

THE *GRAY* AREA: FINDING IMPLICIT DELEGATION TO AGENCIES AFTER *LOPER BRIGHT*

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In Loper Bright v. Raimondo, the Supreme Court overruled Chevron v. Natural Resources Defense Council and repudiated Chevron's across-the-board presumption that statutory ambiguities should be treated as implied delegations of discretion to agencies. But Loper Bright did not repudiate the possibility that a court might properly find implied delegation in some cases. How should a court identify such cases? Loper Bright did not offer much guidance. In the coming years, a central project of administrative law will be articulating, elaborating, and refining the doctrine that is to govern this inquiry.

This Article argues that the canonical pre-Chevron cases Gray v. Powell and NLRB v. Hearst Publications, Inc. together with their antecedents and progeny, provide a useful framework for distinguishing those interpretive questions on which courts ought to find implicit delegations to agencies from those issues that are for the courts to decide without deference. The Gray doctrine establishes a presumption that, when a statute empowers an agency to take some authoritative action which necessarily involves the application of an imprecise statutory term to particular situations, the statute should be read as implicitly delegating to the agency the authority to make the necessary line-drawing decisions. At the same time, the Gray doctrine does not call for judicial deference to an agency's views on the resolution of interpretive questions that can be answered through abstract textual or structural analysis.

Courts can and should incorporate the Gray doctrine into the implicit delegation prong of the Loper Bright framework. Doing so would be both legal—consistent with the Administrative Procedure Act as interpreted by Loper Bright—and desirable. The Gray doctrine provides a structured, workable method—one well-grounded in decades of pre-

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Chevron case law—for deciding when a finding of implicit delegation is appropriate. Integrating Gray into Loper Bright would achieve a more appropriate allocation of authority between the judicial and executive branches than would alternative and more restrictive approaches to Loper Bright’s implicit delegation prong.

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INTRODUCTION

This Article is a contribution to the burgeoning literature on the implications of the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*.¹

1. 144 S. Ct. 2244 (2024). For some examples of the rapidly proliferating literature on the *Loper Bright* decision and its ramifications, see, for example, Jack M. Beermann, *Chevron Deference Is Dead, Long Live Deference*, 2024 CATO SUP. CT. REV. 31; Bernard W. Bell, *Loper Bright: Resurrecting Skidmore in a New Era*, 55 SETON HALL L. REV. 1577 (2025); Eric R. Bolinder, *Litigating Loper Bright: Interpretive Challenges and Solutions for the Post-Chevron Era*, 128 W. VA. L. REV. 219 (2025); Lisa Schultz Bressman, *Lower Courts After Loper Bright*, 31 GEO. MASON L. REV. 499 (2024); Lisa Schultz Bressman, *The Ordinary Questions Doctrine*, 92 GEO. WASH. L. REV. 985 (2024); Christine Kexel Chabot, *Nondelegation Under Loper Bright*, LOY. U. CHI. L.J. (forthcoming 2026); Cary Coglianese & David B. Froomkin, *Loper Bright’s Disingenuity*, 174 U. PA. L. REV. 91 (2025); Cary Coglianese & Daniel E. Walters, *The Great Unsettling*:

The specific question this Article takes up concerns when courts should continue to find, post-*Loper Bright*, that unclear statutory language ought to be treated as an implicit delegation of discretion to the responsible administrative agency. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,² reviewing courts *presumed* that such ambiguities were implicit delegations, so long as the case fell within *Chevron*'s domain.³ In overruling *Chevron*, *Loper Bright* repudiated this across-the-board presumption.⁴ But *Loper Bright* did not repudiate the possibility that a court might properly find implied delegation in some cases. Indeed, notwithstanding *Loper Bright*'s insistence that reviewing courts must exercise "independent judgment" when determining statutory meaning,⁵ the Court expressly acknowledged that sometimes vague or open-ended statutory language should be treated as an implicit delegation to the agency.⁶ Although *Loper Bright* declared that "statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning,"⁷ the Court also recognized that sometimes the "best reading of a statute is that it

Administrative Governance After Loper Bright, 77 ADMIN. L. REV. 1 (2025); Robin Kundis Craig, *The Impact of Loper Bright v. Raimondo: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671 (2025); Adam Crews, *Navigating the New Loper Bright Regime*, 34 WIDENER COMMONWEALTH L. REV. 43 (2025); Anuj C. Desai, *Loper Bright as Jurisprudence: Institutional Choice and the Expressive Value of the Law*, 67 ARIZ. L. REV. 585 (2025); Renee Farmer & Daniel G. Aaron, *Loper Bright's Deregulatory Synergies*, 55 SETON HALL L. REV. 1697 (2025); Abbe R. Gluck, *Overruling Chevron Without a Coherent Theory of Statutory Interpretation and the Court-Congress Relationship*, 62 HARV. J. ON LEGIS. 20 (2024); Donald L. R. Goodson, *Discretion Is Not (Chevron) Deference*, 62 HARV. J. ON LEGIS. 12 (2024); Kristin E. Hickman & Amy J. Wildermuth, *Harmonizing Delegation and Deference After Loper Bright*, 100 N.Y.U. L. REV. 1924 (2025); Sapna Kumar, *Scientific and Technical Expertise After Loper Bright*, 74 DUKE L.J. 1749 (2025); Gary Lawson, "Then What?": *A Framework for Life After Chevron*, 60 WAKE FOREST L. REV. 57 (2025); Thomas W. Merrill, *The Demise of Deference—And the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227 (2024) [hereinafter Merrill, *The Demise of Deference*]; Haley Proctor, "One Step Too Many": *Deference in Bruen, Loper Bright, and Rahimi*, 78 SMU L. REV. 369 (2025); Edward L. Rubin, *Chevron Was Not, and Cannot Be, Overruled: The Dullness of Loper Bright*, 20 DUKE J. CONST. L. & PUB. POL'Y 31 (2025); Catherine M. Sharkey & Ian Pultz-Earle, *Out from Under the Guise of Judicial Review*, 78 ADMIN. L. REV. 3 (forthcoming Sept. 2026); Mila Sohoni, *Chevron's Legacy*, 138 HARV. L. REV. F. 66 (2025); Cass R. Sunstein, *Our Marbury: Loper Bright and the Administrative State*, 74 DUKE L.J. 1893 (2025) [hereinafter Sunstein, *Our Marbury*]; Adrian Vermeule, *The Old Regime and the Loper Bright "Revolution,"* 2024 SUP. CT. REV. 235 (2025).

2. 467 U.S. 837 (1984).

3. On the scope of *Chevron*'s domain, see *infra* text accompanying notes 33–35.

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

5. *Id.* at 2257–58, 2262–63, 2265, 2269–70, 2273.

6. *Id.* at 2262–63.

7. *Id.* at 2266.

delegates discretionary authority to an agency.”⁸ In those cases, *Loper Bright* made clear, judicial *deference to* (not merely *respect for*) an agency’s reasonable statutory construction is still appropriate.⁹

How should a court identify such cases? *Loper Bright* offered a few clues, but only a few. In the brief passage where the Court acknowledged the possibility that a statute might implicitly delegate discretion to the agency, the opinion noted that some statutes “empower an agency to prescribe rules to ‘fill up the details’ of [the] statutory scheme,”¹⁰ and further observed that in some cases a statute will instruct an agency “to regulate subject to the limits imposed by a term . . . that leaves agencies with flexibility, such as ‘appropriate’ or ‘reasonable.’”¹¹ Beyond that, *Loper Bright* did not offer much guidance as to when a finding of implicit delegation is appropriate.

In the coming years, lower courts are likely to confront hundreds of cases in which one party (typically the agency) asserts that the statutory language at issue “leaves [the] agenc[y] with flexibility,” while the adverse party insists that this statutory language, though perhaps not crystal clear, has a single best meaning that the court must determine through the exercise of independent judgment.¹² How should courts resolve these disputes? A central

8. *Id.* at 2263.

9. *See id.* at 2263–64; *see also* *Seven Cnty. Infrastructure Coal. v. Eagle County*, 145 S. Ct. 1497, 1511–12 (2025).

10. *Loper Bright*, 144 S. Ct. at 2263 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

11. *Id.* (internal citation and quotation marks omitted); *see also Seven Cnty.*, 145 S. Ct. at 1512 (indicating that “significant” and “feasible” are terms that imply delegation to the responsible agency, and that reviewing courts should therefore defer to the agency’s judgment regarding when those criteria are satisfied).

12. *Loper Bright*, 144 S. Ct. at 2263 (citation omitted). Such cases have already started to appear. *Compare, e.g.*, (Corrected) Appellant’s Opening Brief at 43–44, *Munro v. U.S. Copyright Off.*, No. 24-5136 (D.C. Cir. Mar. 18, 2025), 2025 WL 857786, at *43–44 (arguing that because *Loper Bright* “insisted that courts must always exercise independent judgment in determining the meaning of a statute,” the District Court should not have “deferred to the Copyright Office’s (mis)interpretations of” the meaning of the term “originality” in the Copyright Act), *with* Brief for Appellees at 37–38, *Munro v. U.S. Copyright Off.*, No. 24-5136 (D.C. Cir. May 14, 2025), 2025 WL 1411383, at *37–38 (asserting that because *Loper Bright* confirmed that “the best reading of a statute [may be] that it delegates discretionary authority to an agency,” the District Court was correct to defer to the Copyright Office’s judgment that appellant’s work was not “original” within the meaning of the Act, and arguing more generally that “[t]he application of a settled legal standard to facts does not implicate *Loper Bright*” (citation omitted)). *Compare* Opening Brief for Petitioners at 25, 30, *Chamber of Com. v. EPA*, No. 24-1193 consolidated with Nos. 24-1261, 24-1266, 24-1271, 24-1272 (D.C. Cir. Nov. 4, 2024), 2024 WL 4679007, at *25, *30 (insisting that under *Loper Bright*, the court must review

project of administrative law over the next decade (or more) will be articulating, elaborating, and refining the doctrine that is to govern this inquiry post-*Loper Bright*—in much the same way that a central preoccupation of post-1984 administrative law was fleshing out the contours of the *Chevron*

de novo EPA’s interpretation of the phrase “may present substantial danger” in the provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) that authorizes EPA to designate “hazardous substances” (citation omitted), *with* Brief for U.S. EPA at 28–29, *Chamber of Com. v. EPA*, No. 24-1193 consolidated with Nos. 24-1261, 24-1266, 24-1271, 24-1272 (D.C. Cir. Jan. 17, 2025), 2025 WL 239015, at *28–29 (acknowledging that under *Loper Bright* the court must determine the best reading of the statute, but arguing that the best reading of CERCLA is that it delegates to EPA the authority to determine whether a given substance is “hazardous” within the meaning of the statute). *Compare* Brief for the NLRB at 17–18, *NP Red Rock LLC v. NLRB*, Nos. 24-1240, 24-1221, 24-1239 (D.C. Cir. Apr. 7, 2025), 2025 WL 1040941, at *17–18 (emphasizing that *Loper Bright* “reaffirmed that Congress may enact specific statutes granting discretionary authority to agencies tasked with prescribing rules to fill up the details of a statutory scheme,” and that the court should therefore defer to reasonable NLRB rules that fill the interstices of broad statutory provisions (internal quotation marks, alteration, and citation omitted), *with* Reply Brief of Petitioner at 5, *NP Red Rock LLC v. NLRB*, Nos. 24-1221, 24-1239, 24-1240 (D.C. Cir. Apr. 7, 2025), 2025 WL 1040943, at *5 (claiming that *Loper Bright* “did not limit its reach to an agency’s interpretation of the law—it also foreclosed judicial deference to an agency’s application of the law to the facts”).

While this Article was in production, the Supreme Court heard arguments in *Urias-Orellana v. Bondi*, which raised a closely related issue. In *Urias-Orellana*, the Court is reviewing a Board of Immigration Appeals (BIA) determination that the threats and assaults that the petitioner, a noncitizen asylum seeker, had experienced in his home country did not count as “persecution” within the meaning of the relevant portion of the Immigration and Nationality Act. Importantly, the BIA did not dispute the veracity of the petitioner’s testimony. The case therefore raises the question whether, when reviewing an agency’s decision as to whether an uncontested set of historical facts satisfies a legal standard, *Loper Bright* requires the reviewing court to decide the issue de novo, or whether the court should apply the more deferential “substantial evidence” standard of review. *Compare* Brief for Petitioners at 16, *Urias-Orellana v. Bondi*, No. 24-777 (U.S. Aug. 27, 2025), 2025 WL 2532581, at *16 (asserting that *Loper Bright*’s insistence on independent judicial determination of legal questions “extends to statutory determinations made by the BIA as to whether a given set of undisputed facts qualifies as ‘persecution’ under the law”), *with* Brief for Respondent at 16, 46, *Urias-Orellana v. Bondi*, No. 24-777 (U.S. Oct. 9, 2025), 2025 WL 2916069, at *16, *46 (contending that *Loper Bright* does not require de novo review for “fact-bound applications of law to facts” as distinct from “pure legal questions,” and that requiring de novo review in the former situation would be “unworkable,” as it “would subject . . . almost all federal agencies[] to second-guessing of virtually every substantive, fact-bound decision other than discrete findings of historical facts”).

doctrine.¹³ This Article is intended as an early contribution to that project. To date, most of the academic commentary on *Loper Bright* has focused on evaluating that decision's reasoning¹⁴ or predicting its practical effects.¹⁵ These issues are important, but they are not directly relevant to the judges who will need to further develop the *Loper Bright* framework. In contrast with much of the first wave of *Loper Bright* scholarship, this Article is prescriptive rather than predictive or evaluative. It is directed principally to the litigants

13. The literature on *Chevron* is, of course, vast. Notable examples of the many articles on *Chevron* that were published in the first decade following that decision would include, among others: Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255 (1988); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) [hereinafter Merrill, *Executive Precedent*]; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REGUL. 283 (1986); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

14. The early scholarly commentaries on the quality of *Loper Bright*'s legal analysis—from commentators across the ideological and jurisprudential spectrum—have not been complimentary. See, e.g., Coglianese & Froomkin, *supra* note 1, at 93 (declaring that the *Loper Bright* Court “failed to meet the most fundamental judicial responsibility of candor and care in its decisionmaking”); Merrill, *The Demise of Deference*, *supra* note 1, at 246 (stating that *Loper Bright*'s “dubious” reasoning “does not get high marks”); Rubin, *supra* note 1, at 32 (characterizing *Loper Bright* as “an opinion with innumerable defects,” the most significant of which is that “[t]he Court did not understand the decision that it claimed to overrule”); Vermeule, *supra* note 1, at 240 (asserting that the *Loper Bright* Court's “overstated and simplistic” account “unmistakably distorted the history of deference doctrine”).

15. Scholars have disagreed about the likely practical impact of *Loper Bright*. Compare, e.g., Sunstein, *Our Marbury*, *supra* note 1, at 1915 (asserting that it is “pretty safe” to predict that “[b]ecause of *Loper Bright*, lower courts will, in the coming years, invalidate some nontrivial number of agency interpretations that they would have upheld under *Chevron*”), and Farmer & Aaron, *supra* note 1, at 1719 (asserting that, especially when considered in conjunction with other doctrinal developments, *Loper Bright* “threatens upheaval of the administrative state”), with Desai, *supra* note 1, at 589 (asserting that *Loper Bright* was mainly “expressive,” and that its direct practical impact on case outcomes “might well be insignificant”), and Vermeule, *supra* note 1, at 239 (contending that *Loper Bright* “may change much less than might initially appear”). See also Coglianese & Walters, *supra* note 1, at 5 (emphasizing the difficulty of making predictions regarding *Loper Bright*'s impact at this early stage); Craig, *supra* note 1 (documenting some preliminary patterns in lower court applications of *Loper Bright*, but without attempting to assess the overall impact of the decision).

and lower court judges who must treat *Loper Bright* as binding precedent, but who may treat silences or ambiguities in that opinion as opportunities for elaboration in directions that are normatively attractive.¹⁶

This Article's central claim is that the canonical pre-*Chevron* cases *Gray v. Powell*¹⁷ and *NLRB v. Hearst Publications, Inc.*,¹⁸ together with their antecedents and progeny, provide a useful framework—which this Article will refer to as “the *Gray* doctrine”—for distinguishing, under *Loper Bright*, those interpretive questions on which courts ought to find implicit delegations to agencies from those issues that are for the courts to decide without deference. The *Gray* doctrine establishes a presumption that, when a statute empowers an agency to take some authoritative action (such as issuing a permit, levying a penalty, or imposing an obligation) which necessarily involves the application of an imprecise statutory term to particular situations—drawing the line that separates those cases that fall within the meaning of that term from those cases that fall outside of it—the statute should be read as implicitly delegating to the agency the authority to decide, within reason, the scope and limits of that imprecise term. In other words, statutes that authorize an agency to sort cases into (and out of) some legally significant category should be read as implicitly granting the agency the power to make the necessary line-drawing decisions regarding the boundaries of that category. At the same time, the *Gray* doctrine does *not* call for judicial deference to an agency's views on the resolution of interpretive questions that can be answered through abstract textual or structural analysis, even if those interpretive questions are hard. Such questions, which the *Gray* doctrine reserves to the courts, often take the form of choices among discrete alternatives, in contrast to the applied line-drawing questions that are (presumptively) for agencies to decide.

Courts can and should incorporate the *Gray* doctrine into the implicit delegation prong of the *Loper Bright* framework. Doing so would provide a structured, workable method—one well-grounded in decades of pre-*Chevron* case law—for deciding when a finding of implicit delegation is appropriate. Recognizing the *Gray* doctrine as integrated into *Loper Bright*'s implied delegation inquiry would also achieve an appropriate allocation of authority between the judicial and executive branches. Under the *Gray* doctrine, the judiciary

16. To be clear, some of the emerging scholarship on *Loper Bright* has taken a similarly prescriptive line, though offering different recommendations from the one advanced in this Article. See, e.g., Hickman & Wildermuth, *supra* note 1, at 1934, 1977–82; Sharkey & Pultz-Earle, *supra* note 1 (manuscript at 17–29); see also Lawson, *supra* note 1, at 57 (expressly declining to answer the question of “[w]hat should happen next” but proffering “a framework to promote careful thinking about th[at] question[]”).

17. 314 U.S. 402 (1941).

