326] Because the Constitution vests "all legislative powers" granted therein to the United States government in the legislative branch, Congress cannot delegate those powers and the executive cannot exercise them. As regards the judicial power, Article III gives that power to the courts, and Congress cannot authorize the executive powers that Congress itself does not first possess.[327] Although Hamburger does not quite say so precisely, his interpretation of the Constitution would, by implication, nullify categorically most if not all statutes authorizing agencies to adopt legally binding rules and regulations and render the entirety of the Code of Federal Regulations merely advisory. The prominence of Hamburger's work notwithstanding, to date only Justice Thomas has suggested adopting his interpretation of the Constitution.[328]

Alternatively, but only somewhat less dramatically, the Court could overturn *Chevron*'s recognition of implicit delegations based on statutory ambiguity,[329] and return to the early twentieth-century consensus that general authority rulemaking grants that support legally binding rules and regulations categorically violate the Constitution's prohibition against delegating legislative power.[330] This position would retain rules and regulations adopted pursuant to express congressional authorization to fill a specifically identified statutory gap—and there

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325 HAMBURGER, *supra* note 34, at 2–3, 377–78. Hamburger labels congressional attempts to delegate legislative authority to the executive as "subdelegation," based on his theory that the original delegation of legislative power is from the people to Congress. *Id.* at 380–86.

326 *Id.* at 2–3.

327 *Id.* at 386–88.

328 *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 70–71 (2015) (Thomas, J., concurring in the judgment) (arguing that the Constitution does not allow the Executive to "formulate generally applicable rules of private conduct" and citing Hamburger's book several times as supporting his analysis). By comparison, Justice Gorsuch cited Hamburger's book in his *Gundy* dissent, but only for the proposition that the intelligible principle standard "sets a ludicrously low standard for what Congress must supply." *Gundy*, 139 S. Ct. at 2140 n.62 (Gorsuch, J., dissenting) (quoting HAMBURGER, *supra* note 34, at 378).

329 *See supra* Section II.D.

330 *See supra* Section II.B.

are plenty of rules and regulations that meet that definition. But agencies have adopted many other rules and regulations on the basis of general authority.[331] That subset of rules and regulations thus would become advisory under this categorical approach. Meanwhile, the legal effect of rules and regulations promulgated by agencies citing both specific and general authority or relying on hybrid delegations would become uncertain.[332]

Again, however, no Justice has raised the possibility of distinguishing between specific and general authority regulations in reforming the nondelegation doctrine. It was only a decade ago, in 2011, that the Court's *Mayo Foundation* decision expressly declined to treat general authority regulations differently from specific authority ones for *Chevron* purposes.[333] Also, I have argued elsewhere that, its rhetoric notwithstanding, the Court is unlikely to overturn *Chevron* deference and is more likely to curtail its scope,[334] as it has done in the past in cases like *United States v. Mead Corp.*[335] and as it did with respect to *Auer* deference in *Kisor v. Wilkie*.[336]

Recognizing the indeterminacy of at least Justice Gorsuch's proposed alternative to the intelligible principle standard, Michael Rappaport has offered a third approach that he contends is more definite and categorical, at least in the abstract.[337] He first segregates delegations into two tiers. The lenient tier concerns "traditional areas of executive responsibility, such as foreign and military affairs, spending, and the management of government property," for which he says the

331 Although not necessarily representative of all agencies, one study of 232 Treasury Department tax regulations found that, in one three-year period, 59.1% relied on general authority only and 40.9% cited a combination of specific and general authority. *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1751 (2007); *see also, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 306–07 (2013) (extending *Chevron* deference to an FCC general authority regulation); Sullivan v. Everhart, 494 U.S. 83, 87, 89 (1990) (granting *Chevron* deference to HHS rules issued under both specific and general authority).

332 *See supra* Section II.C.

333 *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 56–57 (2011).

334 *See, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 937 (2021); Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1443 (2017).

335 533 U.S. 218, 226–27 (2001).

336 139 S. Ct. 2400, 2415 (2019); *see also id.* at 2448 (Kavanaugh, J., concurring in the judgment) (observing that the majority opinion narrowed *Auer*'s scope and reduced the likelihood a court would defer).

337 Michael B. Rappaport, *A Two Tiered and Categorical Approach to the Nondelegation Doctrine*, in PETER WALLISON & JOHN YOO, THE NONDELEGATION DOCTRINE (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710048 [https://perma.cc/GG5J-3BHP].