18. 322 U.S. 111 (1944).

is responsible for answering general interpretive questions that are susceptible to resolution through textual and structural analysis of the relevant statute. At the same time, the *Gray* doctrine assigns line-drawing decisions—which rely more on policy judgments and practical considerations related to effective implementation—to the responsible administrative agencies in the executive branch, thereby both improving governance and relieving the pressure on judges to make fine-grained distinctions on questions that are not amenable to resolution through abstract legal reasoning.¹⁹

Part I of this Article provides an overview of the concept of implied delegation as the basis for judicial deference to an agency’s understanding of a statutory provision, discusses the central role that the presumption of implied delegation played under the now-defunct *Chevron* doctrine, and traces the pre-*Chevron* emergence of this implied delegation concept in the early-to-mid twentieth century case law, especially but not exclusively in the leading cases of *Gray* and *Hearst*. This Part also elaborates on the key features of the *Gray* doctrine and the distinction between that doctrine and the *Chevron* doctrine. Part II argues that expressly endorsing the *Gray* doctrine and integrating it into *Loper Bright*’s implicit delegation prong would be both legal—consistent with the Administrative Procedure Act (APA) as interpreted by *Loper Bright*—and desirable. Part III illustrates how such an integration would work in practice by considering a series of specific examples drawn from Justice Kagan’s *Loper Bright* dissent. This discussion explains how a court would approach each of these cases under a version of *Loper Bright* that incorporates

19. This argument for embracing the *Gray* doctrine is similar to the argument, advanced by several scholars during the *Chevron* era, that *Chevron* deference should be limited to cases in which an agency has given more definite content to an open-ended, imprecise statutory term—a process variously referred to as “construction,” “specification,” or “prescriptive reasoning”—and that the extension of *Chevron* deference to cases involving the resolution of semantic ambiguities (legal “interpretation” more narrowly defined) was misguided. See, e.g., Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1888–89 (2015); Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 115, 141–46, 161–62 (2011); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1085–90 (2016); Brian G. Slocum, *Replacing the Flawed Chevron Standard*, 60 WM. & MARY L. REV. 195, 231–64 (2018); Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 256–59, 261, 265–70, 292, 299 (2021); Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 CORNELL L. REV. 1465, 1468–76 (2020); Ilan Wurman, *The Specification Power*, 168 U. PENN. L. REV. 689 (2020). Several of these scholars pointed to pre-*Chevron* cases, most notably *Hearst*, as embracing something like this more limited approach. See Herz, *supra*, at 1897–98; Solum & Sunstein, *supra*, at 1486; Wurman, *supra*, at 727. This Article builds on these earlier contributions by more fully fleshing out the contours of the *Gray* doctrine and explaining how that doctrine can and should be integrated into the *Loper Bright* framework now that *Chevron* has been overruled.

the *Gray* doctrine, contrasting this approach both with the *Chevron* approach and with a version of *Loper Bright* that eschews integration of *Gray*. These comparisons reinforce the case for embracing the *Gray* doctrine as part of the *Loper Bright* framework, rather than construing the “implied delegation” category much more narrowly.

I. THE IMPLIED DELEGATION THEORY OF JUDICIAL DEFERENCE TO AGENCY STATUTORY INTERPRETATIONS

A. *The Standard of Review Dilemma and the Implied Delegation Theory*

Before turning to the doctrine and case law on judicial review of agency statutory constructions, it is useful to begin with the fundamental problem that makes this area of law so challenging. When a statutory term is unclear—when the language, read in context, could support more than one possible result—what exactly are we doing when we select one of these readings as the one that will be given legal effect? The stipulation that the term is unclear rules out the possibility that this chosen interpretation is the *only* reading that a reasonable interpreter, acting in good faith, could embrace. So, what is it that a decisionmaker is doing when that decisionmaker selects one interpretation from among the set of interpretations that cross some threshold of reasonableness and chooses to give that interpretation binding legal effect?

One possibility is that this choice among plausible readings is still an act of *legal interpretation*—one that identifies the correct meaning of the statute—even if the interpretive question is a hard one, such that reasonable people, applying legitimate interpretive techniques, could reach different conclusions. On this understanding, the resolution of the statutory ambiguity is a quintessential exercise of judicial power and is therefore a job for courts.

An alternative view maintains that if, after exhausting the traditional tools of statutory construction, the statute remains susceptible to more than one plausible reading, then the selection of one of those readings as the one that will be given legal effect is not really an act of legal interpretation—in the sense of determining what the ambiguous provision really means—but is instead a form of *discretionary policymaking*. That sort of decision—choosing among multiple approaches to implementing a statute, all of which are consistent with, and none of which is required by, the statutory text²⁰—is

20. The reference to “statutory text” here is a shorthand and is not meant to imply that *only* the text of the statute is relevant to determining the range of meanings that are permissible. The question of what legal tools are legitimate for ascertaining statutory meaning is, of course, hotly contested, and the statement in the main text should not be read as endorsing any particular interpretive theory.

traditionally a task for the executive branch, even though some statutes do confer this sort of policymaking discretion on the judiciary.²¹

This difference in perspective—whether selecting one among a set of plausible meanings is better conceptualized as an act of legal interpretation or as an act of discretionary policymaking—is at the root of the longstanding controversies over the appropriate standard of review for courts to apply when considering a challenge to an agency’s interpretation of unclear statutory language.²² If resolving this sort of ambiguity is an act of legal interpretation, then it is a task for the judiciary, not for an administrative agency. To be sure, a reviewing court might consider the agency’s views as informative and worthy of respect—especially if the statute uses technical terms about which the agency has expertise, or if the agency’s longstanding view might be probative evidence of the statute’s original public meaning—but the agency’s interpretation is not authoritative. If, however, one concludes that the legitimate tools of legal interpretation cannot fully determine which reading of the statute is the correct one—if the law “runs out” before the statutory ambiguity has been fully resolved—then it is more natural to conclude that the agency, not the court, should have the authority to select from among the choices that the statute’s language leaves open. That does not mean that the

21. On delegation to the judiciary, see, for example, Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 428, 430, 433, 435 (2008); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 138–41 (2000). Several scholars have pointed out that when statutory provisions are sufficiently unclear, those statutes inevitably delegate discretionary decisionmaking to some other entity, and if the delegation is not to an administrative agency, then the statute will, in practice, delegate to the courts. See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330 (2000) (asserting that “when statutory terms are ambiguous, there is no escaping delegation . . . [and t]he recipient of the delegation will be either agencies or courts”); Spence & Cross, *supra*, at 139 (arguing that “when Congress passes vague legislation without delegating discretionary authority to implementing agencies, the authority for interstitial discretionary interpretation inevitably devolves to the courts”).

22. See, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985) (describing “[t]wo competing traditions in American jurisprudence . . . [concerning] the appropriate allocation of interpretive authority between agencies and courts,” one of which “views matters of statutory interpretation as questions of ‘law’ reserved for independent determination by the judiciary,” and the other of which “views agencies as delegates, empowered by the legislature to exercise legislative power to articulate and implement public goals”); Farina, *supra* note 13, at 453–54 (contrasting the “independent judgment model” of judicial review of agency statutory interpretations, in which “the court exercises its own judgment to determine de novo what the statute means,” with the “deferential model,” in which it is “the agency’s function to give meaning to the statute,” and “the court determines only whether the interpretation the agency has chosen is a ‘rational’ reading, not whether it is the ‘right’ reading”).

judiciary has no role to play. The court must still ensure that the agency's choice falls within the range of legally plausible readings, just as a court must always ensure that an agency's exercise of delegated discretion falls within the scope of the statutory delegation. But if that condition is satisfied, then the decision at hand is really a policy question, not a legal question. In such cases, the court should recognize that the decision is one that the statute *has assigned to the agency*, not to the judiciary, and the court should therefore defer to the agency's interpretation.²³

So, when is the resolution of an ambiguous statutory provision an issue of law for the courts, and when is it a matter of policy discretion for the agency? In some cases, Congress may settle the matter clearly, as when a statute expressly confers interpretive authority on the agency,²⁴ or when a statute explicitly states that the court should decide an issue without deference to the agency.²⁵ But such explicit directives are the exception, not the rule. In the typical case, a statute uses language that is simply unclear; one could make a plausible case, using the standard tools of statutory construction, for outcome A or outcome B, and the reviewing court must decide whether to treat the statutory provision as having one or the other of these two possible meanings (either A or B, with the court deciding which of these is better and therefore

23. Confusingly, courts and commentators sometimes use the term “deference” to describe both of these ways in which a court might attach significance to the agency's interpretive views, but they are not the same, as many scholars have emphasized. See Peter L. Strauss, “Deference” Is Too Confusing—Let's Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1144–46 (2012); Herz, *supra* note 19, at 1888–89; Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 9–11 (2013). In *Loper Bright*, the Court appeared to restrict the use of the term “deference” to settings in which a court treats another decisionmaker (in this context an agency) as having primary authority to make some decision; the *Loper Bright* opinion used terms like “respect” and “weight” when characterizing settings in which the court considers the agency's views on a question of law that is ultimately for the court to decide. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2258–60, 2265 (2024).

24. See, e.g., *Loper Bright*, 144 S. Ct. at 2263 n.5 (citing, as examples of statutes that expressly delegate to agencies the authority to define statutory terms, the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(15), and the Atomic Energy Act, 42 U.S.C. § 5846(a)(2)); see also *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (observing that the Social Security Act (SSA) “expressly delegated to the [agency] the power to . . . determin[e] what constitute[d] ‘unemployment’” within the meaning of the relevant SSA provision (emphasis omitted)).

25. See, e.g., Kent H. Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 27–29 (2015) (citing a section of the Dodd-Frank Act, 12 U.S.C. § 25b(b)(5)(A), as deliberately altering the standard of review); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 216 n.58 (noting a provision of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6714(e), as a rare example of a statute that specifically instructs courts to resolve an issue without deference to the federal agency).

correct) or to treat this unclear language as implicitly delegating to the agency the discretion to choose either A or B. As Justice Scalia succinctly framed the challenge in his influential commentary on the *Chevron* doctrine:

An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. When the former is the case, what we have is genuinely a question of law, properly to be resolved by the courts. When the latter is the case, what we have is the conferral of discretion upon the agency, and the only question of law presented to the courts is whether the agency has acted within the scope of its discretion—i.e., whether its resolution of the ambiguity is reasonable.²⁶

If the statute is unclear—both in the first-order sense of being susceptible to multiple readings and in the second-order sense of not explicitly stating whether the ambiguity was intended as a delegation to the agency—what should a reviewing court do? When should courts treat ambiguous statutory language as having a definite meaning (albeit one that is not expressed clearly) and when should courts treat such language as a delegation of discretion to the executive branch? In principle, Congress's decision on this issue should control, but as noted above, Congress often does not give clear directions and may not even have anticipated the problem.²⁷ This question also cannot be answered through abstract appeals to institutional values and constitutional commitments, because these cut both ways. Under our constitutional system, matters of law are for the courts and matters of policy (at least in the context of implementing statutory commands) are (usually) for the executive. For a court to defer to an agency's view on a question of legal meaning would be an abdication of judicial responsibility; cumulatively, such abdications could lead to an excessive concentration of power in the executive branch, undermining essential checks and balances.²⁸ But for a court to override an agency's decision on a matter that a statute has delegated to that agency would be an egregious judicial intrusion on the power of another branch, and such intrusions threaten both political accountability and effective governance.²⁹ In short, there are error costs in both directions. In fashioning an appropriate doctrine on the standard of review, courts need to consider

26. Scalia, *supra* note 13, at 516.

27. *See id.* at 517 (concluding that “the quest for ‘genuine’ legislative intent [on this question] is probably a wild-goose chase,” because “[i]n the vast majority of cases . . . Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn’t think about the matter at all”).

28. *See, e.g.,* Farina, *supra* note 13.

29. *See, e.g.,* Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273 (2011).

the trade-off between these different error costs, as well as the costs associated with doctrinal complexity and uncertainty.³⁰

Courts could respond to this doctrinal challenge by setting a default presumption regarding Congress's intent. A default presumption entails a greater risk of errors in one direction, but it reduces errors in the other direction. It also provides greater predictability and puts Members of Congress and other parties on notice of what the court will do in the absence of clearer statutory instructions. But which default rule? One approach would be to presume that unclear statutory language always has a single best or correct meaning—one that Congress intended but failed to express clearly. Under this approach, a court should find that a statute delegates to an agency only when it does so explicitly.³¹ The opposite default rule would presumptively treat unclear statutory language as an implicit delegation of discretionary authority to the agency responsible for administering that statute. The *Chevron* doctrine, at least in its strong form, embraced this latter presumption. Regardless of whether that was the intent of Justice Stevens, who wrote the *Chevron* opinion, or of the other Justices who joined it, *Chevron* came to be understood as instructing reviewing courts to presume that statutory ambiguities are implicit delegations to the responsible agency, and to rely on this general presumption rather than trying to decide, on a case-by-case basis, whether any particular statutory ambiguity ought to be treated as an implicit delegation.³²

Chevron's ambiguity-is-delegation presumption was not absolute, however. Over time, the Court recognized a few important limits to that presumption. First, the presumption only applied to statutory provisions that the agency in question was responsible for administering.³³ Second, the Court held that interpretations issued in formats that are not subject to significant procedural safeguards, such as opinion letters and informal orders, are unlikely to warrant deference, on the logic that it is usually implausible that Congress would delegate to agencies the authority to issue legally binding interpretations in

30. For general discussions of this way of thinking about the design of legal doctrines, see, for example, Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

31. It is possible to understand *Loper Bright* as embracing this approach, though as discussed below, this is not the best reading of the opinion. See *infra* Part II.A.

32. Scalia, *supra* note 13, at 516 (explaining that *Chevron* “replaced [the] statute-by-statute evaluation [of whether the statute implicitly delegated authority to the agency] . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant”).

33. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990); *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993); *Pro. Reactor Operator Soc'y v. Nuclear Regul. Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991); *Fed. Lab. Rels. Auth. v. U.S. Dep't of Treasury*, 884 F.2d 1446, 1454 (D.C. Cir. 1989).

such informal contexts.³⁴ Third, under what has come to be known as the “major questions” doctrine, the Court held that a statutory ambiguity could not reasonably be construed as delegating to an agency the authority to take extraordinary actions with enormous economic, social, or political consequences; the Court reasoned that Congress would typically prefer to resolve major issues itself, or at least would speak especially clearly if it meant to delegate extraordinary powers to an agency.³⁵

These limitations on *Chevron* deference were important, and they generated a great deal of commentary, debate, and litigation, but this should not obscure the significance of *Chevron*’s core presumption. In the mine-run of cases where an agency had issued its interpretation of its statutory authority in a rule or formal order, under the *Chevron* doctrine the reviewing court would presume that ambiguities in the relevant statute were implicit delegations to the agency, and the court would therefore uphold the agency’s resolution of those ambiguities so long as the agency’s interpretation was reasonable.

Loper Bright rejected *Chevron*’s across-the-board presumption.³⁶ *Loper Bright* did not, however, reject the notion that unclear statutory language might *sometimes* be properly understood as an implicit delegation to the agency.³⁷ One of the most important questions that judges and litigants must grapple with post-*Loper Bright* is when a court should find such an implicit delegation.

In getting some purchase on this question, it is useful to wind the clock back to consider the development of the implied delegation concept in the pre-*Chevron* case law. After all, *Chevron* did not invent the idea that a statutory ambiguity might be characterized as an implied delegation of discretion to an agency. Indeed, in writing the *Chevron* opinion, Justice Stevens did not

34. See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 233–34 (2001); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 842, 858, 884–86, 907–08 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 206–26 (2006).

35. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2614–16 (2022); *Nebraska v. Biden*, 143 S. Ct. 2355, 2373 (2023). For a discussion of different possible understandings of the relationship between the major questions doctrine and the *Chevron* doctrine, see Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 5–18 (2023).

36. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2274 (2024).

37. See *id.* at 2269–71; see also Brett M. Kavanaugh & J. Joel Alicea, *The Center for the Constitution and the Catholic Intellectual Tradition Presents: A Conversation with Justice Brett Kavanaugh*, 74 CATH. U. L. REV. 1, 5 (2025) (remarks of Justice Kavanaugh) (defending *Loper Bright* as a necessary “course correction,” but cautioning against “over-read[ing] *Loper Bright*,” pointing out that “[o]ftentimes Congress will grant a broad authorization to an executive agency” and emphasizing that in such cases it is important that the courts do not “unduly hinder the executive branch from performing its congressionally authorized functions”).

think he was breaking new ground, but rather thought of *Chevron* as restating and applying a familiar strain of the existing doctrine.³⁸ Although Justice Scalia saw *Chevron* as a more substantial change to (and improvement on) the pre-*Chevron* doctrine, he too agreed that “the theoretical justification for *Chevron* is no different from the theoretical justification for those pre-*Chevron* cases that sometimes deferred to agency legal determinations”—namely, that Congress intended, through its use of imprecise language, to confer discretion on the agency.³⁹ Of course, pre-*Chevron* courts did not *always* treat statutory ambiguities as delegations; sometimes they did and sometimes they didn’t, which is why Justice Scalia complained that the pre-*Chevron* approach was “a font of uncertainty and litigation.”⁴⁰ Indeed, by the time *Chevron* was decided, it had become common to characterize the pre-*Chevron* era as a period when courts deployed an unstructured, multi-factor approach to deciding whether a given statute should be read as implicitly delegating interpretive authority to the agency and that judicial application of this multi-factor standard was ad hoc and often inconsistent.⁴¹ That criticism has a kernel of

38. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 & n. 13 (1984) (noting that “[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit” and that in such cases a reviewing court should accept the agency’s reasonable interpretation, citing for this proposition *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) and *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 87 (1975)); *id.* at 843 & n.9 (stating that “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 citing for this principle *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981), *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978), *Train*, 421 U.S. at 75, *Udall v. Tallman*, 380 U.S. 1, 16 (1965), *Unemployment Comp. Comm’n v. Aragon*, 329 U.S. 143, 153 (1946), and *McLaren v. Fleischer*, 256 U.S. 477, 480–81 (1921)); see also Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275 (2014) (noting that “Justice Stevens . . . regarded [*Chevron*] as simply a restatement of existing law”); *id.* at 276 (observing that there is no “evidence that Justice Stevens’ colleagues on the Court perceived *Chevron* as some kind of watershed decision, either when it was decided or for some time afterwards”); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENV’T L. REP. 10606, 10613 (1993) (concluding from the Justices’ papers that they did not consider *Chevron* to be a significant change to the doctrine); Lawson & Kam, *supra* note 23, at 3–4 (asserting that the *Chevron* case and the *Chevron* doctrine “have very little to do with each other,” and that the latter derived “from a series of lower court decisions in the mid-1980s that converted . . . [the *Chevron*] case . . . into a generalized doctrine . . . [that] [t]he Supreme Court [then] adopted . . . essentially by default”).

39. Scalia, *supra* note 13, at 516.

40. *Id.*

41. See, e.g., *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976)

truth, but stated in its strong form it may obscure the extent to which pre-*Chevron* judicial opinions had developed a relatively coherent approach to identifying those statutes that ought to be read as implicitly delegating a degree of interpretive authority to the responsible agency. Understanding that approach may prove useful in fleshing out the meaning of *Loper Bright*'s "implicit delegation" category.

B. *The Emergence and Persistence of the Gray Doctrine*

Although the implicit delegation justification for judicial deference to agency interpretations is today closely associated with *Chevron*, the idea goes back much further, at least to the early twentieth century.⁴² Perhaps the

(asserting that "there are two lines of Supreme Court decisions on [the question of when an agency interpretation of its statute should receive judicial deference] which are analytically in conflict"); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 913 (3d Cir. 1981) (favorably citing *Pittston Stevedoring* to make a similar point); Merrill, *Executive Precedent*, *supra* note 13, at 972–75 (asserting that prior to *Chevron*, "the Supreme Court had no unifying theory for determining when to defer to agency interpretations of statutes," and that the various factors the Court would consider "did not comprise, either individually or collectively, what could be described as a coherent doctrine"); Diver, *supra* note 22, at 562 & n.95 (stating that the "prevailing judicial orthodoxy" in the pre-*Chevron* period was that if the statute's meaning is not plain, then "the decision whether to grant deference depends on various attributes of the agency's legal authority and functions and of the administrative interpretation at issue," and summarizing eight such considerations as "[a] partial list of the factors" that the Court would cite when making this determination).

42. There is a debate about whether it goes back even further than that. Over the course of the nineteenth century, several of the Court's cases articulated or referenced the idea that, if a statute's meaning is unclear, the reviewing court should give substantial weight to the construction of the statute embraced by the executive branch officer or department responsible for administering that statute. However, these cases typically used the language of "weight" or "respect" rather than of (strong) deference. *See, e.g.*, *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827); *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 382 (1874); *United States v. Moore*, 95 U.S. 760, 763 (1877); *Brown v. United States*, 113 U.S. 568, 571 (1885); *Hastings & Dakota R.R. v. Whitney*, 132 U.S. 357, 366 (1889); *Heath v. Wallace*, 138 U.S. 573, 582 (1891); *United States v. Alger*, 152 U.S. 384, 397 (1894). Furthermore, many of these cases emphasized that the executive department's interpretation should carry the most weight when the executive had announced its view roughly contemporaneously with the adoption of the statute and/or when the executive had adhered to a consistent position over a long period of time, such that affected parties had reasonably come to rely on this interpretation and Congress could be characterized as having acquiesced to it. *See, e.g.*, *United States v. State Bank of N.C.*, 31 U.S. (6 Pet.) 29, 39 (1832); *Surgett v. Lapice*, 49 U.S. (8 How.) 48, 68 (1850); *United States v. Alexander*, 79 U.S. (12 Wall.) 177, 179–81 (1871); *Peabody v. Stark*, 83 U.S. (16 Wall.) 240, 243–44 (1872); *United States v. Pugh*, 99 U.S. 265, 269 (1878); *United States*

earliest case in which the Court clearly embraced this theory is *Bates & Guild*

v. Burlington & Mo. River R.R., 98 U.S. 334, 341 (1878); Kan. Pac. R.R. v. Atchison, Topeka & Santa Fe R.R., 112 U.S. 414, 418 (1884); Iowa v. McFarland, 110 U.S. 471, 484–85 (1884); United States v. Philbrick, 120 U.S. 52, 59 (1887); United States v. Johnston, 124 U.S. 236, 253 (1888); Hahn v. United States, 107 U.S. 402, 406 (1882); United States v. Ala. Great S. R.R., 142 U.S. 615, 621 (1892); Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 34 (1895); Webster v. Luther, 163 U.S. 331, 342 (1896).

That said, some nineteenth century cases contain hints of something closer to genuine deference. For example, in *Schell v. Fauché*, the Court declared that “the contemporaneous construction” of a statute by “the departments . . . whose duty it is to carry the law into effect . . . [is] controlling.” 138 U.S. 562, 572 (1891) (emphasis added); see also *Moore*, 95 U.S. at 763 (stating that “[t]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and *ought not to be overruled without cogent reasons*” (emphasis added)). Additionally, in an earlier case, *Martin v. Mott*, the Court asserted, in the context of a statute that delegated to the President, that “[w]henver a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.” 25 U.S. (12 Wheat.) 19, 31–32 (1827). On its face, *Mott* seems inapposite because of its focus on factfinding, but the “fact” that the President had found in this case concerned whether the United States was “in imminent danger of invasion” within the meaning of the relevant statute, and this seems more like a question of whether a given set of facts justifies a particular *legal* conclusion rather than a question of what the facts *are*.

Scholars have debated whether the nineteenth century cases embraced, or at least prefigured, genuine judicial deference to executive branch interpretations. Compare Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 962 (2017) (concluding that “[a]t the turn of the twentieth century, . . . executive interpretations of statutes were relevant to judicial determinations only insofar as they embodied understandings made roughly contemporaneously with the statute’s enactment and stably maintained and practiced since that time”), with Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 679–80 (2020) (critiquing Professor Bamzai’s interpretation of the cases and other historical materials, and insisting that “many . . . expressions of administrative deference appear throughout nineteenth- and twentieth-century case law,” such that the increase in deference in the 1940s was not “a clean break from some kind of uniformly nondeferential past”), and Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 167–69 (2021) (criticizing Professor Bamzai’s claims about the nineteenth century case law as “overstated” and “reductionist,” and arguing that in several of the Court’s nineteenth century cases, “the principle of administrative deference was an important variable in its own right”). See also Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991). Because this Article focuses on the doctrine as it developed in the twentieth century, both before and after the enactment of the Administrative Procedure Act (APA), it will not engage in further discussion of the pre-twentieth century case law.

Co. v. Payne,⁴³ decided in 1904.⁴⁴ In *Bates & Guild*, the Court considered a challenge to the Postmaster General's refusal to classify a series of thematically related publications as a "periodical" for purposes of determining postage rates.⁴⁵ Although the Court acknowledged that the question whether the publication series qualified as a "periodical" was "largely one of law"—there was no dispute about the facts regarding the nature or contents of the publications—the Court nevertheless concluded that the statute left "some discretion in the Postmaster General with respect to the classification of such publications."⁴⁶ The Court therefore held that the Postmaster General's "exercise of such discretion ought not to be interfered with unless the court be clearly of the opinion that it was wrong."⁴⁷ In so holding, *Bates & Guild* articulated a general rule that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, *whether it involve questions of law or fact*, will not be reviewed by courts unless he has exceeded his authority or this court should be of the opinion that his action was *clearly* wrong."⁴⁸

Notably, the classification decision to which the Court deferred represented a break with the Post Office's previous interpretation of the term "periodical," an interpretation that had been in place for the prior sixteen years.⁴⁹ Although the dissent stressed this fact, the majority did not treat it as significant, and indeed did not even mention it.

In the short term, *Bates & Guild*'s "general rule" did not appear all that consequential.⁵⁰ But the doctrinal seed planted by *Bates & Guild* began to

43. 194 U.S. 106 (1904).

44. The claim that this is the earliest such case is contestable, even if one brackets the suggestive language in some nineteenth century opinions. See *supra* note 42. Another case, *United States ex rel. Riverside Oil Co. v. Hitchcock*, decided a year before *Bates & Guild*, suggests something similar. 190 U.S. 316, 324–25 (1903). But *Bates & Guild* lays out the position more fully and clearly, without some of the additional factors related to the posture of the case that might complicate the interpretation of *Riverside Oil*. The proximity in time of these two cases at the very least suggests that the early twentieth century Court had a consistent view about when and why reviewing courts should defer to an executive branch officer's statutory classification decisions.

45. 194 U.S. at 106–07.

46. *Id.* at 107–08.

47. *Id.* at 108.

48. *Id.* at 108–09 (emphases added); see also *id.* at 109 (declaring that "even upon mixed questions of law and fact, or of law alone," the responsible administrator's "action will carry with it a strong presumption of its correctness"); *Pub. Clearing House v. Coyne*, 194 U.S. 497, 509 (1904).

49. *Bates & Guild*, 194 U.S. at 111 (Harlan, J., dissenting).

50. See Bamzai, *supra* note 42, at 969 (noting *Bates & Guild*'s "lack of immediate impact").

flower in the 1930s and 1940s. During that period, the Court decided a series of cases that invoked the idea that when a statute empowers an administrative agency to implement some program or policy, the statute should be read as implicitly delegating to the agency the authority to make line-drawing decisions regarding the scope and meaning of imprecise statutory terms—even when those decisions could be characterized as legal interpretations, with no

That said, it is not really accurate to characterize *Bates & Guild* as an “outlier,” Michael Rappaport, *Chevron and Originalism: Why Chevron Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 WAKE FOREST L. REV. 1281, 1320 (2022), rather than a harbinger, or to suggest that the Supreme Court did not issue any decisions that took a similar approach in the two decades following *Bates & Guild*. To the contrary, in several cases decided in the 1910s that involved the application of imprecise statutory terms to particular situations, the Court deferred to the responsible agency’s judgment on the grounds that the statute had assigned the agency the discretionary authority to decide such matters. *See, e.g.*, *Cent. Tr. Co. v. Cent. Tr. Co. of Ill.*, 216 U.S. 251, 261 (1910); *Smith v. Hitchcock*, 226 U.S. 53, 58 (1912); *United States v. Louisville & Nashville R.R. Co.*, 235 U.S. 314, 320–21 (1914); *Pa. Co. v. United States*, 236 U.S. 351, 361–62 (1915); *Mfrs.’ Ry. v. United States*, 246 U.S. 457, 481–82 (1918); *Houston v. St. Louis Indep. Packing Co.*, 249 U.S. 479, 484 (1919).

These cases are easy to miss or misunderstand, because during this period the Court had the habit of labeling what we might now call “mixed questions” of fact and law (or “fact-bound” legal questions) as “questions of fact,” even when the issue concerned the legal implications of uncontested facts rather than a dispute over the facts themselves. *See* KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* § 246, at 881 (1951) (observing that in this period the Court “used the term ‘fact’ for a question on which it thought [judicial] judgment should not be substituted [for the agency’s judgment], even though the question was analytically one of law,” and therefore the Court tended to characterize questions concerning the “application of a statutory term to undisputed facts” as “question[s] of ‘fact’” on which “the reviewing court should avoid substitution of [its] judgment [for that of the agency]”). Indeed, Professor Kenneth Culp Davis concluded that although *Gray* came to be regarded as the “leading case” on the standard of judicial review for applications of statutes to particular situations, *Gray* “did no more than to apply what . . . in another form had been developed as early as the second decade of the [twentieth] century.” *Id.* at 882; *see also id.* at 881 n.62 (asserting that the standard of review embraced in *Pennsylvania Co.* “embodies precisely the principle which the Court adopted in the landmark case of *Gray v. Powell*” (italics added)); *id.* § 249, at 898 (asserting that the 1915 cases *Louisville & Nashville Railroad* and *Pennsylvania Co.* “unequivocally adopted” the position that courts should defer to agency judgments when the statutory language implies a delegation of power to the agency).

To be sure, some cases from this period did appear to stake out a different position, one that emphasized judicial primacy in the interpretation of even open-ended language. *See, e.g.*, *FTC v. Gratz*, 253 U.S. 421, 427 (1920). And the judicial doctrine on deference was not as clear in the first few decades of the twentieth century as it would become in the 1930s and 1940s. Nonetheless, the portrayal of *Bates & Guild* as an anomaly for its time, or as an isolated “[c]rack in the [g]lass,” Bamzai, *supra* note 42, at 966, is hard to square with the multiple cases from the 1910s that adopted a similar approach.

element of factfinding. For example, in the 1932 case *Norfolk & Western Railway Co. v. United States*,⁵¹ the Court reviewed an Interstate Commerce Commission (ICC) decision regarding the classification of certain railroad property (coal mines used for the supply of locomotive fuel) as “property held for purposes other than those of a common carrier” rather than as property “held for and used in the service of transportation.”⁵² In upholding the ICC’s determination, the Court observed that “the Commission, under the authority conferred upon it by Congress, must draw a line between the two sorts of property owned by the railroads.”⁵³ The Court therefore concluded that “[w]ithin broad limits, [the ICC’s] determination is necessarily beyond revision and correction by the courts,” such that the Court would be “without power to usurp [the ICC’s] discretion and substitute [the Court’s] own.”⁵⁴ Several other cases during this period took a similar line.⁵⁵ The two most significant and influential of these were *Gray v. Powell*⁵⁶ and *NLRB v. Hearst Publications, Inc.*⁵⁷

Gray concerned a dispute that arose under a 1937 statute called the Bituminous Coal Act.⁵⁸ The Act, which was administered by an Interior Department unit called the Coal Commission, imposed certain regulatory requirements on coal transactions, but the Act exempted from these requirements transactions involving “coal [that is] consumed by the producer [of that coal].”⁵⁹ The statute defined a coal “producer” as a person or entity “engaged in the business of mining coal,” without further elaboration.⁶⁰ The statute instructed that an entity seeking to avail itself of the “producer” exemption should file an application with the Coal Commission, which would rule on the request for an exemption after holding a hearing.⁶¹

51. 287 U.S. 134 (1932).

52. *Id.* at 139, 141 (1932).

53. *Id.* at 141.

54. *Id.* (emphases added).

55. See, e.g., *Brewster v. Gage*, 280 U.S. 327, 336 (1930); *Universal Battery Co. v. United States*, 281 U.S. 580 (1930); *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 184–85 (1938); *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939); *S. Chi. Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399–400 (1940); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *Switchmen’s Union v. Nat’l Mediation Bd.*, 320 U.S. 297, 303 (1943); *Dobson v. Comm’r*, 320 U.S. 489, 501 (1943); *Billings v. Truesdell*, 321 U.S. 542, 552–53 (1944).

56. 314 U.S. 402 (1941).

57. 322 U.S. 111 (1944).

58. 15 U.S.C. § 828–852 (1940) (repealed 1966).

59. *Id.* § 833(*l*).

60. *Id.* § 847(*c*).

61. *Id.* § 834.

The dispute in *Gray* involved the Seaboard Air Line Railway Company's exemption application. Seaboard had entered into some complicated contractual relationships with several coal mines and mining companies; these arrangements gave Seaboard more control over the mines than would be typical in an ordinary buyer-seller relationship, but Seaboard did not directly own or operate the mines.⁶² Seaboard asserted that its acquisition of coal from these mines ought to be exempt from the usual requirements of the Bituminous Coal Act because Seaboard was the "producer" of this coal within the meaning of the Act.⁶³ After a hearing, the Commission denied Seaboard's application, and Seaboard sued.⁶⁴

The Supreme Court upheld the Commission's order. Crucially, the Court did not decide what exactly a "producer" of coal is, nor did the Court exercise its independent judgment on the question whether Seaboard was best understood as engaged in the business of mining coal.⁶⁵ Rather, the Court held that the Bituminous Coal Act's delegation to the Coal Commission of the authority to rule on exemption applications implicitly delegated to the Commission the authority to determine, within reason, the scope of the "producer" exemption.⁶⁶ When "a determination has been left to an administrative body," the *Gray* Court declared, "this delegation will be respected and the administrative conclusion left untouched."⁶⁷ And that is true, the Court

62. The *Gray* Court described the arrangements as follows: First, the owner of the coal mine leased the land—including the mineral rights but not the buildings or mining equipment—to Seaboard for a 14-month period, with the option for annual extensions. The lease provided a per-ton royalty for the coal extracted from the land, to be paid by Seaboard to the landowner as rent. The landowner simultaneously leased the machinery, buildings, and other mining equipment needed to extract coal from the land to a contractor selected by Seaboard. This contractor, not Seaboard, ran the actual mining operation. The contractor entered into a separate contract with Seaboard, under which the contractor agreed to mine the coal and sell it to Seaboard at a flat cost per ton. The contractor assumed all responsibilities for mining the coal and all obligations to the landowner, except for the per-ton royalty paid by Seaboard. *Gray*, 314 U.S. at 407–09. As the Court summarized the arrangement:

The landowner, the contractor and Seaboard by this series of coordinated and synchronized contracts[] caused the entire output of the mine to be delivered to Seaboard for its consumption at a fixed price Under the contractor's agreement, the contractor assumed all risks of operation . . . [and] Seaboard furnished no facilities or equipment for mining or loading.

Id. at 409.

63. *Id.* at 411.

64. *Id.* at 404–05.

65. *Id.*

66. *Id.* at 412–13.

67. *Id.* at 412.

made clear, even if the determination in question is a purely *legal* determination. The *Gray* Court acknowledged that there was “no dispute as to the evidentiary facts” in Seaboard’s case; the dispute was solely about the legal ramifications of those facts.⁶⁸

As in previous cases, such as *Bates & Guild* and *Norfolk & Western Railway*, the Court emphasized that the statutory interpretation question at issue involved a line-drawing problem: the agency had to decide whether a particular fact situation fit within the scope of an imprecise statutory category, in this case “producer.”⁶⁹ The *Gray* Court noted that there are cases in which the answer to the question “Is this entity a ‘producer’ of coal?” would be obvious.⁷⁰ On the one hand, a consumer of coal is clearly *not* the producer of that coal if the consumer “obtains supplies from a seller totally free from buyer connection.”⁷¹ On the other hand, a consumer of coal would clearly qualify as the producer of that coal if “the consumer extracts [the] coal from its own land with its own employees.”⁷² But not all cases are so easy to classify. “Between the[se] two extremes,” the Court observed, “are the innumerable variations that bring the arrangements closer to one pole or the other.”⁷³ And with respect to judgment calls in that intermediate zone—the “gray area,” if readers will forgive the pun—*Gray* held that reviewing courts should presume that Congress delegated decision-making authority to the agency. As the Court put the point in perhaps the most important passage of the opinion:

To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept “producer” is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court’s duty to leave the Commission’s judgment undisturbed.⁷⁴

The Court took a similar line three years later in *Hearst*.⁷⁵ That case involved a dispute between a publishing company and the individual newsvendors who sold the company’s newspapers on Los Angeles city streets. Those vendors filed a petition with the National Labor Relations Board (NLRB) seeking recognition as a lawful union; in their petition, the vendors asserted

68. *Id.*

69. *Id.* at 412–13.

70. *Id.* at 413.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 322 U.S. 111 (1944).

that they were the publisher's "employees" within the meaning of the National Labor Relations Act (NLRA) and should be allowed to unionize.⁷⁶ The Board agreed and granted recognition to the vendors' union.⁷⁷ The publishing company insisted that the vendors were not entitled to unionize because they were "independent contractors" rather than "employees," and the publisher therefore refused to bargain with the union.⁷⁸ The NLRB found that this refusal constituted an unfair labor practice and issued a cease-and-desist order, which the publisher challenged in court.⁷⁹

In maintaining that the NLRB had acted unlawfully, the publisher argued that the term "employee" in the NLRA ought to be given the same meaning that it has at common law.⁸⁰ The Court rejected this argument, but the Court did not suggest that its holding on this point was based on deference to the NLRB. Indeed, in this portion of the opinion, the Court barely mentioned the NLRB's views.⁸¹

76. *Id.* at 113–14.

77. *Id.* at 114.

78. *Id.* at 119–20.

79. *Id.*

80. *Id.* at 120.

81. *Id.* at 120–29. Similarly, in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), a car manufacturing company challenged the NLRB's determination that the foremen at the company's factories were "employees" within the meaning of the National Labor Relations Act (NLRA). In this case, the company did not argue that the foremen would not count as "employees" at common law. Rather, the company pointed out that the statutory definition of "employer" includes "any person acting in the interest of an employer." *Id.* at 488 (quoting 29 U.S.C. § 152(2)). The company asserted that because foremen are supervisors, and therefore act in the company's interest, they are, for NLRA purposes, "employers" rather than "employees." The question whether a person who "act[s] in the interest of an employer" can ever count as an employee is, as the *Packard* Court put it, a "naked question of law." *Id.* at 493. The Court agreed with the NLRB that the answer to that question is yes, but did not defer to the NLRB in reaching this conclusion. The Court reasoned that the foremen were "employees both in the most technical sense at common law as well as in the common acceptance of the term" and that, rather than excluding from the "employee" category anyone who "act[s] in the interest of [their employer]"—an interpretation that, the Court pointed out, might exclude all employees from the NLRA's protections—this piece of the statutory definition was meant to codify the *respondeat superior* principle that employers are liable for labor law violations committed by their employees and agents when (but only when) those employees or agents act in the employer's interest. *See id.* at 488–90; *see also id.* at 492 (asserting that there is "no ambiguity in th[e] Act" as to whether foremen are employees).

This holding was not sufficient to resolve the case, however, because the decision whether foremen (or any given employee class) can unionize requires a separate determination that this set of employees constitutes an appropriate "bargaining unit." The NLRA delegates

Rejecting the publisher's claim that the use of the term "employee" in the NLRA imported the common law distinction between employees and independent contractors was not sufficient to resolve the case, however.⁸² The Court still had to decide whether the vendors were "employees" within the meaning of the NLRA. On that point, *Hearst* declared that it was unnecessary for the Court to articulate a precise definition of "employee," because the task of determining the meaning of that term, in the context of the NLRA, "has been assigned primarily to [the NLRB,] the agency created by Congress to administer the Act."⁸³ Citing *Gray*, the *Hearst* Court explained that such questions are to be resolved by the agency in the course of executing its functions under the statute.⁸⁴

Notably, *Hearst* acknowledged that there was no dispute over any material facts, and that "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute."⁸⁵ "But," the Court continued—using language that recalls earlier cases like *Gray*, *Bates & Guild*, and *Norfolk & Western Railway*—"where the question is one of *specific application of a broad statutory term* in a proceeding where the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination that specified persons are 'employees' under this Act *is to be accepted* if it has warrant in the record and a *reasonable basis in law*."⁸⁶ Thus *Hearst*, like *Gray* and its progenitors, recognized that in cases where an agency has been authorized to implement a statute, and in so doing must decide whether or how an imprecise statutory term applies to specific situations—drawing lines between, in this case, employees and non-

that determination to the NLRB. See 29 U.S.C. § 159(b) (granting the Board authority to determine appropriate bargaining units). The *Packard* Court observed that many of the company's arguments about why foremen should not be treated as "employees" really amounted to policy arguments against recognizing these foremen as an appropriate bargaining unit. 330 U.S. at 490–93. But *that* decision, the Court emphasized, is a policy decision that the statute assigned to the Board. See *id.*

Though not directly relevant to the discussion regarding the standard of review, it is worth mentioning that in the 1947 Labor-Management Relations Act, also known as the Taft-Hartley Act, Congress overrode the results of both *Hearst* and *Packard* by amending the statutory definition of "employee" to exclude both "any individual having the status of an independent contractor" and "any individual employed as a supervisor." Pub. L. No. 80-101, sec. 101, § 2, 61 Stat. 136, 138 (amending 29 U.S.C. § 152(3)).