Constitution places "no limits or weaker limits."[338] For other delegations, "which can be roughly summarized as rules that regulate citizens as to their private rights in the domestic sphere" and thus merit a stricter approach, Rappaport suggests distinguishing policymaking from "law interpretation, fact finding, and applying the law to the facts."[339] Delegations of policymaking discretion to agencies would be per se unconstitutional under Rappaport's new nondelegation doctrine; delegations requiring agencies to interpret laws, find facts, and apply the law to the facts would not be.[340] Rappaport's approach would also eliminate *Chevron* deference for interpretations of law because "*Chevron* deference is commonly understood as a delegation of policymaking authority to the executive."[341]

As Rappaport's approach generally would leave untouched delegations for foreign and military affairs, spending, and government property management, I will leave to others the merits and demerits of carving out those areas for special treatment. But his assertions regarding the relative ease of distinguishing between policymaking and interpretations of law, and between policymaking and fact finding, are more suspect. For although the categories that Rappaport outlines may seem distinct in theory, decades of real-world efforts to apply those categories in other doctrinal contexts prove otherwise.

Since 1984, when the Court's decision in *Chevron* drew a conceptual line between statutory clarity determined through the application of traditional tools of statutory interpretation and statutory ambiguity representing policymaking discretion, courts and scholars have disagreed over how to apply that distinction in practice. Over the past thirty-five years, judges and scholars have argued continually over how ambiguous a statute must be to trigger policymaking discretion and which interpretive tools to use in evaluating that ambiguity.[342] As then–Judge Brett Kavanaugh once observed,

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338 *Id.* at 2.

339 *Id.*

340 *See id.*

341 *Id.* at 15; *see also* Part II.D. (making this same point).

342 *See generally, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES (2014) (discussing the various approaches to statutory interpretation and advocating for reliance on congressional purpose and legislative history); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing KATZMANN, *supra*, and identifying points of disagreement reflecting his own perspective); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315 (2017) (describing changes in statutory interpretation and the judge's role in determining ambiguity); *see also* Bednar & Hickman, *supra* note 334, at 1418–41 (summarizing the debate over issues associated with determining clarity versus ambiguity in connection with *Chevron*'s two steps).

> [J]udges will often go back and forth arguing over this point. One judge will say that the statute is clear, and that should be the end of it. The other judge will respond that the text is ambiguous, meaning that one or another canon of construction should be employed to decide the case. Neither judge can convince the other. That's because there is no right answer.[343]

Of course, Kavanaugh was describing *Chevron* rather than nondelegation analysis. Nevertheless, the inquiry at the heart of *Chevron* is much the same as Rappaport's distinction between law interpretation and policymaking discretion. Rappaport attempts to demonstrate a clear line between legal interpretation and policymaking through an examination of four nondelegation cases: *Panama Refining*, *The Benzene Case*, *American Trucking*, and *Gundy*.[344] But those four examples pale in comparison to decades of judges failing to agree over how to distinguish mere legal interpretation from policymaking discretion as part of *Chevron* analysis.

As for a distinction between policymaking and fact finding, Rappaport suggests that "if an agency is required to make a decision genuinely based on facts, then that decision does not involve policymaking discretion."[345] Rappaport recognizes that some agency decisions are based upon legislative as opposed to adjudicative fact finding, although he labels legislative facts like whether a substance is dangerous to humans at high versus low exposure levels as "judgmental facts" rather than legislative facts.[346] Yet, as with statutory interpretation and policymaking discretion, the courts have been blurring the lines between fact finding and policymaking discretion since at least the 1980s.

In its 1983 decision in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[347] the Supreme Court held that the APA's arbitrary and capricious standard[348] requires agencies to justify their regulatory choices.[349] According to the Court, this includes drawing a "rational connection between

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343 Kavanaugh, *supra* note 342, at 2136 (footnote omitted).

344 *See* Rappaport, *supra* note 337, at 18–22.

345 *Id.* at 22–23.

346 *Id.* at 23; *see also* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 365–66 (1942) (offering the insight that there is a distinction between legislative and adjudicative facts and fact finding in the administrative process); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 232–34 (2018) (attributing the distinction to Davis in calling for its reexamination).

347 463 U.S. 29 (1983).

348 5 U.S.C. § 706(2)(A).