82. *Hearst*, 322 U.S. at 129.

83. *Id.* at 130.

84. *Id.*

85. *Id.* at 130–31.

86. *Id.* at 131 (emphases added) (internal quotation marks omitted).

employees—the court should treat the statute as implicitly delegating to the agency the responsibility to make those line-drawing calls.⁸⁷

87. See also *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403–04 (1947) (applying the *Hearst* framework to decide another case involving the meaning of “employee” under the NLRA and restating the *Hearst* Court’s conclusion that “the Board has the duty of determining in the first instance who is an employee for purposes of the [NLRA],” and describing this duty as a “delegated function” of the Board).

Some have suggested that *Packard*, decided the same year as *Atkins*, is inconsistent with *Hearst*, because although *Packard* and *Hearst* involved what seems like a similar question—whether certain workers (newsvendors in *Hearst*, factory foremen in *Packard*) count as “employees” under the NLRA—the *Hearst* Court treated this as a mixed question of law and fact and deferred to the NLRB, while the *Packard* Court treated this as a pure question of law to be decided by the judiciary. See Louis L. Jaffe, *Judicial Review: Questions of Law*, 69 HARV. L. REV. 239, 254–55 (1955); John G. Osborn, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 HARV. J. ON LEGIS. 115, 131–32 (1999); Lawson & Kam, *supra* note 23, at 19–21. But this alleged inconsistency is illusory, for two reasons.

First, the contested question in *Packard* is more like the *first* issue in *Hearst*—whether certain workers are per se excluded from the “employee” category—than the *second* issue in *Hearst*—whether, assuming the answer to the first question is no, the lines drawn by the Board between employees and non-employees are consistent with the NLRA. In *Hearst*, the company argued that a worker could not, as a matter of law, qualify as an employee if that worker would be categorized as an independent contractor at common law. In *Packard*, the company argued that a worker could not, as a matter of law, qualify as an employee if that worker acts as an agent of the employer, because the NLRA defines “employer” as including those who act in the employer’s interest. So, in both cases, the challenger argued for a per se rule that would exclude certain workers from the NLRA’s coverage. And in both cases, the Court decided the issue in the NLRB’s favor—rejecting the proposed per se rule—but did so without deference to the Board. In *Hearst*, the resolution of that pure question of law was not enough to decide the case, because the Court still had to decide if newsvendors *were* employees as the NLRA uses that term. In *Packard*, by contrast, there was no serious question that foremen are “employees” in both the ordinary sense and the common law sense, so there was no line-drawing decision on which the *Packard* Court would have had occasion to apply *Gray-Hearst* style deference. Moreover, once the *Packard* Court concluded that there was no per se bar to treating foremen as employees, the Court turned to the question of whether the Board had acted lawfully when it determined that foremen constituted an appropriate bargaining unit, and on *that* question, the Court *did* defer to the Board. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491–93 (observing that the NLRA “confers upon the Board a broad discretion to determine appropriate [bargaining] units” and that a court should therefore reject the Board’s classification decisions only if those decisions are “so unreasonable and arbitrary as to exceed the Board’s power”; in other words, the only legal question a reviewing court must decide in such a case is “whether the Board is . . . acting within the terms of the statute”).

Second, even if the classification of foremen *did* raise the sort of line-drawing issue for which *Hearst* would call for deference to the agency’s reasonable determinations, such

In staking out this position, *Gray* and *Hearst* were not outliers or anomalies. Rather, they were quickly recognized as leading cases.⁸⁸ Other decisions in the wake of *Gray* and *Hearst* followed their lead, holding that when a statute empowers an agency to apply statutory categories and criteria to specific situations, the reviewing court should treat the statute as implicitly delegating to the agency the authority to make line-drawing decisions regarding the scope of the inevitably imprecise statutory language, subject to judicial review only for reasonableness. To be sure, some of these cases involved extremely

deference would not be necessary or appropriate in *Packard* because the Court determined that the term “employee” *unambiguously* includes foremen. A contrary conclusion would presumably have been unreasonable even under *Hearst*’s deferential standard. *See Packard*, 330 U.S. at 488 (stating that it is “obvious” that foremen are employees both in the ordinary sense and in the technical legal sense); *id.* at 492 (declaring that there is “no ambiguity” on this question); *id.* at 493 (emphasizing that the company’s policy arguments cannot overcome the statute’s “plain provisions”). Notably, the Board never suggested otherwise. That is worth mentioning, because some commentators have claimed that the Board had vacillated over time as to whether foremen qualify as employees. *See, e.g.,* Strauss, *supra* note 23, at 1165; Lawson & Kam, *supra* note 23, at 20–21. But that is not so. According to the *Packard* Court, the Board had consistently maintained that foremen *are* employees; the question on which the Board had vacillated was whether this *particular class* of employees constituted an *appropriate bargaining unit*—a distinct question under the statute. *See Packard*, 330 U.S. at 492 n.3 (observing that the Board had changed its position over time on the question whether “supervisory employees may organize in an independent union,” but that “[i]n none of th[e] series of cases [on this issue] did the Board hold that supervisors were not employees”).

In short, the claim that *Packard* is inconsistent with *Hearst*, or that it can be made consistent only by introducing additional factors beyond those considered in *Hearst*, does not withstand scrutiny. *See also* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 24–25 (1985) (explaining that *Hearst* and *Packard* not only “can be reconciled” but can “be seen as having . . . [employed] a single analytical framework”); Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 793–94 (2007) (concluding that *Hearst* and *Packard* embodied a single “model” of judicial review, in which courts policed “the limits of agency authority” but deferred to “an agency’s determination about how to apply a statutory term,” so long as that determination is reasonable); John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1122–25 (2004) (concluding, after a close analysis of both cases, that “*Packard* is consistent with *Gray-Hearst*”).

88. *See* DAVIS, *supra* note 50, § 246, at 882; Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 571–73 (1950); Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 472 (1950); Bernard Schwartz, *Gray v. Powell and the Scope of Review*, 54 MICH. L. REV. 1, 20–21 (1955) [hereinafter Schwartz, *Gray v. Powell*]; *see also* Mulry v. Driver, 366 F.2d 544, 549 (9th Cir. 1966).

broad and subjective terms like “unfair,”⁸⁹ “public convenience and necessity,”⁹⁰ and “fair and equitable.”⁹¹ But other cases involved terms that, while imprecise, are not so amorphous. Take, for example, *Unemployment Compensation Commission v. Aragon*,⁹² decided in 1946. That case involved the interpretation of a provision in a federal statute that denied unemployment benefits to workers whose unemployment was due to a labor dispute in “active progress.”⁹³ The benefit applicants in *Aragon* were members of a union that was involved in a longstanding conflict with certain companies.⁹⁴ Although the facts concerning the history of this conflict were not contested, the parties disagreed as to whether, on those facts, the labor dispute was in “active

89. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (concluding that the NLRA “did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice,” but instead “left to the [NLRB] the work of applying the Act’s general prohibitory language in light of the infinite combinations of events which might be charged as violative of its terms”); *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 367 (1965) (upholding a Federal Trade Commission (FTC) ruling that a sponsorship agreement between two companies constituted an “unfair method of competition” under the Federal Trade Commission Act on that grounds that “[w]here the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, [the reviewing court’s] function is limited to determining whether the Commission’s decision has warrant in the record and a reasonable basis in law” (internal quotation marks omitted) (citing *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 131 (1944))); *FTC v. Cement Inst.*, 333 U.S. 683, 720 (1948) (giving “great weight” to the FTC’s conclusion that a certain practice is an “unfair method of competition”).

90. See *ICC v. Parker*, 326 U.S. 60, 64–65 (1945) (observing that the Interstate Commerce Act (ICA), which required all motor vehicles to receive a “certificate of public convenience and necessity” from the ICC in order to travel on the public highways, did not define the term “[p]ublic convenience and necessity,” and inferring that “[t]he purpose of Congress was to leave the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity,” and emphasizing that the statute gives the ICC the discretion “to draw its conclusions from the infinite variety of circumstances which may occur in specific instances”).

91. See *SEC v. Chenery Corp.*, 332 U.S. 194, 208 (1947) (declaring, in the context of upholding a Securities and Exchange Commission (SEC) ruling that a corporate reorganization plan would not be “fair and equitable” or in the “public interest” within the meaning of the Public Utility Holding Company Act, that “[t]he application of those [statutory] criteria, whether in the form of a particular order or a general regulation, necessarily requires the use of informed discretion by the Commission”); see also *SEC v. Cent.-Ill. Secs. Corp.* 338 U.S. 96, 127 (1949).

92. 329 U.S. 143, 145 (1946).

93. *Id.* at 148.

94. *Id.* at 146–47.

progress.”⁹⁵ The federal agency responsible for administering the statute concluded that it was, and therefore denied benefits.⁹⁶ The *Aragon* Court upheld that decision.⁹⁷ Citing and quoting *Hearst*, the Court declared that because “the question presented is ‘one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially,’” the Court “need not find that [the agency’s] construction is the only reasonable one or even that it is the result that [the Court] would have reached had the question arisen in the first instance in judicial proceedings.”⁹⁸ Rather, “[t]he responsibility of applying the statutory provisions to the facts of the particular case *was given in the first instance to the Commission*,”⁹⁹ and the Court should not “substitut[e] a different construction from that made by the Commission with the responsibility of administering the statute.”¹⁰⁰ Three months later, in *Cardillo v. Liberty Mutual Insurance Co.*,¹⁰¹ the Court relied on similar reasoning to uphold a federal agency’s determination that a benefit claimant’s injury had “ar[isen] out of and in the course of employment” within the meaning of the relevant statute.¹⁰² *Cardillo* began by noting the great deference owed by courts to an agency’s factual determinations.¹⁰³ But the Court proceeded to explain that although “the inference of the type here made by the [agency] involves an application of a broad statutory term or phrase to a specific set of facts,”

95. *Id.* at 146–49.

96. *Id.* at 149.

97. *Id.* at 152.

98. *Id.* at 153 (quoting *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 131 (1944)).

99. *Id.* at 155 (emphasis added).

100. *Id.* at 154. It is worth noting that *Aragon* also involved a second question that seemed to concern the application of a general statutory term to the circumstances of the case, namely whether the labor dispute in question occurred “at” the establishments covered by the statute. *See id.* at 154–55. The Supreme Court chided the Court of Appeals for addressing this issue, which the challenger had not raised earlier in the litigation, but the Court proceeded to explain, in a brief paragraph, why the challenger’s objection was not “convincing on its merits.” *Id.* at 155. As Kenneth Culp Davis observed, this part of the *Aragon* opinion did not mention deference to the agency’s judgment, and this may appear to create some internal tension in the opinion regarding the correct standard of review. *See* DAVIS, *supra* note 50, § 247, at 891–94. Professor Davis suggested, however, that the apparent tension may be illusory. He pointed out, plausibly, that on this second issue “the Court simply agreed with the Commission and very naturally said so The Court was focusing upon disposition of the case, not writing an opinion to guide the determination of whether or when a reviewing court should substitute [its] judgment [for that of the agency].” *Id.* at 893; *see also id.* § 251, at 907.

101. 330 U.S. 469 (1947).

102. *Id.* at 470.

103. *Id.* at 477–78.

rather than the determination of the facts themselves, this difference “gives rise to no greater scope for judicial review.”¹⁰⁴ Citing *Hearst* and *Aragon*, *Cardillo* declared that “[e]ven if such an inference be considered more legal than factual in nature, the reviewing court’s function is exhausted when it becomes evident that the [agency’s] choice has substantial roots in the evidence and is not forbidden by the law.”¹⁰⁵

The *Gray* doctrine persisted, with numerous Supreme Court and Court of Appeals cases taking a similar line in the ensuing decades. For instance, in the 1962 case *United States v. Drum*,¹⁰⁶ the Court considered a challenge to the ICC’s determination that certain trucking firms were “contract carriers” rather than “private carriers” under the Motor Carriage Act.¹⁰⁷ In upholding the ICC’s order, the *Drum* Court, citing *Bates & Guild*, *Gray*, and *Hearst*, emphasized that “[t]he problem is one of determining . . . the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure,” and that in such a situation the agency’s reasonable determination should control.¹⁰⁸ Six years later, the Court sounded a similar note in *Hardin v. Kentucky Utilities Co.*,¹⁰⁹ which concerned a statutory provision that barred the Tennessee Valley Authority (TVA) from selling electricity outside of “the area for which the [TVA] or its distributors were the primary source of power supply on July 1, 1957.”¹¹⁰ The issue in *Hardin* concerned the meaning of “area,” which the statute did not define.¹¹¹ In upholding the TVA’s decision, the Court concluded that “the proper rule” in such a case is that the agency’s determination “is entitled to acceptance unless it lies outside the range of permissible choices contemplated by the statute.”¹¹² *Hardin* emphasized “the innate and inevitable vagueness of the ‘area’ concept and the complexity of the factors relevant to decision in this matter,” and asserted (citing *Bates & Guild*) that it would be more “in line with the overall purposes of the Act[] for the courts to take the TVA’s ‘area’ determinations as their starting points and to set those determinations aside

104. *Id.* at 478.

105. *Id.* at 478 (citing *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 131 (1944) and *Unemployment Comp. Comm’n v. Aragon*, 329 U.S. 143, 153–54 (1946)).

106. 368 U.S. 370 (1962).

107. *Id.* at 371–74.

108. *Id.* at 375–76 (citing *Bates & Guild*, 194 U.S. at 106, *Gray*, 314 U.S. at 412–13, and *Hearst*, 322 U.S. at 130–31).

109. 390 U.S. 1 (1968).

110. *Id.* at 2–3 n.1.

111. The Tennessee Valley Authority (TVA) had decided that each county could be treated as a single “area” under the Act, while the challengers insisted that each individual village should be considered a separate “area.” *See id.* at 2–5.

112. *Id.* at 8.

only when they lack reasonable support in relation to the statutory purpose.”¹¹³ Numerous other cases from the 1950s through the 1980s embraced a similar approach, often citing to some combination of *Gray*, *Hearst*, and their antecedents and progeny.¹¹⁴

Several points are worth emphasizing about the scope and rationale for judicial deference to agency statutory interpretations under the *Gray* doctrine.

First, the *Gray* doctrine calls for *deference to*, not merely *respectful consideration of*, the responsible agency’s decisions regarding the application of general statutory terms to specific situations. And this deference appears to be grounded in the conclusion that, in empowering an agency to issue authoritative decisions—such as setting a rate (*Bates & Guild*), conferring a legal status (*Hearst*), or ruling on an application for a permit (*Hardin*), exemption (*Gray*), or benefit (*Aragon*)—Congress implicitly delegated to the responsible agency the authority to decide, within reason, the scope and meaning of the imprecise statutory terms that the agency is supposed to apply. Admittedly, some of the cases use language that suggests that deference to the agency may be based on respect for the administrator’s longstanding views.¹¹⁵ One can also find in several cases language declaring that issues of statutory

113. *Id.* at 9 (citing *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109–10 (1904)).

114. *See, e.g.*, *O’Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506–09 (1951); *Mitchell v. Budd*, 350 U.S. 473, 480 (1956); *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 40–41 (1961); *United States v. Shimer*, 367 U.S. 374, 381–83 (1961); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566–70 (1980); *S. Dev. Co. v. R.R. Ret. Bd.*, 243 F.2d 351, 352–53 (8th Cir. 1957); *Cal. Co. v. Udall*, 296 F.2d 384, 388 & n.13 (D.C. Cir. 1961); *Purolator Prods., Inc. v. FTC*, 352 F.2d 874, 883–84 (7th Cir. 1965); *Int’l Packers, Ltd. v. Fed. Mar. Comm’n*, 356 F.2d 808, 811 (D.C. Cir. 1966); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 769 (6th Cir. 1966); *Comm’r. v. Pepsi-Cola Niagara Bottling Corp.*, 399 F.2d 390, 393 (2d Cir. 1968); *SEC v. Talley Indus., Inc.*, 399 F.2d 396, 403 (2d Cir. 1968); *Kramer v. Gov’t of Virgin Islands*, 479 F.2d 350, 353 (3d Cir. 1973); *NLRB v. Drs.’ Hosp. of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir. 1973); *NLRB v. Local No. 106, Glass Bottle Blowers Ass’n*, 520 F.2d 693, 696 (6th Cir. 1975); *McInnis v. Weinberger*, 530 F.2d 55, 62–63 (1st Cir. 1976); *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 267, 272 (D.C. Cir. 1979); *Nat’l Ass’n of Greeting Card Publishers v. U.S. Postal Serv.*, 607 F.2d 392, 429–30 (D.C. Cir. 1979) (*per curiam*); *Capitol Transp. v. United States*, 612 F.2d 1312, 1324 (1st Cir. 1979); *Am. Trucking Ass’ns v. ICC*, 697 F.2d 1146, 1148 (D.C. Cir. 1983).

115. *See, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *SEC v. Sloan*, 436 U.S. 103, 118 (1978); *McInnis v. Weinberger*, 530 F.2d 55, 63 (1st Cir. 1976); *cf.* *United States v. Drum*, 368 U.S. 370, 376 (1962) (noting, in confirmation of the decision to defer to the agency’s line-drawing decision, that the agency’s determination did not “violate the coherence of the body of administrative and judicial precedents so far developed in [the relevant] area”).

interpretation are ultimately for the courts.¹¹⁶ And none of the cases in the *Gray* line laid out the implied delegation theory in as much detail, or with as much theoretical sophistication, as appeared in later cases elaborating on the *Chevron* doctrine.¹¹⁷ But, as the cases discussed and quoted above demonstrate, the *Gray* doctrine was grounded in the conclusion that, in the relevant set of cases, the interpretive decision had been *assigned* to the responsible agency by Congress, and that the reviewing court's function in such cases should be limited to ensuring that the agency's interpretation is reasonable.

Second, deference under the *Gray* doctrine is not derived from the principle that courts should defer to an administrative agency's factual determinations. It is true that the *Gray* doctrine has sometimes been characterized as involving deference to agency views on "mixed questions of law and fact," and there are some judicial opinions that suggest the *reason* for deference in such cases is that it is impossible, or at least impractical, to disentangle the disputed questions of law from the disputed questions of fact.¹¹⁸ But as the above discussion makes clear, the *Gray* doctrine calls for deference to an agency's application of a general statutory term to particular situations even when the relevant facts are uncontested. Indeed, in *Gray* itself the Court was explicit that the case involved no dispute about facts, only a dispute about

116. See, e.g., *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130–31 (1944); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *NLRB v. Brown*, 380 U.S. 278, 291–92 (1965).