349 *State Farm*, 463 U.S. at 42–43.

the facts found and the choice made"[350] in addition to ascertaining whether the agency "offered an explanation for its decision that runs counter to the evidence before the agency."[351] *State Farm*-style arbitrary and capricious review plays an important role as a check on ensuring transparency and accountability in agency policymaking,[352] but it is hardly a bright line. Criticism of the *State Farm* line of cases abounds[353] as courts and agencies disagree, for example, over which facts matter and how to weigh them.[354] For that matter, the Court has recognized an overlap between *State Farm* analysis and statutory policy choice under *Chevron*.[355]

Rappaport is entirely correct about the indeterminacy of Justice Gorsuch's proposed alternative to the intelligible principle standard. As with Justice Kavanaugh's major questions model, one virtue of Rappaport's categories would be the courts' ability to draw substance and guidance from existing administrative law doctrine and jurisprudence, which could make Rappaport's approach at least somewhat clearer in its application from the outset.[356] Nevertheless, Rappaport is overly optimistic in suggesting that his replacement for the intelligible principle standard would be straightforward to apply. Instead, Rappaport's alternative—like those of Justices Gorsuch and Kavanaugh—seems more incremental than categorical and sweeping, and just as indeterminate.

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350 *Id.* at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

351 *Id.* at 43.

352 *See, e.g.*, Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. Rev. 721, 743–44 (2014).

353 *See, e.g.*, Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 Notre Dame L. Rev. 331, 349–55 (2016) (criticizing *State Farm* arbitrary and capricious review); Breyer, *supra* note 311, at 383–84 (same).

354 *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15, 549–52 (2009) (featuring disagreement between Justices Scalia and Breyer in the application of *State Farm* analysis); Mayor of Balt. v. Azar, 973 F.3d 258 (4th Cir. 2020) (en banc) (reflecting how divided the en banc Fourth Circuit was over the factual basis and justifications offered for an HHS rule regarding abortion referrals by physicians); Breyer, *supra* note 311, at 388–94 (offering examples demonstrating the interactivity of policymaking and fact finding in criticizing judicial review under *State Farm*).

355 *See*, *e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–27 (2016); Michigan v. EPA, 576 U.S. 743, 750–52 (2015); Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011).

356 Rappaport obviously does not see virtue in drawing from *Chevron* and *State Farm* jurisprudence to give the nondelegation doctrine greater heft, as his article is critical of those cases and his approach would effectively get rid of both. Nevertheless, it seems equally obvious to me that, if the Court were to categorize delegations as Rappaport suggests, it would find itself following the same analytical path as it has at the subconstitutional level under those precedents.

IV. Weighing Incremental and Symbolic Change

The goal of this Foreword is less to advocate or to reject replacing the intelligible principle standard than to question the expectation that doing so will have dramatic consequences for the regulatory state, for good or for ill. Given the omnipresence and variability of statutory delegations in contemporary American law and the Court's seeming preference for an incremental standard rather than a categorical one, substantial change through a revitalized nondelegation doctrine simply seems unlikely.

If the Court's current trajectory seems calibrated to avoid sweeping change, broad rhetoric notwithstanding, then what really is driving the move to replace the intelligible principle standard? Of course, if the Court actually makes such a move, then the terms of the standard it adopts and the language it uses to frame its choice will determine what happens next. But perhaps replacing one murky and case-dependent standard with another would be an exercise of constitutional symbolism, more important for what the Court has to say at that particular moment than for its actual impact (or lack thereof) on future jurisprudence. Legal scholars have perceived the Court on other occasions as making constitutional decisions for symbolic rather than practical reasons.[357] Arguably, given its history, the nondelegation doctrine itself has been mostly symbolic—eternally recognized by the Court, but only rarely applied, its power in its mere existence rather than its actual use.

If replacing the intelligible principle standard is, in fact, more about symbolic messaging than eviscerating the administrative state, then presumably, evaluations of that outcome should shift accordingly. Even in the realm of symbolic constitutional gestures, however, there are reasons to think that the nondelegation doctrine might not be the right choice for such a message. Based on the Court's current standards for reconsidering its precedents, the case for replacing the intelligible principle standard seems weak. Whatever one thinks about the intelligible principle standard, it has been stable and predictable for the better part of a century. A new nondelegation standard, no matter how incremental or infrequently applied, will yield some amount of uncertainty regarding the validity of innumerable statutory delegations as well as associated regulations and other agency pronouncement, at least in the short term. For private parties who have

357 *See, e.g.*, William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495, 498 (1986) (describing the Court's Establishment Clause jurisprudence in these terms).

organized their affairs in reliance on agency actions undertaken pursuant to delegated authority, the resulting legal uncertainty may be a large price to pay for the current Justices' perceptions of constitutional accuracy.

On the other hand, if the Justices' objective really is to curtail the administrative state, then one must ask whether the Court's current, incremental trajectory is the best option. As Justice Gorsuch's dissent in *Gundy* noted, the Court has other tools for limiting the scope of agency authority and overseeing agency action. Applying those doctrines may be less splashy and exciting than overturning a century of precedent, but may also be more effective at limiting what agencies can accomplish without congressional action.

A. Nondelegation as Constitutional Symbolism

With the possible exception of Philip Hamburger's absolutist model, finding a workable standard for determining when a particular piece of legislation assigns too much discretionary power to the executive branch is hard. Justice Antonin Scalia was of the view that it could not be done and that "the difficulty of enunciating how much delegation is too much" made the nondelegation doctrine unenforceable.[358] The Constitution may vest the legislative powers in the Congress and the executive power in the President, but it does not (and probably could not) define those terms precisely. Meanwhile, exercising the executive power has always entailed some amount of policymaking discretion.

Yet, on its own, the challenge of developing a coherent and robust replacement for the intelligible principle standard has never been a good reason for the Court not to try.[359] A key function of Supreme Court decision making is to construe and operationalize vague constitutional provisions like the vesting clauses and develop standards so that lower courts can resolve individual cases raising constitutional issues.[360] Ideally, one hopes that the standards the Court develops will

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358 Scalia, *supra* note 44, at 27; *see also* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[The nondelegation doctrine] is not . . . readily enforceable by the courts.").

359 *See, e.g.*, REDISH, *supra* note 43, at 136 ("[Nondelegation] difficulties should be no greater than those facing the Court in attempting to delineate the scope of numerous other constitutional concepts.").

360 *See, e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103–08 (2010) (recognizing that constitutional decision making frequently requires courts to "translate the semantic content of the constitutional text (its linguistic meaning) into the legal content of constitutional doctrine (or rules of constitutional law)").

lead to a certain amount of consistency and predictability in judicial decision making. But uncertainty in the application of doctrinal standards in constitutional law cases often seems more the norm than the exception.[361]

Although Justice Scalia was no fan of the nondelegation doctrine, he nevertheless supported the idea of invalidating an occasional statute just to remind Congress of the importance of legislative, rather than executive, policymaking.[362] "[E]ven those who do not relish the prospect of regular judicial enforcement of the unconstitutional delegation doctrine might well support the Court's making an example of one—just one—of the many enactments that appear to violate the principle," he suggested optimistically, because "[t]he educational effect on Congress might well be substantial."[363]

Courts and scholars have often recognized that Supreme Court decisions interpreting the Constitution may have symbolic value apart from their immediate practical import.[364] Akhil Amar has written about the symbolic import of *Brown v. Board of Education*,[365] as compared with the Court's more muted and "middle course" implementation of its teachings.[366] Bill Marshall has argued the Court's Establishment Clause jurisprudence is best understood as "primarily 'symbolic' and not 'substantive,' that is, concerned less with the substantive goal of limiting certain types of government involvements and supports of religion than with eliminating the perception of improper government action."[367]

The separation of powers is another area in which recent Supreme Court decisions arguably have been more symbolic than substantive in this way, honoring a more formalist understanding of the Constitution without substantially altering administrative governance. After decades of supporting extensive legislative creativity in the con-

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361 *See* REDISH, *supra* note 43, at 137 ("Few, if any, of the Supreme Court's modern constitutional doctrines meet [standards of certainty and predictability].").

362 *See, e.g.*, Scalia, *supra* note 44, at 27 (arguing that "the difficulty of enunciating how much delegation is too much" made the nondelegation doctrine unenforceable).

363 *Id.* at 28.

364 *See, e.g.*, Christopher E. Smith, *Law and Symbolism*, 1997 DET. COLL. L. MICH. ST. U. L. REV. 935, 940–43 (describing the symbolic nature of some judicial decision making).

365 347 U.S. 483 (1954).

366 AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 264–70 (2012).

367 Marshall, *supra* note 357, at 498; *cf.* William P. Marshall, *The* Lautsi *Decision and The American Establishment Clause Experience: A Response to Professor Weiler*, 65 ME. L. REV. 769, 773 (2013) ("[The Court's] incoherent [Establishment Clause] jurisprudence may not necessarily be simply unprincipled decision-making. Rather, . . . it may reflect a deeper understanding that a wholesale adoption of the American nonestablishment principle would be problematic.").

text of agency design through functionalist reasoning, the Court seemed to hit the brakes sharply in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[368] when it declared that the structure of the Public Company Accounting Oversight Board ("PCAOB") violated separation of powers by imposing two layers of for-cause removal restrictions for PCAOB members.[369] Chief Justice Roberts's opinion for the Court was rhetorically grand, quoting James Madison on the importance to the Constitution's structure of the President's authority to oversee the execution of the laws,[370] emphasizing the critical role of the removal power as a tool of presidential oversight of the executive branch, and lamenting the tremendous imposition of for-cause removal restrictions on the President's ability to fulfill his constitutional responsibilities.[371] "The people do not vote for the 'Officers of the United States.' . . . Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'"[372]