117. See, e.g., *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) (explaining that the Court "accord[s] deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved . . . by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"). This line of argument was developed and explored even more thoroughly in the voluminous scholarly commentary on *Chevron*. See, e.g., Barron & Kagan, *supra* note 25; Levin, *supra* note 87; John F. Manning, *Chevron and the Reasonable Legislator*, 128 HARV. L. REV. 457 (2014); Scalia, *supra* note 13, at 517; Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937 (2018); Seidenfeld, *supra* note 29; Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613 (2019).

Some pre-*Chevron* scholarship also laid out more clearly the implied delegation theory undergirding the *Gray* doctrine. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 106–09 (1944).

118. See, e.g., *Marquez v. Frisbie*, 101 U.S. 473, 476 (1879); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 145–46 (1939); *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 40–41 (1961); *Hanly v. Kleindienst*, 471 F.2d 823, 828–30 (2d Cir. 1972); *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 267, 272 (D.C. Cir. 1979).

how the statutory language applied to those facts.¹¹⁹ Other cases in the line, both before and after *Gray*, underscored this point as well.¹²⁰ The cases in which the *Gray* doctrine calls for deference are “factbound” in the sense that they involve application of law *to* facts—more specifically, they involve determining whether a particular fact situation falls within the scope of a statutory term—but these cases do not invariably, or even usually, involve situations where the resolution of the legal questions turns on the resolution of disputed factual questions.¹²¹

119. See *Gray v. Powell*, 314 U.S. 402, 412 (1941) (“Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director.”); see also *Stern*, *supra* note 117, at 103 (explaining that although the standard of review applied by the Court in *Gray* is “the same as that applied to strictly factual issues[,] . . . this identity is not sufficient to warrant the misleading description of the issue [in *Gray*] as one of fact”).

120. See, e.g., *Bates & Guild Co. v. Payne*, 194 U.S. 106, 108–09 (1904) (observing first that the “settled practice” of the Court in land cases has been “to treat the findings of the Land Department as conclusive,” and then declaring that this rule of deference applies more broadly, such that “where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, *whether it involve questions of law or fact*, will not be [reversed] by the court[] unless . . . his action was clearly wrong” (emphasis added)); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 478 (1947) (declaring that “[i]t matters not that the basic facts from which the Deputy Commissioner draws [a conclusion as to whether an injury arose ‘in the course of employment’] are undisputed rather than controverted,” because “[t]he Deputy Commissioner alone is charged with the duty of selecting the inference which seems most reasonable,” and “the fact that the inference of the type made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review”); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945) (calling for judicial deference not only to the agency’s factual determinations, but also to “such [legal] conclusions as reasonably may be based upon the facts proven”); *SEC v. Chenery Corp.*, 332 U.S. 194, 207, 209 (1947) (deferring to the agency’s application of the general statutory terms to the particular circumstances at issue, while emphasizing that the facts of the case were “undisputed” and “uncontested”); see also *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 591 (2d Cir. 1961) (recognizing that in cases like *Gray*, *Hearst*, and others in this line, the “principal dispute relates to the meaning of the statutory term,” and therefore these cases “quite clearly present questions of law” rather than questions of fact).

121. See *DAVIS*, *supra* note 50, § 245, at 875 (explaining that the term “mixed questions of law and fact” concerns the “application of legal concepts to undisputed or established facts,” and noting the confusion that follows from the use of the terms “question of fact” or “mixed question” to describe such questions, given that “[e]very determination which refines the meaning of a legal concept is to that extent analytically a determination of law”). We see examples of precisely this confusion even among the most astute modern commentators. See,

Third, deference under the *Gray* doctrine is not limited to statutory terms that are so broad, vague, and subjective that they could fairly be characterized as calling for an all-things-considered judgment of “reasonableness” or “appropriateness.” As noted above, *some* of the cases in the line had something of that character, involving application of terms like “unfair,”¹²² “good faith,”¹²³ “public interest,”¹²⁴ and “public convenience and necessity.”¹²⁵ But most of the cases applying the *Gray* doctrine involved the interpretation of terms that, while imprecise, have more definite content—terms like “producer,”¹²⁶ “employee,”¹²⁷ “employer,”¹²⁸ “supervisor,”¹²⁹ “owner,”¹³⁰ “purchaser,”¹³¹ “member of a crew,”¹³² “course of employment,”¹³³

e.g., Sunstein, *Our Marbury*, *supra* note 1, at 1901 n.42 (asserting that “there is no such category” as “mixed questions” of law and fact, because “[a]ny supposedly mixed question should be divided into two components,” one of which involves fact (what happened in the world), the other of which involves law (the legal consequences of those facts)). Professor Sunstein is not wrong, but his criticism of the mixed question category is based on precisely the misunderstanding that, as Professor Davis pointed out, this misleading terminology tends to produce. Mixed questions of law and fact are really questions of *law*—but they are questions of law that concern how the law applies to specific fact situations, as distinct from abstract or general questions of law. See also Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235–236 (1985) (distinguishing “law application” from both “law declaration” and “fact identification,” acknowledging that “[i]f all legal propositions could be formulated in great detail, [the law application] function would be rather mechanical and require no distinctive consideration,” but emphasizing that in the real world “[l]inking the [legal] rule to the conduct is a complex psychological process, one that often involves judgment”).

122. See *Republic Aviation Corp.*, 324 U.S. at 798; *Chenery Corp.*, 332 U.S. at 208; *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 367 (1965); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 769 (6th Cir. 1966); *Capitol Transp. v. United States*, 612 F.2d 1312, 1324 (1st Cir. 1979).

123. See *Local 13, Detroit Newspaper Printing and Graphic Communications Union, v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979).

124. See *Chenery Corp.*, 332 U.S. at 208; *NBC v. United States*, 319 U.S. 190, 217–21 (1943).

125. See *ICC v. Parker*, 326 U.S. 60, 65 (1945).

126. See *Gray v. Powell*, 314 U.S. 402 (1941); see also *Cal. Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961) (involving a dispute over the meaning of “production”).

127. See *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1941); *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947).

128. See *S. Dev. Co. v. R.R. Ret. Bd.*, 243 F.2d 351, 352–53 (8th Cir. 1957).

129. See *NLRB v. Drs.' Hosp. of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir. 1973).

130. See *Am. Trucking Ass'ns v. ICC*, 697 F.2d 1146, 1148 (D.C. Cir. 1983).

131. See *Purolator Prods. v. FTC*, 352 F.2d 874, 883–84 (7th Cir. 1965).

132. See *S. Chi. Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940).

133. See *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951).

“periodical,”¹³⁴ “area,”¹³⁵ “compensation,”¹³⁶ “highly paid,”¹³⁷ “joint participant,”¹³⁸ “recreational use,”¹³⁹ “restrain or coerce,”¹⁴⁰ and “estimated costs.”¹⁴¹ Thus deference under the *Gray* doctrine is not limited to cases involving what we might call “do the right thing” language. Under *Gray*, the implicit delegation rationale for deference applies to terms that establish categories or criteria that are relatively clear in many cases but have fuzzy boundaries.

Fourth, the *Gray* doctrine only calls for deference when the agency has issued its interpretation through a relatively formal adversarial or quasi-adversarial process that produces an authoritative decision, one that the statute empowers the agency to make. When this is not the case—when the agency announces its opinion on statutory meaning in some other context, such as an informal opinion letter or legal brief—the *Gray* doctrine does not treat the statute as implicitly delegating interpretive authority to the agency. The leading case for this principle is *Skidmore v. Swift & Co.*¹⁴² *Skidmore*, which was decided less than a year after *Hearst*, involved a dispute over whether the time that a company’s in-house firefighters spend after hours on company premises qualifies as overtime work within the meaning of the Fair Labor Standards Act (FLSA). The Administrator of the Labor Department’s Wages and Hours Division had issued statements, both before and during the *Skidmore* litigation, expressing the Division’s views on this matter. But although the Administrator has certain responsibilities under the FLSA, the statute does not give the Administrator the authority to adjudicate disputes or to issue binding orders.¹⁴³ For this reason, the *Skidmore* Court declined to treat the

134. See *Bates & Guild Co. v. Payne*, 194 U.S. 106, 107, 110 (1904).

135. See *Hardin v. Ky. Utils. Co.*, 390 U.S. 1 (1968); *Mitchell v. Budd*, 350 U.S. 473, 476–480 (1956).

136. See *United States v. Drum*, 368 U.S. 370, 375–76 (1962).

137. See *Comm’r v. Pepsi-Cola Niagara Bottling Corp.*, 399 F.2d 390, 393 (2d Cir. 1968).

138. See *SEC v. Talley Indus., Inc.*, 399 F.2d 396, 403 (2d Cir. 1968).

139. See *Kramer v. Gov’t of V.I.*, 479 F.2d 350, 353 (3d Cir. 1973).

140. See *NLRB v. Local No. 106, Glass Bottle Blowers Association*, 520 F.2d 693, 696 (6th Cir. 1975).

141. See *Nat’l Ass’n of Greeting Card Publishers v. U.S. Postal Serv.*, 607 F.2d 392, 429–30 (D.C. Cir. 1979).

142. 323 U.S. 134 (1944).

143. As *Skidmore* explained, in the FLSA “Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act,” but Congress “did create the office of Administrator,” and gave this office “a variety of duties,” including the duties of investigating “conditions in industries and employments subject to the Act” and “bringing injunction actions to restrain violations.” *Id.* at 137.

Administrator's views on what counts as "working time" under the FLSA as controlling.¹⁴⁴ Instead of calling for the sort of strong deference embraced in cases like *Gray* and *Hearst*, *Skidmore* held that the Administrator's interpretive views should be given an appropriate degree of "respect" and "weight,"¹⁴⁵ after taking into consideration various factors.¹⁴⁶ Other FLSA cases, both before and after *Skidmore*, similarly emphasized that a key difference between the FLSA and statutes like the NLRA and the Interstate Commerce Act (ICA) is that, because these latter statutes empower an agency to make legally binding decisions, they implicitly delegate to that agency the authority to make line-drawing judgments regarding the meaning of statutory terms; the FLSA, by declining to give any agency such authority, leaves these line-drawing decisions to the judiciary.¹⁴⁷ Even though *Skidmore* was not particularly

144. The *Skidmore* Court observed that "[t]he rulings of [the] Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact," and noted further that the Administrator's determinations "are not . . . conclusive . . . even in the cases with which they directly deal"; therefore, the Court concluded, "the rulings, interpretations and opinions of the Administrator under [the FLSA] [are] not controlling upon the courts by reason of their authority." *Id.* at 139–40.

145. *Id.* at 140; *see also* *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936) (stating that even on an issue where the reviewing court is obligated to exercise "independent judgment," the court may be "informed and aided by the sifting procedure of an expert . . . agency").

146. *See Skidmore*, 323 U.S. at 140 (stating that the weight a court should give to the Administrator's "judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking [the] power to control").

147. *See A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517, 523 (1942) (observing that in the "task of [interpreting the FLSA, the Court is] without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area," and highlighting that in contrast to other statutes like the ICA and NLRA, the FLSA "puts upon courts the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations" (emphasis omitted)); 10 *E. 40th St. Bldg., Inc. v. Callus*, 325 U.S. 578, 579–80 (1945) (noting that the FLSA "involve[s] the courts in the empiric process of drawing lines from case to case, and inevitably nice lines," because the FLSA, in contrast to statutes like the ICA and NLRA, "withheld from the courts . . . the benefit of a prior judgment, on vexing and ambiguous facts, by an expert administrative agency"); *see also* DAVIS, *supra* note 50, § 249, at 899 (distinguishing two other cases that might seem on their face to be inconsistent with *Gray* and *Hearst*—*United States v. Silk*, 331 U.S. 704 (1947), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)—on the ground that "Congress had not delegated administrative power to the [] two agencies [involved in those cases, the Wage and Hour Division and the Commissioner of Internal Revenue, respectively,] in the same way it had delegated power to the [NLRB]").

explicit or systematic in articulating why the authoritativeness of an agency's decision and the degree of procedural formality are relevant to the appropriate level of deference to the agency's interpretation of the statute, commentators emphasized this distinction in explaining what might otherwise appear to be inconsistencies in the Court's application of the *Gray* doctrine.¹⁴⁸ A

148. See Schwartz, *Gray v. Powell*, *supra* note 88, at 39–45 (explaining that the *Gray* doctrine does not call for deference to agency interpretations issued in informal interpretive rules, but instead limits deference to those determinations issued pursuant to more formal procedures); DAVIS, *supra* note 50, § 249, at 901 (explaining that courts engage in “narrow” (that is, deferential) review of agency legislative rules because Congress “by virtue of its delegation of power to promulgate legislative rules . . . has shown its intent that the determination of the content of the rules should be made by the agency and not by the courts,” and explaining that a similarly deferential approach applies to “an agency’s interpretation of a statute through an adjudication” because “the process of administrative determination through an adversary proceeding gives special authority to the determination which would be lacking if the interpretation had been otherwise made”).

For example, one of the most prominent cases from the 1940s that initially appears inconsistent with *Gray* is *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944). The *Davies Warehouse* Court refused to defer to the Price Administrator’s interpretation of the term “public utility” in the Emergency Price Control Act; this interpretation appeared in a ruling issued by the Administrator without a hearing or other adversary process. *Id.* at 146–47, 156. In seeming contradiction to the *Gray* doctrine’s presumption of implicit delegation, the *Davies Warehouse* Court observed that “[i]f Congress had deemed it necessary or even appropriate that the Administrator’s order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so.” *Id.* at 156. While it is possible to treat *Davies Warehouse* as an attempt to walk back *Gray*—only for the Court to reverse course again a few months later in *Hearst*—commentators have persuasively argued that the cases are not inconsistent, and that the key distinguishing factor concerns the procedures used to produce the respective declarations. See Schwartz, *Gray v. Powell*, *supra* note 88, at 45 (explaining that although *Gray* and *Davies Warehouse* might appear inconsistent, the “basic difference” between them is that in *Gray*, “the challenged finding had been made after a formal adversary hearing before the agency,” whereas “[i]n *Davies*, this essential element was lacking”); see also *Morton v. Ruiz*, 415 U.S. 199, 236–37 (1974) (refusing to treat as binding an agency’s “unpublished ad hoc determination” regarding the meaning of a statutory provision, and instead applying the *Skidmore* standard of review (emphasis omitted)); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 290 (1946) (holding that administrative interpretations “not made in adversary proceedings . . . are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making inter partes decisions,” and are instead eligible for review only under the less deferential *Skidmore* standard); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49–50 (2d Cir. 1976) (concluding—after noting that cases like *Gray* and *Hearst*, which call for deference to “the decisions of an administrative agency applying a statute to the facts,” might seem to be in tension with other cases that endorse “free substitution of judicial for administrative judgment”—that in

version of this distinction was also incorporated into the *Chevron* doctrine—with citations to *Skidmore*—in cases like *Christensen v. Harris County*¹⁴⁹ and *United States v. Mead Corp.*¹⁵⁰

the case at hand deference was not appropriate in part because, in contrast to *Gray* and *Hearst*, the agency whose decision was under review “is not a policy making . . . agency” and, additionally, this agency had not “rendered [its decision] on a full record”). *But see id.* at 50 (also noting, as additional reasons for declining to defer, factors that are not traditionally part of the *Gray* doctrine, such as the fact that the agency “had little experience in administration of the Act” and the interpretive question implicated issues, such as the meaning of legislative history, on which “a court has greater competence”).

One additional wrinkle to consider with respect to this aspect of the *Gray* doctrine is whether an interpretation issued in the context of a notice-and-comment rulemaking under § 553 of the APA (or similar procedures in other statutes) would qualify for deference under *Gray*. Most of the cases that have invoked the *Gray* doctrine involved orders in individual cases, issued pursuant to adversarial hearings. There is language in some of the commentaries suggesting that such proceedings are a prerequisite for *Gray* deference, *see* Schwartz, *Gray v. Powell*, *supra* note 88, at 40–41, a conclusion that might imply that interpretations announced in notice-and-comment rules would not qualify for such deference. But that is not the better reading of the doctrine. For one thing, while most of the cases that deferred under the *Gray* doctrine involved orders issued after adversarial hearings, at least a few of them involved regulations. *See, e.g.*, *Billings v. Truesdell*, 321 U.S. 542, 552–53 (1944) (deferring to an interpretation of the Selective Service Act that appeared in a regulation issued by the Director of the Selective Service); *Mitchell v. Budd*, 350 U.S. 473, 480 (1956) (deferring to a Labor Department regulation that announced criteria for interpreting and applying a statutory exemption in the FLSA); *United States v. Shimer*, 367 U.S. 374, 381–83 (1961) (deferring to a Veterans’ Administration regulation that interpreted a provision in the Servicemen’s Readjustment Act). Additionally, the paucity of case law embracing *Gray* deference to interpretations announced in notice-and-comment rules is likely attributable to the fact that the § 553 notice-and-comment rulemaking was an APA innovation, and one that only entered into widespread use in the late 1960s and the 1970s. *See* Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1147–48 (2001); Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1143–44 (2014). While it is hard to find many cases in which the Court deferred to an interpretation in a notice-and-comment rule under the *Gray* doctrine, it is also hard to find cases from the relevant time period in which the Court *declined* to defer to an interpretation in a notice-and-comment rule. Notice-and-comment rulemaking, especially on important matters, was relatively rare for most of the *Gray* doctrine’s pre-*Chevron* lifespan. Finally, the reasoning of *Chevron*-era cases that addressed the same issue—the relationship between procedural formality and deference—typically presumed that notice-and-comment procedures were sufficiently formal to merit the same sort of deference on statutory interpretation questions as would be appropriate for interpretations issued after formal adjudications. *See* *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

149. 529 U.S. at 587–88.

150. 533 U.S. at 226–31.

Fifth, even in those cases where the *Gray* doctrine calls for judicial deference, that deference is not absolute. The reviewing court must still decide whether the agency has acted within the scope of its delegated authority, which in this context means deciding whether the agency's line-drawing decisions reflect a *reasonable* interpretation of the statute. So, for example, if the Coal Commission in *Gray* had granted the "producer" exemption to a buyer that "obtains [coal] supplies from a seller totally free from buyer connection,"¹⁵¹ or if the Commission had denied the exemption to a coal consumer that "extracts coal from its own land with its own employees,"¹⁵² then presumably the Court would have invalidated the Commission's decision as unreasonable and therefore beyond the scope of the authority that Congress had implicitly delegated. While those examples are hypothetical, the Court did sometimes reject an agency's interpretive decision because the Court deemed that decision simply unreasonable, even under the deferential standard embraced by *Gray* and *Hearst*.¹⁵³ That is unsurprising. After all, under the *Chevron* doctrine—which applied the presumption of implicit delegation to a larger set of cases than did the *Gray* doctrine—agencies sometimes lost on the grounds that their interpretations were clearly contrary to the statute, and were therefore beyond the scope of the agency's implicitly delegated authority.¹⁵⁴

Finally, the *Gray* doctrine only calls for judicial deference to a specific *type* of agency decision regarding statutory meaning: Such deference is limited to line-drawing decisions concerning how imprecise statutory terms apply to particular situations. Under the *Gray* doctrine, pure or abstract questions of law, which typically involve a choice between two discrete alternative readings of a statutory provision, are for courts to decide.¹⁵⁵ The most well-

151. *Gray v. Powell*, 314 U.S. 402, 413 (1941).

152. *Id.* at 413.

153. *See, e.g.*, *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 369–70 (1946); *Office Employees International Union, Local No. 11 v. NLRB*, 353 U.S. 313, 316–19 (1957); *NLRB v. Brown*, 380 U.S. 278, 290–92 (1965); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 315–18 (1965); *Volkswagenwerk v. Fed. Mar. Comm'n*, 390 U.S. 261, 272–73 (1968); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

154. *See, e.g.*, *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229–32 (1994); *Wis. Cent. Ltd. v. United States*, 585 S. Ct. 274, 283 (2018); *Pereira v. Sessions*, 585 S. Ct. 198, 208–09 (2018).