Lofty rhetoric notwithstanding, the practical impact of the Court's *Free Enterprise* decision for regulated parties was limited, principally due to the Court's choice of remedy for the constitutional violation. The petitioners in *Free Enterprise* had asked the Court to declare all of the statutory provisions creating and empowering the PCAOB unconstitutional and to enjoin the PCAOB from exercising any of its statutory powers.[373] Had the Court done so, Congress would have been forced to address the PCAOB's structure statutorily before the agency could continue its operations. Instead, the Court merely severed the offending removal restriction from the statute and then sent the case back to the agency for reconsideration under the now-constitutionally acceptable structure.[374] The regulated party who challenged the PCAOB won the case, but the agency did not skip a beat in

368 561 U.S. 477 (2010).

369 *Id.* at 484.

370 *Id.* at 492.

371 *See id.* at 496–97.

372 *Id.* at 497–98 (citations omitted) (first quoting U.S. CONST. art. II, § 2, cl. 2; and then quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961)).

373 *See id.* at 508; Joint Appendix at 71, *Free Enter. Fund*, 561 U.S. 477 (No. 08-861); *see also* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 160–63 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting) (supporting this remedy in another, similar agency design case), *abrogated by* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

374 *Free Enter. Fund*, 561 U.S. at 508–10.

continuing to pursue enforcement until settling with the regulated party who initiated the case several months later.[375]

The Court's subsequent decision in *Seila Law v. Consumer Financial Protection Bureau*[376] reflects this same pattern: declaring the Consumer Financial Protection Bureau ("CFPB") unconstitutional on separation of powers grounds as an independent agency headed by a single director,[377] but resolving the constitutional difficulty by severing from the relevant statute a for-cause limitation on the President's ability to remove the director from office and remanding the case for reconsideration.[378] After the Court's decision, the CFPB's then–Director simply ratified the agency's earlier action, and the Ninth Circuit upheld that action as valid.[379] Again, the challenging party won the case at the Supreme Court, but with little practical effect for agency operations.

Lower courts have followed the Supreme Court's lead in this regard. They recognize agency structures as constitutionally flawed, but then resolve the difficulty by severing statutory removal restrictions and allowing the agencies in question otherwise to continue functioning as usual.[380]

Justice Gorsuch's dissenting opinion in *Gundy* followed a similar pattern with respect to the nondelegation doctrine. He spoke expansively about liberty, popular sovereignty, and protecting minority rights from "the tyranny of the majority."[381] He quoted Hamilton, Madison, Chief Justice John Marshall, and John Locke.[382] Then he proposed a standard for effectuating nondelegation principles that

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375 *See* Michael Cohn, *Beckstead and Watts Settles Inspection Case with PCAOB*, ACCT. TODAY (Feb. 23, 2011, 2:32 PM), https://www.accountingtoday.com/news/beckstead-and-watts-settles-inspection-case-with-pcaob [https://perma.cc/77EU-Q557].

376 140 S. Ct. 2183 (2020).

377 *Id.* at 2197.

378 *Id.* at 2209–11 (plurality opinion); *id.* at 2245 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

379 Consumer Fin. Prot. Bureau v. Seila L. LLC, 984 F.3d 715, 718 (9th Cir. 2020).

380 *See, e.g.*, Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1340–41 (D.C. Cir. 2012); PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 8 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018). Although the en banc D.C. Circuit in *PHH* later reversed the panel's decision, then–Judge Kavanaugh wrote sweepingly on separation of powers principles at the panel stage to find the CFPB's structure unconstitutional, but then resolved the issue by severing the statutory removal power restriction, citing *Free Enterprise Fund*. *See PHH*, 839 F.3d at 8.

381 Gundy v. United States, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting).

382 *See id.*

seems limited in its potential real-world impact by its indeterminacy and its incrementalism.[383]

Yet, *Gundy* and the nondelegation doctrine also differ in a very key way from the Court's other recent separation of powers cases. In *Free Enterprise Fund* and *Seila Law*, the Court pointedly disclaimed that it was overturning past precedent.[384] Even if legal scholars question the accuracy of that assertion,[385] the Court benefitted in this regard from the relative paucity and murkiness of its jurisprudence with respect to agency design questions.[386] By contrast, the Justices would revitalize the nondelegation doctrine by explicitly overturning the century-old intelligible principle standard, which has been applied numerous times with consistent effect.[387] Replacing the intelligible principle standard outright would inevitably raise doubt regarding the validity of past nondelegation decisions applying that standard, and likewise the constitutionality of the statutes those decisions upheld. Such a comprehensive reversal likely would generate both strong positive and negative reactions—reflecting, and perhaps exacerbating, our present political polarization as well as concerns about the Court's political credibility.

Neither the lack of immediate practical impact nor political concerns necessarily should dissuade the Court from enforcing its understanding of the Constitution and separation of powers principles. Even if replacing the intelligible principle standard is more symbolic

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383 *See supra* Section III.A (describing Justice Gorsuch's *Gundy* dissent).

384 *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010); Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2206 (2020).

385 *See, e.g.*, Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439, 442 (2021) ("Although *Seila*'s unitarian premises flatly contradict [*Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988)], the Chief Justice went to some trouble to distinguish and narrow them rather than expressly overrule them."); Howard Schweber, *The Roberts Court's Theory of Agency Accountability: A Step in the Wrong Direction*, 8 BELMONT L. REV. 460, 482–83 (2021) ("Where another reader might have perceived a shifting landscape of competing principles, adjustments to new conditions, movement in one direction or another over time, and an undertheorized set of underlying justifications . . . , Roberts saw no such ambiguities."); Ilan Wurman, *The Removal Power: A Critical Guide*, CATO SUP. CT. REV., 2019–2020, at 157, 201–02 (observing that "the reasoning of *Humphrey*'s has been abandoned" while acknowledging that the Court in *Seila Law* declined to overturn it).

386 *See, e.g.*, Linda D. Jellum, *"You're Fired!" Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 GEO. MASON L. REV. 705, 709 (2019) (acknowledging that the Supreme Court's removal power cases have been inconsistent, with their only clear pattern being the variability of their reasoning); Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1350 (2012) (describing the Court's removal power jurisprudence as "incoherent," "inconsistent," and "ad hoc").

387 *See supra* Part I (summarizing nondelegation jurisprudence).

than substantive, there is power in symbolism—particularly in the context of constitutional separation of powers.

Drawing from personal anecdote, I have suggested elsewhere that many Americans understand the organization and operation of the federal government in fairly formalist terms, at least in part due to how the three branches are taught in K–12 schools.[388] The legislative branch (Congress) enacts laws. The executive branch (the President, not the bureaucracy) executes and enforces laws. The judicial branch (the Supreme Court) decides individual cases and, in doing so, interprets laws and protects rights. Elected government officials are politically accountable to the people who elect them, in a way that unelected government officials are not.[389] Judges are the least political branch.[390] Of course, reality is more complicated. Judges, lawyers, and scholars analyze, debate, and appreciate the nuances and complexities of American government. But most Americans are not judges, lawyers, or scholars. Hence, some degree of formal adherence to separation of powers principles carries with it a certain symbolism that hits many ordinary people at a visceral level and contributes to perceptions of the fairness and legitimacy of government.[391]

We may have had delegation of policymaking discretion to the executive branch to varying degrees since the founding era, but agencies staffed mainly by unelected officials have always fit a little oddly with the Constitution's tripartite structure. Any teacher of administrative law can attest that even law students often have very little understanding of what agencies actually do, notwithstanding the tremendous role that they play in governing the nation. It is hardly surprising that some percentage of the American public seems skeptical of the breadth of agency policymaking. On the other hand, there is little evidence of consensus regarding the particular agencies or government programs to be eliminated by the courts via the nondelegation doctrine. Thus, a carefully chosen case and calibrated judicial opinion that replaces the intelligible principle standard with an equally malleable alternative standard could send a signal to the disaffected that the Supreme Court recognizes their concerns while not, in fact, changing facts on the ground all that much.

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388 *See* Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1496 (2018); *see also, e.g.*, *Schoolhouse Rock!: Three Ring Government* (ABC television broadcast Mar. 13, 1979) (describing the three branches of government and using graphics showing the branches as entirely separate, even if checking one another).

389 *See* Hickman, *supra* note 388, at 1497.

390 *See id.*

391 *See id.*

B. Stare Decisis and Subconstitutional Alternatives

The question, therefore, is whether there are countervailing reasons for avoiding the symbolic constitutional gesture. Stare decisis concerns and the availability of subconstitutional alternatives to curtail agency discretion suggest that a mostly symbolic resurrection of the nondelegation doctrine may not be the best move.