155. This distinction closely tracks the distinction between what philosophers of language would call *ambiguity* (where a word or phrase can have two or more distinct, disjoint meanings) and *vagueness* (where a term has a spectrum of related meanings that cannot be clearly or sharply distinguished). *See, e.g.*, Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 512–15 (1994); Lawrence B. Solum, *The Interpretation-*

known illustration of this distinction comes from *Hearst*. In that case, the Court first considered the publisher's argument that the term "employee" in

Construction Distinction, 27 CONST. COMMENT. 95, 97–98 (2010); Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 128, 128–29 (Peter M. Tiersma & Lawrence M. Solan eds., 2012). Some scholars have drawn additional distinctions, identifying a larger number of qualitatively distinct ways that language might be unclear. See, e.g., Solum, *supra* note 19, at 262–63 (disaggregating statutory indeterminacy into "ambiguity," "vagueness," "open texture," "gaps," and "contradictions"); Slocum, *supra* note 19, at 212–15 (explaining that linguists have identified several distinct forms of indeterminacy, including "lexical ambiguity," "syntactic ambiguity," "polysemy," "vagueness," and "generality").

It is possible, and for some readers may be helpful, to frame the argument developed in the main text as asserting that the *Gray* doctrine calls for deference to an agency's position regarding the implementation of a *vague* statutory provision (the sort of determination that the literature sometimes refers to as statutory "construction") but preserves independent judicial judgment for the resolution of an *ambiguous* statutory provision (what the literature sometimes refers to as statutory "interpretation"). Cf. Solum & Sunstein, *supra* note 19 (emphasizing the distinction between statutory construction and statutory interpretation in the context of judicial review of agency action); Herz, *supra* note 19, at 1898–99 (drawing on the ambiguity-vagueness distinction, and the associated distinction between interpretation and construction, to argue for a reconceptualization of the *Chevron* doctrine that has some resemblance to this Article's proposed integration of the *Gray* doctrine into *Loper Bright*).

The main text, however, does not use this terminology, for two reasons. First, although philosophers of language and some legal scholars have embraced the more technical and distinct understandings of terms like "ambiguity" and "vagueness," most judges and lawyers continue to treat these terms as largely interchangeable, as does most of the legal scholarship on this topic. (The same is true for the terms "interpretation" and "construction.") Using these terms in a technical sense is therefore likely to introduce more confusion than it resolves for this Article's primary intended audience of judges, litigants, and legal scholars engaged in the project of developing the post-*Loper Bright* doctrine on judicial review of agencies' decisions regarding statutory meaning.

Second, while the ambiguity-vagueness distinction largely tracks the distinction that the *Gray* doctrine implicitly draws, it might not do so perfectly. In some cases, a term may have a number of distinct potential meanings, which can be arranged in rough order of distance from the term's "core" meaning, even though the term lacks the kind of open texture that some of the philosophical literature associates with vagueness. Whether or not this is the case, introducing these terms into the law and insisting on adherence to their technical meanings in the philosophy of language might invite unfruitful debates over whether this or that line-drawing problem genuinely involves "vagueness" (or "open texture" or "polysemy") in the technical sense.

In sum, for those familiar with the philosophers' terminology, the distinction between ambiguity and vagueness—and the associated distinction between interpretation and construction—may provide a useful touchstone for understanding the key distinction that the *Gray* doctrine implicitly draws, but the discussion in the main text does not rely on this distinction or use the philosophers' terminology in its rigorous technical sense.

the NLRA imported the common law definition of that term.¹⁵⁶ Although the Court agreed with the Board's rejection of this claim, the Court reached this conclusion without deferring to, or even mentioning, the Board's analysis of that issue.¹⁵⁷ Only after the Court, exercising its independent judgment, had rejected the claim that "employee" had the same meaning in the NLRA as at common law did the Court defer to the Board's determination that the newsvendors at issue ought to be considered "employees" for NLRA purposes.¹⁵⁸ Similarly, although the *Gray* Court deferred to the Coal Commission's determination that the Seaboard company was not a "producer" of coal, the Court also had to decide whether a transfer of coal could ever be considered a "sale" or "disposal" within the meaning of the Bituminous Coal Act if there was no legal transfer of title.¹⁵⁹ On this point, the Court ultimately agreed with the Commission that a transfer of title was *not* a necessary condition for a "sale" or "disposal" within the meaning of the statute, but the Court reached this conclusion after independent analysis of the statute, with no mention of deference to the agency.¹⁶⁰ Other cases corroborate this pattern: Independent judicial determination of what we might characterize as general or abstract issues of statutory interpretation, and deference to agency determinations with respect to residual applied questions, which typically involve line-drawing.¹⁶¹

This is the most significant distinction between the *Gray* doctrine and the *Chevron* doctrine. Under *Chevron*, any statutory ambiguity that could not be eliminated through the application of the traditional tools of statutory construction would be treated as an implicit delegation to the agency (as long as the case fell within *Chevron's* domain¹⁶²); under the *Gray* doctrine, only a subset

156. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 129 (1944).

157. *Id.* at 129–30.

158. As Professor Davis succinctly put it, "[t]he two parts of the *Hearst* case fully support the idea that the choice of criteria is for the reviewing court but that the application of the criteria is for the agency." DAVIS, *supra* note 50, § 250, at 903.

159. Because Seaboard's lease of the mining lands included mineral rights, Seaboard took the position that it had title to the coal from the moment it was extracted, even though the contractor did the actual mining and subsequently transferred the coal to Seaboard, and Seaboard subsequently paid a per-ton royalty to the landowner per the terms of the lease. If a coal "sale" under the Bituminous Coal Act required a formal transfer of title, then no "sale" of coal to Seaboard ever took place, and it would be immaterial whether or not Seaboard qualified as the "producer" of the coal. *Gray v. Powell*, 314 U.S. 402, 414 (1941).

160. *See id.* at 415–17; *see also* Nathanson, *supra* note 88, at 473–75 (discussing this part of the *Gray* decision); Rappaport, *supra* note 50, at 1302 (same).

161. *See, e.g.,* Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 480–81 (1947); *Am. Trucking Ass'n v. ICC*, 697 F.2d 1146, 1148–49 (D.C. Cir. 1983).

162. *See supra* text accompanying notes 33–35.

of such ambiguities—those involving the blurry boundaries of statutory categories—are presumed to be implicit delegations. Although some have suggested that the *Chevron* doctrine and the *Gray* doctrine amount to (almost) the same thing,¹⁶³ that is not correct. While there is substantial overlap—both doctrines call for deference to an agency’s decision as to how to demarcate the boundaries of imprecise statutory categories—there are all sorts of hard interpretive questions about the scope of an agency’s statutory authority that involve a choice among a limited number of discrete, identifiable alternatives. The *Chevron* doctrine calls for treating these situations as implicit delegations. The *Gray* doctrine does not.¹⁶⁴

Because distinguishing those cases where the *Gray* doctrine calls for independent judicial judgment from those cases where the *Gray* doctrine calls for deference to the agency is essential for understanding how to apply the *Gray* doctrine in a post-*Loper Bright* world—and for understanding why integrating *Gray* into *Loper Bright* would not simply reproduce most of *Chevron* under another name—the next section further elaborates on this key difference between *Gray* and *Chevron*.

C. *The Core Distinction Between the Gray Doctrine and the Chevron Doctrine*

Although there will inevitably be some situations that are debatable and hard to classify, it is possible to identify several categories of statutory ambiguity which would have been treated as implicit delegations under *Chevron*—thus triggering deference—but that would not be so categorized under *Gray*.

First, sometimes a question arises as to whether a statutory term is being used in its ordinary sense or in a more specialized legal or technical sense. Additionally, in some cases a statute uses a term that is clearly a specialized term of art, but within the relevant field the term carries two or more related but distinct meanings. When a statute is not clear on which of these candidate meanings (ordinary versus specialized, or two or more distinct specialized meanings) is the correct one—when one can make a plausible argument for each of them—*Chevron* doctrine instructs the reviewing court to defer to the agency.¹⁶⁵ But under the *Gray* doctrine, a statute’s use of a term that has

163. See, e.g., Bernard Schwartz, *Administrative Law Cases During 1989*, 42 ADMIN. L. REV. 423, 444 (1990) (asserting that “[t]he *Chevron* doctrine . . . is really but a reprise of the *Gray v. Powell* doctrine”); see also *Loper Bright Enters. v. Raimondo*, 2244 S. Ct. 2244, 2305–06 (Kagan, J., dissenting) (suggesting that replacing the *Chevron* doctrine with the *Gray* doctrine would “preserve *Chevron* in a substantial part of its current domain”).

164. See, e.g., Rappaport, *supra* note 50, at 1297 (concluding that the pre-APA case law “only recognized deference for mixed questions but not for pure questions”).

165. Compare *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687,

both an ordinary and a specialized meaning, or multiple specialized meanings, would *not* be treated as an implicit delegation to the agency to choose one of those options. Rather, the reviewing court would use its independent judgment to decide which understanding of the term is correct in the context of the relevant statute. This sort of situation is well illustrated by *Hearst*, in which the Court independently decided whether the term “employee” in the NLRA carries its common law meaning; only after the Court concluded that the answer was no did the Court proceed to defer to the agency’s classification of newsvendors as “employees” for NLRA purposes.¹⁶⁶

Second, sometimes the phrasing of a statute gives rise to a grammatical ambiguity, such as an uncertainty about the object of a modifier. Under *Chevron*, courts would typically defer to the agency’s resolution of such an ambiguity, so long as the agency’s reading was reasonable (both grammatically and more generally).¹⁶⁷ But the *Gray* doctrine would not call for deference in this sort of case, because this situation involves a choice between two discrete alternatives rather than a decision as to where to draw the “median line” in the gray area between two poles.

Third, it is sometimes unclear whether or how the meaning of a statutory term is constrained or otherwise influenced by other statutory provisions. For example, a litigant might assert that a term must be read in a manner that is consistent with the meaning of that term in other sections of the same statute or in other statutes on the same subject matter. During the *Chevron* era, courts would sometimes (though not always) defer to the agency’s view on whether or not to assume this sort of linguistic consistency.¹⁶⁸ But under the *Gray* doctrine, deference would not be appropriate in such cases. This sort of issue involves a choice between two discrete options—either the term has the identical meaning across statutory provisions or it does not—rather than a line-drawing problem. A similar logic would pertain to cases in which the question is whether some other linguistic canon, such as *expressio unius*,

697–98, 703–04 (1995) (construing the word “take” in § 9 of the Endangered Species Act broadly, in light of the statutory definition, to include certain forms of habitat modification, and noting that this reading is sufficiently plausible to warrant deference under *Chevron*), *with id.* at 717–18 (Scalia, J., dissenting) (insisting that the term “take” is a traditional term of art that describes the process of reducing a wild animal to human control and does not include habitat modifications). *See also, e.g.*, *Atl. Mut. Ins. Co. v. Comm’r*, 111 F.3d 1056, 1060–66 (3d Cir. 1997); *Pugin v. Garland*, 19 F.4th 437, 444–50 (4th Cir. 2021).

166. *See supra* text accompanying notes 155–158.

167. *See, e.g.*, *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 979–84 (1986); *Barnhart v. Thomas*, 540 U.S. 20, 26–30 (2003).

168. *See, e.g.*, *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009); *Abbott Lab’ys. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990).

requires a particular understanding of a statutory term.¹⁶⁹ Deciding whether a statutory list is exhaustive or non-exhaustive is a binary choice, not a decision as to where to fix the median line between two poles.¹⁷⁰

Fourth, when two sections of a statute appear to conflict with one another, *Chevron* would likely call for deference to the agency's view on which one should be given effect.¹⁷¹ But deciding which of two candidate meanings is the correct one is an abstract legal question, not a line-drawing question, and therefore under the *Gray* doctrine, this sort of problem would be a matter for independent judicial resolution rather than deference to the agency.

Fifth, consider a situation in which an agency must make statutory categorization decisions—the sort of line-drawing decisions for which both

169. See, e.g., *Holder v. Martinez Gutierrez*, 566 U.S. 583, 594–97 (2012); *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991); *Cheney R.R. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). Indeed, the D.C. Circuit's opinion in *Loper Bright* reasoned that the *expressio unius* inference urged by the challengers was not enough to establish a sufficiently clear statutory meaning under the *Chevron* framework to overcome the presumption of deference. See *Loper Bright Enters. v. Raimondo*, 45 F.4th 359, 366–67 (D.C. Cir. 2022), *rev'd*, 144 S. Ct. 2244 (2024).

170. In some cases that involve potential applications of semantic canons, the approach under the *Gray* doctrine—and the need to distinguish “pure” questions of abstract interpretation from applied line-drawing questions—can get a bit complicated and subtle. Consider the *nosctur a sociis* canon and its close cousin the *eiusdem generis* canon. These canons are sometimes invoked to justify reading a seemingly broad term as implicitly limited by the surrounding terms. Suppose an agency takes some action based on a broad reading of an apparently broad statutory term, but a challenger asserts this action is beyond the agency's authority because the broad term is implicitly limited by the terms with which it is associated in the statute. Or, conversely, suppose the agency interprets a broad term as implicitly limited by surrounding terms, and a challenger argues that reading this limitation into the broad term is a misreading of the statute. See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1239–40 (3d Cir. 1993). In such cases, the reviewing court may need to ask two related but distinct questions. The first question is whether the case at hand is indeed one in which the application of the canon is apt—that is, whether the broad term should be understood as limited by the more specific terms with which it is associated. If the answer to that first question is yes, then the court may need to ask a second question: Whether the challenged application of the broad term is permissible on the grounds that this application is not too dissimilar from the meaning implied by the more specific terms. Under the *Chevron* doctrine, the agency's view on both questions would be entitled to deference (assuming the other predicates for *Chevron* deference are met). Under the *Gray* doctrine, the reviewing court *would not* defer to agency's view on the *first* question (whether the broad term is implicitly limited by the narrower terms), but the court *would* defer to the agency's view on the *second* question (whether a given application of the broad term is “close enough” to the narrower meaning implied by the more specific terms).

171. See *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion); *id.* at 86 & n.3 (Sotomayor, J., dissenting).

Chevron and *Gray* ordinarily counsel deference—but the statute is unclear as to whether the presence or absence of a certain identifiable factor *requires* the agency to make a specific categorization decision. Assuming the statute is sufficiently unclear, then under *Chevron* the reviewing court should defer to the agency’s position on this issue. But that is not so under *Gray*. The decision whether a statute *requires* treating the presence or absence of a specific factor as necessary and/or sufficient for making a given classification involves answering a binary, yes-or-no question; it is not a matter of degree or weight. For example, although *Gray* deferred to the Coal Commission’s determination as to whether a company exercised enough control and direction over a coal mine to qualify as a coal “producer,” the Court independently decided—without deference—whether a coal transaction could *ever* be considered a “sale” or “disposal” of coal if there was no transfer of title.¹⁷² Importantly, though, the question of *how much* weight to put on a given factor is the sort of question that, under *Gray* as well as *Chevron*, would be treated by courts as presumptively delegated to the agency.

Sixth, the same sort of reasoning just discussed would apply to the question of whether an agency is either *required* or *forbidden* to take some criterion into account when engaging in its delegated line-drawing tasks. If the statute is unclear as to whether an agency may or must consider certain criteria when making categorization decisions, then under *Chevron*, the agency would presumably get deference on its decision to consider or ignore those criteria. By contrast, under *Gray*, when a challenger asserts either that an agency has ignored a factor that the agency is statutorily obliged to consider, or that the agency has considered a factor that the agency is statutorily obliged to ignore, the reviewing court must exercise its independent judgment to decide whether to accept that objection. But if the court determines that the agency has neither ignored a required criterion nor considered a forbidden criterion, then the *Gray* doctrine, like the *Chevron* doctrine, would instruct the court to defer to the weights that the agency chose to assign to the various criteria that the agency considered when determining the boundaries of an imprecisely defined statutory term.¹⁷³

Although these six categories may not exhaust the sorts of cases where the *Chevron* doctrine but not the *Gray* doctrine would treat a statutory ambiguity as an implicit delegation, they should provide a sufficiently clear sense of the

172. See *supra* text accompanying notes 159–160.

173. One might object that this distinction suggests that the “consideration” of a factor is a mere formality, as the agency could consider the factor but then give it trivial weight. That may be so, but recall that even under the *Gray* doctrine, the agency’s decisions must be reasonable. Giving *almost* zero weight to a relevant factor might be considered unreasonable, especially if in practice it appears that the agency treated that factor as irrelevant.

limits on the scope of appropriate deference under the *Gray* doctrine. Crucially, these examples demonstrate that there is a meaningful distinction between *Chevron* deference and *Gray* deference, such that embracing the latter would not simply recreate the former.

D. *The Coherence and Consistency of the Gray Doctrine*

To restate the basic picture that emerges from the above discussion: Under the *Gray* doctrine, if a statute authorizes an agency to make binding determinations pursuant to formal procedures, and these determinations entail making interpretive decisions regarding the scope of imprecise statutory terms—that is, determinations regarding which fact situations fall within, and which fall outside, the relevant statutory categories—then reviewing courts should presume that the statute implicitly delegates to the agency the authority to make those line-drawing decisions, and should therefore defer to the agency’s reasonable choices.¹⁷⁴ If a challenge to an agency’s statutory interpretation arises outside of this context—if, for example, the interpretive issue is not an applied line-drawing question concerning the boundaries of an imprecise category but rather an abstract question that involves a choice between two discrete alternative meanings, or if the agency had offered its views in a non-binding statement issued without formal procedures—then under *Gray* the reviewing court would treat the question as a legal matter for judicial resolution.¹⁷⁵ In this latter set of cases, the court might give the agency’s view a degree of respect, particularly if the question is technical or if the agency’s longstanding view might shed light on the original understanding of the statute, but the issue would be treated as one on which the court should exercise its independent judgment to ascertain the correct legal answer.

Before proceeding, it is important to consider a potential objection to this characterization of the *Gray* doctrine. Some critics insist that even when *Gray* and *Hearst* were ostensibly the leading cases governing the standard of review for challenges to agency statutory interpretations, the Court did not consistently apply the *Gray* doctrine, but instead relied on a shifting and unpredictable mélange of factors when deciding whether or how much to defer to an administrative agency’s reading of an unclear statute.¹⁷⁶ Indeed, the *Loper*

174. See *supra* text accompanying notes 147–152.

175. See *supra* text accompanying notes 153–155.

176. See, e.g., *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (asserting that “there are two lines of Supreme Court decisions on [the question of when an agency’s statutory interpretation should receive judicial deference] which are analytically in conflict,” and contrasting cases like *Gray*, *Hearst*, *Cardillo*, and *Rochester Telephone*, which call for “great deference . . . to the decisions of an administrative agency applying a statute to the

Bright Court asserted that in the years following *Gray*, the Court “was far from consistent in reviewing deferentially even [the sort of] factbound statutory determinations” at issue in *Gray* and *Hearst*.¹⁷⁷ Does this alleged inconsistency undercut the case for incorporating the *Gray* doctrine into the *Loper Bright* framework?

The answer is no, for two reasons. First, even if the accusation of inconsistency were accurate, this would not undermine the core claims of this Article. Those claims are, first, that there is a coherent version of the *Gray* doctrine (regardless of whether the Court assiduously adhered to this version), which is summarized above;¹⁷⁸ second, that this version of the *Gray* doctrine is legally compatible with the APA and the framework established by *Loper Bright*;¹⁷⁹ and third, that incorporating this formulation of the *Gray* doctrine into *Loper Bright* would be not only lawful but also desirable.¹⁸⁰ Even if it were true that the Court did not consistently adhere to the *Gray* doctrine in the pre-*Chevron* era, that fact would not undermine any of these core claims.