Stare decisis principles counsel against overturning precedent in order to "promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process."[392] When a standard it develops has proven not to work as intended, then the Court has felt free to replace it—notwithstanding its adherence otherwise to stare decisis principles.[393] "*Stare decisis* is not an inexorable command . . . ."[394] This is particularly true with respect to constitutional questions, where the Court is the ultimate arbiter of the Constitution's meaning and the only other way to correct its errors is a laborious amendment process.[395] Yet, the Court also takes into account the reliance interests at stake.[396] The mere fact that a majority of the Court now appears to disagree with the intelligible principle standard arguably is not a sufficient justification to set it aside.[397]

Whether a standard is considered workable for stare decisis purposes generally turns not on whether it achieves certain outcomes but rather on whether it leads to predicable results as opposed to legal uncertainty.[398] For example, in *Janus v. American Federation of State,*

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392 Gamble v. United States, 139 S. Ct. 1960, 1969 (2019) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

393 *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2481 (2018) (discussing workability as a factor in stare decisis analysis); *Payne*, 501 U.S. at 827 ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944))); *cf.* Montejo v. Louisiana, 556 U.S. 778, 792 (2009) (recognizing workability as a key factor in deciding whether to retain precedent, even where the alternative is theoretically superior).

394 *Payne*, 501 U.S. at 828; *Janus*, 138 S. Ct. at 2478 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009), and citing several other cases for the same proposition).

395 *See, e.g.*, *Gamble*, 139 S. Ct. at 1981–86 (Thomas, J., concurring) (developing this argument at length); *Janus*, 138 S. Ct. at 2478 (making the same point); Agostini v. Felton, 521 U.S. 203, 235 (1997) (same); *Allwright*, 321 U.S. at 665 (same).

396 *See, e.g.*, *Payne*, 501 U.S. at 828.

397 *See* Alleyne v. United States, 570 U.S. 99, 133 (2013) (Alito, J., dissenting) (making this point).

398 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (describing certain rules as "intolerable simply in defying practical workability").

County, & Municipal Employees, Council 31,[399] the Court described the standard under consideration as unworkable because the line it attempted to draw was "impossible to draw with precision," and the resulting unpredictability simply prompted more litigation.[400] By comparison, as toothless as the intelligible principle standard has been as a means of curtailing congressional delegations of agency policymaking discretion, the Court has applied it consistently for a very long time. Predictability alone may be inadequate to justify preserving some constitutional precedents, particularly if retaining them would lead to what the Court considers to be manifestly unjust outcomes. For example, the Court's decision in *Ramos v. Louisiana*[401] to overturn precedent and interpret the Sixth Amendment as requiring unanimous jury verdicts in state criminal trials must have been influenced by the associated prospect of long prison sentences notwithstanding some jurors' doubts of a defendant's guilt.[402] Although separation of powers principles speak ultimately to liberty concerns as well—"[c]oncentration of power in the hands of a single branch is a threat to liberty"[403]—the link between the intelligible principle standard and liberty is more attenuated.

Reliance interests are also at stake in the debate over the nondelegation doctrine. The Supreme Court has upheld decades of broad delegations of administrative policymaking discretion against constitutional challenge.[404] Agencies have promulgated regulations exercising delegated power.[405] Agencies have issued orders based on those regulations or directly in the exercise of delegated power.[406] Private actors have organized their primary behavior accordingly.

In his *Gundy* dissent, Justice Gorsuch seemed to recognize the stare decisis concerns and reliance interests at stake. In the midst of

399 138 S. Ct. 2448 (2018).

400 *Id.* at 2481.

401 140 S. Ct. 1390 (2020).

402 *See id.* at 1408.

403 Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

404 *See supra* Part I (summarizing the Court's nondelegation jurisprudence).

405 According to statistics compiled by the Regulatory Studies Center, as of 2019, the Code of Federal Regulations ran just under 186,000 pages. *See Total Pages Published in the Code of Federal Regulations*, GEO. WASH. U. REGUL. STUD. CTR. (July 9, 2020) https://regulatorystudies.columbian.gwu.edu/reg-stats [https://perma.cc/JYT7-DLZR].

406 Longstanding Supreme Court doctrine allows agencies with both rulemaking and adjudicatory powers to choose between formats when making policy, meaning that some agencies exercise delegated power through adjudicatory orders as well as legally binding regulations. *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). Other agencies possess policymaking discretion but lack rulemaking authority so those agencies exercise delegated power through adjudicatory orders only. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999).

disparaging the intelligible principle standard, he paused briefly to acknowledge that "the scope of the problem can be overstated. At least some of the results the Court has reached under the banner of the abused 'intelligible principle' doctrine may be consistent with more traditional teachings. Some delegations have, at least arguably, implicated the president's inherent Article II authority."[407] He also conceded that "what qualifies as a detail can sometimes be difficult to discern," and that the Court has "upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct."[408] These pronouncements do more than signal that Justice Gorsuch's inclination is to be more incremental than sweeping. They also represent suggestions that the Court will preserve its past conclusions regarding the constitutionality of individual statutes even as it replaces the intelligible principle standard.