Second, although the assertion that the Court was inconsistent in its adherence to the *Gray* doctrine is not entirely unfair, this charge is not entirely fair either. Consider the *Loper Bright* Court’s version of the claim, which for present purposes we can treat as representative of the general line of criticism. In support of the accusation of inconsistency, *Loper Bright* quoted Professor Kenneth Culp Davis’s influential 1951 treatise, which observed that “[t]he one statement that can be made with confidence about [the] applicability of the doctrine of *Gray v. Powell* is that sometimes the Supreme Court

facts,” with cases like *Davies Warehouse, Office Employees International Union*, and *Morton v. Ruiz*, which “sanction[] free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term”); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 913–14 (3d Cir. 1981) (favorably citing *Pittston Stevedoring* to make a similar point); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141, 150 (9th Cir. 1952) (asserting that the cases in which the Court has deferred to an agency’s “interpretation of the proper application of law to admitted facts,” such as *Gray*, *Hearst*, and *Chenery*, are “not easily distinguished” from cases like *Davies Warehouse* in which the Court has “exercise[d] its own independent judgment upon the question”); Scalia, *supra* note 13, at 516 (asserting that prior to *Chevron*, reviewing courts would decide whether to defer to agencies “on a statute-by-statute basis,” taking into account a range of factors, and this approach was “a font of uncertainty and litigation”); Merrill, *Executive Precedent*, *supra* note 13, at 972–75 (asserting that prior to *Chevron*, “the Supreme Court had no unifying theory for determining when to defer to agency interpretations of statutes,” and that the various factors the Court would consider “did not comprise, either individually or collectively, what could be described as a coherent doctrine”).

177. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2260 (2024).

178. See *supra* text accompanying notes 115–164.

179. See *infra* Part II.A.

180. See *infra* Part II.B.

applies it and sometimes it does not,”¹⁸¹ as well as Professor Bernard Schwartz’s declaration—in a 1955 article that was probably the most in-depth treatment of the *Gray* doctrine from that period—that there are an “embarrassingly large number of Supreme Court decisions that do not adhere to the doctrine of *Gray v. Powell*.”¹⁸² The *Loper Bright* opinion then pointed to *Davies Warehouse Co. v. Bowles*¹⁸³ as “one illustrative example” of a case where the Court did not defer to an agency interpretation on a “fact-bound” issue.¹⁸⁴ A closer look at these sources shows that the Court’s claims of pervasive inconsistency are exaggerated, and in some cases appear to be based on incomplete or inaccurate characterizations of the cited sources.

The reliance on Professor Schwartz’s article is particularly misplaced. Professor Schwartz was not a fan of *Gray v. Powell* on the merits,¹⁸⁵ and he also criticized the Supreme Court for *failing to adequately explain* its approach to deference doctrine, especially because this failure created the *appearance* that the Court’s approach was “guided by purely discretionary factors—or, more bluntly, by the arbitrary whims and caprices of the majority of the justices.”¹⁸⁶ But the whole point of Professor Schwartz’s lengthy analysis of the post-*Gray* case law was to assess whether this was actually a fair characterization of the Court’s practice or whether, instead, “the inconsistencies of the Court . . . in applying [the *Gray*] doctrine can be explained (at least in most cases) upon a rational basis.”¹⁸⁷ And he concluded that they can be. “In analyzing the post-*Gray v. Powell* cases,” Professor Schwartz wrote, “one is struck by the fact that most of the [Supreme Court’s] decisions . . . do follow the doctrine of *Gray v. Powell* when it is relevant.”¹⁸⁸ He further concluded that “most of the apparent aberrational refusals to apply the [*Gray*] doctrine . . . can be explained on rational grounds as not inconsistent with *Gray v. Powell*.”¹⁸⁹ Indeed, immediately following the passage that the *Loper Bright* majority quoted, Professor Schwartz explained that “the vast majority of th[e] decisions [that appear not to follow *Gray*] are not really inconsistent with *Gray*,” and that almost all of the apparent inconsistency can be explained by a few specific and identifiable factors.¹⁹⁰

181. DAVIS, *supra* note 50, § 248, at 893 (italics added).

182. Schwartz, *Gray v. Powell*, *supra* note 88, at 68.

183. 321 U.S. 144 (1944).

184. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2260 (2024) (citing *Davies Warehouse*, 321 U.S. at 156).

185. *See* Schwartz, *Gray v. Powell*, *supra* note 88, at 68.

186. *Id.* at 2.

187. *Id.*

188. *Id.* at 21.

189. *Id.*

190. *Id.* at 69.

And what are these factors? Professor Schwartz listed several, but two are particularly noteworthy, as they are consistent with the considerations discussed earlier in this Article.¹⁹¹ First, he observed that the Court typically would not defer when “the challenged agency finding has not been made in a specific contested case after a full, formal adversary hearing.”¹⁹² This consideration distinguishes *Davies Warehouse*, which is the main case (indeed the only case) that the *Loper Bright* majority cited to demonstrate the alleged inconsistency in the application of the *Gray* doctrine.¹⁹³ Second, Professor Schwartz observed that sometimes a reviewing court would decline to defer under *Gray* because the agency’s findings “are without a rational basis.”¹⁹⁴ As previously noted, deference under *Gray*, like deference under *Chevron*, is not absolute, but extends only to *reasonable* agency interpretations of imprecise statutory terms.¹⁹⁵ When the agency’s position is unreasonable, the agency loses—but that is an application of, not a deviation from, the *Gray* doctrine.

As for Professor Davis, it is true that his treatise highlighted several cases that seem inconsistent with *Gray*, and he was not as definitive as Professor Schwartz in concluding that virtually all of these apparent inconsistencies could be explained by a limited number of identifiable and rational considerations. Nevertheless, a careful reading of Professor Davis’s treatise demonstrates that he did not think the inconsistency in the application of the *Gray* doctrine was as pervasive or inexplicable as the sentence quoted in *Loper Bright* would seem to imply. In fact, Professor Davis suggested that the apparent inconsistencies in the Court’s application of the *Gray* doctrine had more to do with whether the Court *cites or discusses* principles of deference (and cases like *Gray*) than with the Court’s actual approach to the standard of

191. See *supra* text accompanying notes 142–154.

192. Schwartz, *Gray v. Powell*, *supra* note 88, at 69; see also *id.* at 39–45.

193. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2260 (2024). This factor also distinguishes the *Morton* case cited by Judge Friendly in *Pittston Stevedoring v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (citing *Morton v. Ruiz*, 415 U.S. 199, 237 (1974)). *Morton* expressly noted that the challenged agency interpretation “was not promulgated in accordance with [the agency’s own] procedures, to say nothing of those [in] the Administrative Procedure Act,” and therefore “lack[ed] . . . binding effect,” 415 U.S. at 236; see also *id.* at 237 (reviewing the agency’s interpretation under the *Skidmore* standard).

194. Schwartz, *Gray v. Powell*, *supra* note 88, at 69.

195. See *supra* text accompanying notes 151–154. This also explains another of the cases cited by Judge Friendly’s *Pittston Stevedoring* opinion as allegedly inconsistent with *Gray*, the *Office Employees* case. See *Pittston Stevedoring*, 544 F.2d at 49 (citing *Office Employees International Union, Local No. 11 v. NLRB*, 353 U.S. 313, 318 (1957)). The *Office Employees* Court held that the NLRB’s conclusion contravened “the clear expression of the Congress,” and that therefore the decision “was contrary to the intent of Congress, was arbitrary, and was beyond its power.” 353 U.S. at 318, 320.

review.¹⁹⁶ Elaborating on this theme, Professor Davis suggested that the Court tends to invoke deference doctrine, and to cite cases like *Gray*, when the Court is most uncertain about the correct legal answer. As he put it, “[j]udicial doubt, lack of confident understanding, or tendency toward mild disagreement [with the agency’s interpretation] is more likely to produce a *Gray v. Powell* opinion than either enthusiastic agreement or strong disagreement [with the agency’s interpretation].”¹⁹⁷

Although the failure to discuss the appropriate standard of review in this latter set of cases produces unfortunate confusion, Professor Davis pointed out that these cases do not necessarily indicate disagreement with the idea that, in cases of doubt, the reviewing court should defer to the agency’s line-drawing decisions.¹⁹⁸ Indeed, the vast majority of the cases that Professor Davis cited in his treatise as allegedly or apparently inconsistent with the *Gray* doctrine are cases in which the court upheld the agency’s determination, but did so without mentioning that a deferential standard of review applied.¹⁹⁹ One *could* infer from this that the Court concluded that the *Gray* doctrine did not apply in those cases, but one could also view these cases as ones in which, because the Court determined that the agency’s decision was clearly correct, there was no need for the Court to discuss deference. It seems that Professor Davis thought the latter explanation was quite plausible.²⁰⁰ And

196. See DAVIS, *supra* note 50, § 251, at 907 (suggesting that whether the Court chooses to invoke principles of judicial deference “has more to do with opinion writing than with control of the scope of inquiry,” and that the accusation of arbitrariness and inconsistency is largely misplaced).

197. *Id.* (italics added).

198. See *id.* at 903–05.

199. See, e.g., *Otis & Co. v. SEC*, 323 U.S. 624 (1945); *SEC v. Cent.-Ill. Sec. Corp.*, 338 U.S. 96, 127 (1949); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Bd. of Governors of the Fed. Rsv. Sys. v. Agnew*, 329 U.S. 441 (1947); *R.R. Ret. Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946).

200. Furthermore, although Professor Davis did cite a handful of cases that he found difficult to reconcile with *Gray*, on closer inspection these cases may not contain as much tension with *Gray* as he suggested. One of the cases he highlighted was the *Davies Warehouse* case, DAVIS, *supra* note 50, § 247, at 887–88, but as noted above, that case is distinguishable—together with cases like *Skidmore*—on the grounds that the agency interpretation was issued without meaningful formal process. He also suggested that *Otis & Co. v. SEC*, 323 U.S. 624, 634–35 (1945) and *SEC v. Cent.-Ill. Sec. Corp.*, 338 U.S. 96, 127 (1949), both of which involved challenges to the SEC’s interpretation and application of the “fair and equitable” standard in the Public Utility Holding Company Act (PUHCA), may be inconsistent with *Gray*. But this is far from obvious. In both cases, the Court ultimately upheld the challenged SEC orders. See *Otis*, 323 U.S. at 633; *Cent. Ill.*, 338 U.S. at 155. And the *Central Illinois* case used language

on that understanding, much of the alleged inconsistency in the Court's approach is illusory.

I do not want to overstate the claim. The Supreme Court never fully, explicitly, and systematically elaborated the *Gray* doctrine with the degree of structure laid out in this Article.²⁰¹ Furthermore, at least some of the Court's decisions may be hard to reconcile with the *Gray* doctrine,²⁰² and a few of the factors that Professors Davis and Schwartz identified to account for some of the seemingly inconsistent cases go beyond the distilled version of the doctrine presented in this Article.²⁰³ It is also possible that by the 1970s, the

that seems consistent with the *Gray* doctrine. *See Cent. Ill.*, 338 U.S. at 155 (concluding that the SEC's "action has not been contrary to law and its findings were sustained by adequate evidence"); *id.* at 126–27 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947), for the proposition that courts should defer to "[a]dministrative determinations of policy, often based upon undisputed basic facts, in an area in which Congress has given the agency authority to develop rules based upon its expert knowledge and experience"). These cases may thus be illustrations of Professor Davis's earlier suggestion that when the Court thought that the agency's interpretation was clearly correct, the Court would simply state the reasons in favor of that interpretation rather than framing the issue in terms of deference, but this does not mean the Court had implicitly rejected the deferential standard of review.

201. Indeed, leading scholars who documented the implicit structure and scope of the *Gray* doctrine criticized the Court for failing to clearly articulate that doctrine, thereby giving the misleading impression of inconsistency and arbitrariness in the doctrine's application. *See, e.g.*, DAVIS, *supra* note 50, § 251, at 905 (observing that "[t]he operative factors determining use or non-use of the doctrine of *Gray v. Powell* are not necessarily all disclosed by judicial language," and criticizing the absence of an "articulated theory" that explained variation in the scope of review from case to case (*italics added*)); Schwartz, *Gray v. Powell*, *supra* note 88, at 39 (asserting that although the Court's decisions to defer or not defer under the *Gray* doctrine "can . . . be explained on rational grounds, . . . the Court itself did not . . . expressly state the reasons"); *id.* at 70 (arguing that although the Supreme Court's application of the *Gray* doctrine is guided by a relatively limited number of identifiable factors, "[t]he failure of the Court itself to give any real explanation of its seemingly arbitrary refusals to adhere to *Gray v. Powell* . . . make[s] matters most difficult for those who seek to analyze the [Court's] jurisprudence").

202. For example, both Professor Davis and Professor Schwartz point to *R.R. Ret. Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946), as a case that is hard to reconcile with *Gray* and *Hearst*. *See* Schwartz, *Gray v. Powell*, *supra* note 88, at 62–63; DAVIS, *supra* note 50, § 247, at 888–89. This may not be correct, however. *Duquesne Warehouse* upheld the agency's determination, and although the Court did not mention deference, it did note that the interpretation the agency had adopted was "plain[ly]" correct. 326 U.S. at 454. Thus, *Duquesne* may be one of those cases where the Court did not feel the need to invoke principles of deference because the Court thought that the agency's decision was clearly consistent with the law. *See supra* text accompanying notes 196–200.

203. *See* DAVIS, *supra* note 50, § 248, at 893–96 (asserting that the factor that best explains

Court's approach really had evolved into a more unpredictable multi-factor standard, without much in the way of a guiding framework. That assertion is also contestable,²⁰⁴ but even if it is true, some degree of inconsistency over a period of roughly four decades is not terribly surprising. The important point is that the suggestion that the *Gray* doctrine was never really an established framework—that the Court's approach to the standard of review was so inconsistent that it is impossible to characterize as a coherent doctrine—does not withstand scrutiny. For many decades before *Chevron*, the *Gray* doctrine provided a rough-and-ready means for identifying the subset of statutory ambiguities that ought to be treated as implicit delegations to the responsible administrative agency.²⁰⁵

the Court's seemingly inconsistent opinions is comparative competence, with the Court likely to invoke deference doctrine when a case involves hard technical subject matter or when understanding the nuances of the issue is difficult without long experience dealing with similar cases); *id.* § 250, at 905 (noting that one factor “guiding the use or non-use of the doctrine of *Gray v. Powell*” is that “[c]ourts tend to decide fundamental issues of law, often leaving incidental or relatively unimportant issues of law—applications—to agency discretion” (italics added)); Schwartz, *Gray v. Powell*, *supra* note 88, at 69–70 (concluding that the Court may decline to follow the *Gray* doctrine when “the challenged finding is inconsistent with other administrative interpretations,” when “the finding at issue is one upon which the agency bases a decision that it does not have jurisdiction in the particular case,” and when the lower court decides the case without deferring under *Gray*, and the Supreme Court finds that the lower court's holding “is reasonable, even though the Supreme Court itself, had the [case] . . . come before it initially, would have upheld the agency finding under the doctrine of *Gray v. Powell*”).

204. On this point, it is worth noting that the go-to citation for the claim that by the 1970s the Court's deference doctrine had become inconsistent and incoherent is Judge Friendly's opinion in the *Pittston Stevedoring* case. 544 F.2d 35, 49 (2d Cir. 1976). But the three “[i]llustrative cases” that *Pittston Stevedoring* cites for the proposition that “there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term”—*Office Employees*, *Davies Warehouse*, and *Morton*—are all easy to accommodate within the *Gray* framework on the basis of factors already discussed. *Id.* *Office Employees* found that the agency's interpretation contravened the clearly expressed intent of Congress, *see supra* note 195, while *Davies Warehouse* and *Morton* concerned agency interpretations announced in non-binding statements that were not the product of adversarial procedures, *see supra* note 148.

205. Other scholars have reached similar conclusions. *See, e.g.*, Lawson & Kam, *supra* note 23, at 9 (concluding that although no “single principle can either account for all pre-*Chevron* Supreme Court decisions or . . . describe the views of all pre-*Chevron* lower courts . . . [.] such decisions and views converge[d] on the key inquiry . . . [into] whether the legal question decided by the agency and under judicial review is a pure question of legal interpretation or a mixed question of law application,” and that in the former situation, “reviewing courts would presumptively conduct de novo review,” while in the latter situation, “courts would presumptively grant great deference to the agency”) (emphases omitted).

II. THE CASE FOR INCORPORATING THE *GRAY* DOCTRINE INTO THE *LOPER BRIGHT* FRAMEWORK

Chevron did not purport to overrule *Gray* or any of the cases in the associated line. Nevertheless, the *Chevron* doctrine superseded the *Gray* doctrine by adopting a categorical presumption of implied delegation that covered a larger set of cases.²⁰⁶ *Loper Bright*'s repudiation of *Chevron* means that the question the *Gray* doctrine sought to address—which statutory ambiguities ought to be treated as implied delegations?—will once again be front and center. And the *Gray* doctrine's approach to answering that question, developed over several decades of pre-*Chevron* case law, is the one that post-*Loper Bright* courts ought to adopt.

Part II.A will argue, first, that incorporating the *Gray* doctrine into the *Loper Bright* framework—more specifically, reading *Loper Bright* to permit a finding of implied delegation to an agency in those situations where the *Gray* doctrine would presume such a delegation—is consistent, as a matter of law, with *Loper Bright*'s interpretation of the APA and with the *Loper Bright* opinion more generally. Part II.B will then explain why incorporating the *Gray* doctrine into *Loper Bright*'s implicit delegation prong would not only be the better reading of the APA and the case law, but would also be more sensible and coherent, and would achieve a better allocation of institutional responsibilities, than the available alternatives.

A. Incorporating the *Gray* Doctrine into the *Loper Bright* Framework Would Be Lawful

Is the *Gray* doctrine legally consistent with *Loper Bright*? The answer is not immediately clear. *Loper Bright* repeatedly asserted that § 706 of the APA—which instructs reviewing courts to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action”²⁰⁷ and to “hold unlawful and set aside agency action, findings and conclusions found to be . . . not in accordance with law”²⁰⁸ or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”²⁰⁹—prohibits *Chevron*'s deferential

206. The *Chevron* doctrine—though arguably not *Chevron* itself—did implicitly overrule the part of the *Gray* doctrine that called for independent judicial resolution of statutory ambiguities that fall outside the scope of the line-drawing determinations for which *Gray* counsels deference.

207. 5 U.S.C. § 706.

208. *Id.* § 706(2)(A).

209. *Id.* § 706(2)(C). Strictly speaking, *Loper Bright* never cited specifically to § 706(2)(C), though that section would seem just as relevant to the Court's statutory argument as § 706(2)(A).

approach.²¹⁰ More generally, *Loper Bright* held that § 706, read in light of the traditional role of the Article III courts as the principal interpreters of federal law, requires courts to exercise “independent judgment” on questions of statutory interpretation, granting only “respect” or “weight”—not deference—to agency interpretations.²¹¹ Read for all it’s worth, this language might suggest that the APA not only precludes *Chevron*’s across-the-board presumption that unclear statutory language is an implicit delegation to the responsible agency but also prohibits a more narrowly targeted presumption of implicit delegation in those cases where imprecise statutory language necessitates line-drawing decisions. On that reading, the *Gray* doctrine should have perished in 1946 and should not be resurrected now.