It is worth noting as well that reinvigorating the nondelegation doctrine is not the only way to curtail agency discretion or actions that the Court finds excessive. Justice Gorsuch recognized as much in his *Gundy* dissent:

> When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.[409]

Justice Gorsuch identified the vagueness doctrine under the Due Process Clause as one tool the Court uses for this purpose and the major questions doctrine from the Court's *Chevron* jurisprudence as another.[410]

For that matter, the *Chevron* doctrine itself arguably serves the goal of curtailing agency discretion by limiting agencies to actions authorized by the statute's terms[411] and by requiring agency policymak-

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407 Gundy v. United States, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting).

408 *Id.* at 2143.

409 *Id.* at 2141 (footnote omitted).

410 *Id.* Although Justice Gorsuch did not mention the *Chevron* decision itself in discussing the major questions doctrine, he cited several other cases in which the Court applied or discussed *Chevron* deference. *Id.* at 2141–42 nn.69–73; *see also supra* Section III.B (describing the major questions doctrine in conjunction with Justice Kavanaugh's statement in *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.)).

411 *See* City of Arlington v. FCC, 569 U.S. 290, 297 (2013) ("[T]he question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."); *see also, e.g.*, Util.

ing to be reasonable, both substantively and procedurally.[412] I have argued elsewhere that the APA, with all of its various procedural and process requirements as well as robust judicial review for agency actions, is a key reason that the Supreme Court has been as lax as it has in applying the nondelegation doctrine.[413] I have suggested above that contemporary intelligible principle analysis is an exercise in statutory interpretation, which means that canons of statutory construction—including but not limited to the constitutional avoidance canon—also serve nondelegation goals by allowing courts to limit the scope of agency discretion.[414]

Perhaps relying on statutory requirements, canons of statutory construction, and other legal doctrines to curtail administrative authority is less transparent than declaring a particular delegation unconstitutional, or perhaps not. Certainly, invoking a canon of construction to interpret a statutory delegation of policymaking discretion narrowly, or invalidating a particular agency action as substantively or procedurally unreasonable under the *Chevron* doctrine or the APA, is less dramatic than declaring all or part of a congressionally-enacted statute unconstitutional. These alternative approaches lack the symbolic punch of a revitalized nondelegation doctrine. But their comparative subtlety may lead courts to apply them more often. If the Justices' goal really is to rein in the administrative state and reduce Congress's reliance on executive branch policymaking, rather than to make a symbolic gesture, then existing statutory and doctrinal alternatives may be more effective at accomplishing that objective.

Air Regul. Grp. v. EPA, 573 U.S. 302, 321 (2014) ("Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.' And reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" (alteration in original) (citations omitted) (first quoting City of Arlington v. FCC, 569 U.S. at 296; and then quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997))).

412 *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–27 (2016) (rejecting *Chevron* deference for agency interpretation due to inconsistency and lack of reasoned explanation); Michigan v. EPA, 576 U.S. 743, 750–54 (2015) (declining *Chevron* deference for agency interpretation lacking adequate cost-benefit analysis).

413 *See* Kristin E. Hickman, *The Promise and Reality of U.S. Tax Administration*, *in* THE DELICATE BALANCE: TAX, DISCRETION AND THE RULE OF LAW 39, 45 (Chris Evans et al. eds., 2011).

414 *See supra* notes 125–26 and accompanying text; *see also, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330–37 (2000) (identifying several other canons as serving the function of the nondelegation doctrine).

Conclusion

If this Foreword seems ambivalent, it likely is because I have mixed feelings about efforts to reinvigorate the nondelegation doctrine. I am persuaded that the intelligible principle standard is a failure as a matter of constitutional construction and that contemporary delegations exceed what the framers anticipated and the Constitution's text contemplates, but reasonable people can and do disagree. The intelligible principle standard as it has been applied would not be my first choice for effectuating the Constitution's separation of powers principles, but it is well established. In contemplating the nondelegation doctrine, the Court is not starting with a blank slate. Should the Court replace the intelligible principle standard, I suspect it will do so at some cost and with little actual payoff. The potential for that outcome gives me pause.

Nevertheless, it is equally apparent (to me, at least) that predictions about what a new nondelegation doctrine will achieve—whether for good or for ill—are overblown. Diving beneath some of the judicial rhetoric and tone, once one compares the alternative standards being proposed with a more comprehensive understanding of delegations on the ground, the likelihood that a new nondelegation doctrine will dramatically alter the administrative state seems remote. My fervent hope is that recognizing this reality may reduce the heat and intensity of the debate, which would be to everyone's benefit.