On the other hand, despite *Loper Bright*’s repeated insistence that the APA requires courts to exercise “independent judgment” on questions of law, *Loper Bright* acknowledged that *sometimes* statutes delegate interpretive or definitional authority to agencies; furthermore, *Loper Bright* also acknowledged that some statutes do so implicitly rather than explicitly.²¹² In these cases, deference to the agency’s position would not contravene the APA, because the reviewing court would have fully discharged its duty under § 706 by determining that the agency had acted within the scope of its (implicitly) delegated discretion.²¹³ Although *Loper Bright* illustrated such implicit delegations with especially broad terms like “appropriate” and “reasonable,”²¹⁴ the Court did not expressly state that *only* such amorphous language would be sufficient to imply a delegation of discretion. To be sure, the *Loper Bright* opinion *could* be read that way, but it could also be read as using these extreme examples to illustrate the more general point that statutes sometimes instruct agencies “to regulate subject to the limits imposed by a term . . . that ‘leaves agencies with flexibility.’”²¹⁵ An expansive reading of that category would be compatible with the *Gray* doctrine.

210. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2260–62 (2024).

211. See *id.* at 2262–65, 2269, 2273.

212. See *id.* at 2262–63.

213. See *id.* at 2263–64 (citing Monaghan, *supra* note 117, at 27). Notably, in the section of Professor Monaghan’s influential article that immediately follows the passage that the *Loper Bright* Court quoted, he discusses *Hearst* as a “paradigmatic illustration” of the idea that a reviewing court can defer to an agency’s applications of a statutory term as long as the court has concluded “that the agency is acting within the zone committed to it.” See Monaghan, *supra* note 117, at 29–30; see also Levin, *supra* note 87, at 20–22, 24–25 (developing an argument similar to Professor Monaghan’s and also using *Hearst* as a lead example).

214. See *Loper Bright*, 144 S. Ct. at 2263; see also *id.* at 2263 (citing *Michigan v. EPA*, 576 U.S. 743, 750, 752 (2015) (reviewing under *Chevron* EPA’s interpretation of the phrase “appropriate and necessary”).

215. *Id.* (quoting *Michigan*, 576 U.S. at 752).

Lending further support to the compatibility of the *Gray* doctrine with *Loper Bright's* interpretation of § 706 is the fact that at several points in the *Loper Bright* opinion, the Court appeared to agree—though somewhat equivocally—that § 706 of the APA restated and codified the approach to judicial review that prevailed at the time the APA was passed.²¹⁶ The Department of Justice (DOJ) and many (though not all) Members of Congress involved in the APA's enactment took that position at the time.²¹⁷ The view that § 706

216. *See id.* at 2261 (concluding that the APA adopted “the settled pre-APA understanding” of the proper approach to judicial review and that “nothing in the APA hints at . . . a dramatic departure” from that traditional approach); *see also id.* at 2294, 2304 (Kagan, J., dissenting) (stating that “the majority recognizes [that] Section 706 was generally understood” to restate the then-existing law on judicial review); *id.* at 2305 (similar); *id.* at 2306 (“[T]he majority agrees that Section 706 was not meant to change the then-prevailing law.”). Admittedly, the Court characterized that pre-APA approach as one that treated statutory interpretation as “exclusively a judicial function.” *Id.* at 2248 (majority opinion) (quoting *U.S. v. Am. Trucking Ass'ns*, 310 U.S. 534, 544 (1940)). This complication will be discussed further below. *See infra* text accompanying notes 225–230. (It is also worth noting that *American Trucking* predates both *Gray* and *Hearst*, and that it involves the Wages and Hours Administrator's interpretation of the FLSA, which, as noted earlier, falls into one of the categories that does not receive deference under the *Gray* doctrine. *See supra* text accompanying notes 143–147 & note 144.)

217. The *Attorney General's Manual on the Administrative Procedure Act*, published by the Department of Justice (DOJ) shortly after the Act's passage, explicitly declared that the APA “restate[d] the present law as to the scope of judicial review.” U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947). The *Attorney General's Manual* has long been treated as persuasive authority for the APA's meaning. *See, e.g.,* *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–64 (2004); *see also* Levin, *supra* note 42, at 149 (explaining that the Court has continued to give great weight to the *Attorney General's Manual*, even as the Court has become more skeptical of other forms of legislative history, “because of the thought and care that went into the manual's preparation, as well as the executive branch's responsibility for putting the Act into practice”). *But see* Kisor v. Wilkie, 139 S. Ct. 2400, 2436 (2019) (Gorsuch, J., concurring in the judgment) (questioning the probative value of the *Attorney General's Manual* on the grounds that it reflects the self-interested position of the executive branch); Jack M. Beermann, *End the Failed Chevron Experiment Now: Why Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 790 (2010) (similar).

As for the pre-enactment legislative history of the APA, there is material going both ways. This history shows that many of the Members of Congress who were involved in the APA's drafting shared the executive branch's view that § 706 merely restated existing law. *See, e.g.,* S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMINISTRATIVE PROCEDURE ACT (COMM. PRINT. 1945), *reprinted in* S. COMM. ON THE JUDICIARY, LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 79–248, AT 39 (1945) (“A restatement of the scope of [judicial] review, as set forth in [§ 706], is obviously necessary lest the

adopted rather than altered the pre-APA judicial approach to the standard of review was also widely embraced by scholars writing in the first few years after the APA was adopted.²¹⁸ If the APA was indeed meant to restate and

proposed statute be taken as limiting or unduly expanding judicial review.”). But other pieces of legislative history suggest that some Members of Congress viewed § 706 as strengthening judicial review and reducing judicial deference. See, e.g., H.R. REP. NO. 79-1980, at App. B (1946). For discussions of the APA’s legislative history, which reach a range of conclusions about the intent and understanding of the drafters, see, for example, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1662–66 (1996); Levin, *supra* note 42, at 147–60; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 130–34 (1998).

218. See, e.g., Herbert Kaufman, *The Federal Administrative Procedure Act*, 26 B.U. L. REV. 479, 500–01 (1946) (stating that § 706 “is rooted entirely in current practice and judicial decision” and is therefore “more aptly termed descriptive rather than effective”); Ray A. Brown, *The Federal “Administrative Procedure Act”*, 1947 WIS. L. REV. 66, 83, 86–87 (1947) (concluding that § 706 “in the main merely codified existing law”); S. Walter Shine, *Administrative Procedure Act: Judicial Review “Hotchpot”?*, 36 GEO. L.J. 16, 29 (1947) (observing that § 706 “fails to make any substantive change” in the standard of judicial review); Alfred Long Scanlan, *Judicial Review Under the Administrative Procedure Act—In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME L. REV. 501, 502 (1948) (asserting that § 706 of the APA “was not intended to upset the existing rules or principles governing judicial review of administrative action,” but “merely restated” the approach to judicial review that prevailed at the time); *id.* at 529 (concluding that the first sentence of § 706, on which *Loper Bright* focused in finding *Chevron* unlawful, “appear[s] to be quite simply a restatement of the present powers which reviewing courts possess”); Davis, *supra* note 88, at 562 (concluding that the APA “probably does not change the scope of [judicial] review”); Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73, 82–87 (1950) [hereinafter Schwartz, *Mixed Questions*] (concluding that § 706 did not alter the standard of review embraced in *Gray*, *Hearst*, and related cases); Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 587 (1950) (concluding that the APA had not “diminished the force of the most recent judge-made administrative legal doctrine, giving preponderant weight to agency holdings involving . . . so-called mixed questions”); Note, *The Federal Administrative Procedure Act: Codification or Reform?*, 56 YALE L.J. 670, 689 (1947) (concluding that, with a handful of exceptions not relevant here, the APA “merely codifies the pre-existing law of judicial review”).

The most notable dissenter from this broad contemporaneous consensus was John Dickinson, who claimed that § 706 called for a less deferential standard of review. See John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 516–17 (1947). Most modern commentators have concluded that virtually no other administrative law experts agreed with Professor Dickinson’s position. See, e.g., Levin, *supra* note 42, at 181 (describing Professor Dickinson’s views as “almost completely isolated”); Sunstein, *supra* note 117, at 1653 n.206 (concluding tentatively that “Dickinson was the only prominent contemporaneous voice” that claimed “section 706 had changed the law with respect to

judicial review of agency judgments of law”). That also appears to have been the view of many contemporaneous commentators. See, e.g., Shine, *supra*, at 29 (identifying Professor Dickinson as the “one leading authority” who challenged the consensus that § 706 did not alter the standard of review); Scanlan, *supra*, at 529 (singling out Professor Dickinson as the “one respectable authority” who believed that the “seemingly harmless first sentence” of § 706 actually altered the standard of review).

Professor Aditya Bamzai has taken issue with this characterization, asserting that other prominent mid-twentieth century administrative law scholars agreed with Professor Dickinson. See Aditya Bamzai, *On the Interpretive Foundations of the Administrative Procedure Act*, 31 GEO. MASON L. REV. 439, 465 & n.167 (2024). Most significantly, Professor Bamzai pointed to a 1951 article by Louis Jaffe and a 1955 article by Bernard Schwartz as allegedly endorsing a view similar to Professor Dickinson’s. See *id.* at 465–67 (citing Louis L. Jaffe, *Judicial Review: “Substantial Evidence on the Whole Record”*, 64 HARV. L. REV. 1233, 1258–60 (1951), and Schwartz, *Gray v. Powell*, *supra* note 88, at 67–68). While it might seem excessive to delve into the question of whether there was indeed a strong contemporaneous scholarly consensus that § 706 merely restated the then-prevailing approach to judicial review, that conclusion is sufficiently important to this Article’s primary legal argument that it is worth scrutinizing Professor Bamzai’s challenge to this view.

Professor Bamzai’s identification of Professor Schwartz as a prominent scholar who subscribed to something like Professor Dickinson’s position is initially puzzling, because Professor Schwartz’s more sustained treatment of the question whether § 706 altered the standard of review appeared in his 1950 article, which concluded that § 706 did *not* “compel the federal courts to change the theory of review that has been firmly established since *Gray v. Powell*.” Schwartz, *Mixed Questions*, *supra*, at 87. Moreover, in the course of this discussion Professor Schwartz specifically considered, critiqued, and rejected Professor Dickinson’s contrary position. See *id.* at 83–86. So what are we to make of the assertion in Professor Schwartz’s 1955 article—the one that Professor Bamzai cited—that “the judicial refusal . . . to concede that statutory interpretation is involved in the *Gray v. Powell* type of case . . . has enabled the highest Court to all but nullify language in the Administrative Procedure Act of 1946 which can be said to eliminate the *Gray v. Powell* doctrine”? Schwartz, *Gray v. Powell*, *supra* note 88, at 67–68 (footnote omitted). One possibility is that Professor Schwartz changed his mind. But it is also possible to understand him as maintaining the consistent position that *because* the Court had embraced the fiction that the “mixed questions” at issue in cases like *Gray* are not really questions of “law” in the relevant sense, language of the sort that appears in § 706 was not understood to alter this standard of review. In accordance with that interpretation, Professor Schwartz noted in his 1955 article that a more strongly worded amendment to the APA would “be necessary before the [APA] will have any real effect upon the doctrine of *Gray v. Powell*.” *Id.* at 68 n.279 (italics added).

As for Professor Jaffe, his 1951 article stated that “[i]t is thought to be open for decision whether the so-called doctrine of *Gray v. Powell* has been repealed by the Administrative Procedure Act.” Jaffe, *supra*, at 1260. His own views on the correct answer to this question seem to depend on how one understands the *Gray* doctrine. On the one hand, consistent with Professor Bamzai’s account, Professor Jaffe argued that if decisions like *Gray* and *Hearst* are

taken to suggest that “Congress, merely by the use of a ‘broad statutory term’ to be applied from case to case, has thereby delegated to the agency the power to determine what considerations are relevant in applying it,” then this doctrine “should be regarded as disapproved” by the APA. *Id.* at 1258, 1260. However, Professor Jaffe promptly clarified—in the sentences immediately following the passage Professor Bamzai quoted—that “it would be a drastic and unwarranted conclusion to read . . . [the APA] as impairing the long-standing doctrine that there are valid areas of administrative discretion and that judgment within these areas will be set aside only if unreasonable or arbitrary,” and, furthermore, that “[i]t should take much more explicit language than appears anywhere in the [APA] to overcome” the principle that “the administrator . . . has the responsibility for applying the relevant criteria to the facts at issue.” *Id.* at 1260–61. Indeed, Professor Jaffe indicated quite clearly that he *disagreed* with Professor Dickinson’s suggestion that § 706 had such an effect. *See id.* at 1260 n.101. In a subsequent article, published in 1955, Professor Jaffe reaffirmed his disagreement with Professor Dickinson’s claim that the APA required independent judicial review of *all* legal questions. *See Jaffe, supra* note 87, at 258–59; *see also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 569–70 & n.79 (1965). So it is hard to know what to make of Professor Bamzai’s assertion that Professor Jaffe agreed with Professor Dickinson’s view that § 706 requires courts to exercise their independent judgment on all legal questions, *see Bamzai, supra*, at 465, given that Professor Jaffe said explicitly that he did *not* agree with Professor Dickinson’s position. True, as Professor Bamzai rightly noted, the view Professor Jaffe expressed on the relationship between § 706 and *Gray* was “nuanced.” *Id.* at 466 n.175. Professor Jaffe’s position on whether § 706 repudiated the *Gray* doctrine appears to depend on how that doctrine is interpreted. He objected to—and thought the APA precluded—a broad reading of *Gray* that would allow agencies rather than courts to “determine what considerations are relevant” when deciding how a broad statutory term applies to particular situations. Jaffe, *supra*, at 1258, 1260–61. But he did not appear to view the *Gray* doctrine as incompatible with the APA if that doctrine were understood as calling for deference to the agency’s weighing and application of those criteria. *See id.* at 1260. That latter characterization would be consistent with the understanding of *Gray* embraced in this Article, *see supra* text accompanying notes 172–173, though it is surely plausible that at time of the APA’s enactment, and afterward, there was a range of views about the proper scope of deference under the *Gray* doctrine.

In sum, while Professor Bamzai may be right that Professors Schwartz and Jaffe articulated positions that were more nuanced than a full-throated endorsement of the majority view that the APA did not alter the standard of review for legal questions, they both appear closer to that view than to Professor Dickinson’s dissenting position. *See also* Levin, *supra* note 42, at 181 (observing, correctly, that Professors Jaffe and Schwartz “*expressly* disagreed with Dickinson’s analysis”).

For completeness, it is worth noting that Professor Bamzai cites six other sources as “echo[ing]” Dickinson’s perspective in the years immediately following the APA’s passage. Bamzai, *supra* at 467 & n.181. Of these six, two in fact say the opposite of what Professor Bamzai claims: These articles embrace the consensus position that § 706 codified rather than altered the standard of review doctrine. *See* Brown, *supra*, at 86; Scanlan, *supra*, at 502, 528–29. Another two of these six sources are not really on point, as they emphasized that the APA

codify the prevailing judicial review doctrine at the time of the APA's enactment, this would imply that the APA preserved the *Gray* doctrine, which was well established by 1946.²¹⁹ Indeed, *Gray* and *Hearst* were considered to be the "leading cases" on standard-of-review doctrine during that period.²²⁰

Furthermore, despite some alleged inconsistency, courts adhered to a version of the *Gray* doctrine immediately following the APA's enactment and for decades afterwards.²²¹ This judicial practice cuts sharply against the notion that the APA was intended or understood to repudiate the *Gray* doctrine.²²²

expanded the *scope* of judicial review—that is, they point out that the APA authorized judicial review of a larger set of agency actions—but they did not assert (at least not clearly) that the APA altered the *standard* of review by overriding *Gray*, *Hearst*, or other cases in that line. See Frederick F. Blachly & Miriam E. Oatman, *The Federal Administrative Procedure Act*, 34 GEO. L.J. 407, 427–30 (1946); *id.* at 428 (noting that the APA does not provide "a single added protection" with respect to the *approach* that courts take to judicial review in those cases where they have jurisdiction); Julius Cohen, *Legislative Injustice and the Supremacy "of Law": An Appraisal of the Federal Administrative Procedure Act*, 26 NEB. L. REV. 323, 339–44 (1947); *id.* at 341 (observing that the APA expanded the set of agency actions that are judicially reviewable but took "needless pains . . . to grant to the courts authority which they already have" with respect to the substantive standard of review). The remaining two pieces that Professor Bamzai cited—one a student note, see Thayer D. Moss, Note, *The Administrative Interpretation of Statutes*, 39 GEO. L.J. 244, 259–60 (1951), and the other by a non-lawyer, see Frank Hinman Jr., *Effect of the Administrative Procedure Act on Judicial Review of Administrative Action*, 20 ROCKY MOUNTAIN L. REV. 267, 276–77 (1948), did embrace Professor Dickinson's position. But the weight of the commentary supports Professor Levin's conclusion that Professor Dickinson's view was "almost completely isolated." Levin, *supra* note 42, at 181 (emphasis added).

219. Some have contested this claim, arguing that characterizing the APA as a "restatement" of existing law is not that informative as to the impact of § 706 on the *Gray* doctrine because of the Court's inconsistency in its adherence to the *Gray* doctrine during the years leading up to the APA's enactment. See Bamzai, *supra* note 218, at 464 & n.160; Beermann, *supra* note 217, at 791. But as discussed above, the claims of inconsistency are wildly overstated. See *supra* text accompanying notes 44–55 & note 55 (citing cases).

220. See Davis, *supra* note 88, at 571–73; Nathanson, *supra* note 88, at 472; Schwartz, *Gray v. Powell*, *supra* note 88, at 20–21; see also Schwartz, *Mixed Questions*, *supra* note 218, at 78 (declaring, in 1950, that the *Gray* doctrine "seems by now to be established in federal administrative law").

221. See *supra* text accompanying notes 88–114 and Part I.D.

222. See Sunstein, *supra* note 117, at 1653 (observing that "[t]he Supreme Court certainly did not take section 706 of the APA as a signal that *Gray* and *Hearst* had been repudiated"); Green, *supra* note 42, at 693 (pointing out that "hundreds of judicial decisions . . . have assumed . . . that the APA changed nothing about judicial deference to agencies' statutory interpretation"). In this context, it is worth noting that George Shepherd, whose in-depth discussion of the history of the APA's enactment is one of the leading treatments of the subject,

Admittedly, the case law contains only a few explicit discussions of the *Gray* doctrine's relationship with § 706, but the discussions that do exist support the claim that post-APA courts construed § 706 as preserving, rather than conflicting with or displacing, *Gray*.²²³ It is therefore reasonable to read *Loper*

concluded that the language of the APA's judicial review provision was intentionally ambiguous, and that parties with very different views regarding the proper scope of review recognized that courts would eventually resolve this ambiguity through case-by-case adjudication. See Shepherd, *supra* note 217, at 1665. If that is correct, then the judicial practice following the APA's passage may be especially meaningful, as this practice can be understood to have "liquidated" the meaning of the APA's deliberately ambiguous standard-of-review provisions. See generally Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–15 (2001) (discussing the theory that judicial decisions can "liquidate"—that is, clarify and settle—an ambiguous statute's meaning); Daniel Deacon, *Statutory Liquidation*, 77 ADMIN. L. REV. 503 (2025) (describing, exploring, and critiquing this theory and its applications by the current Court).

223. At the Supreme Court, the case that engaged with this issue most directly was *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). *O'Leary* involved the question whether an employee's death had occurred in "the course of employment," as that term is used in the Longshoremen's and Harbor Workers' Act (LHWA). *Id.* at 506. This seems like a classic line-drawing issue, or "mixed question," for which *Gray* deference would be appropriate. Indeed, it is essentially the same issue as the one that arose in the *Cardillo* case, see text accompanying notes 102–105, albeit under a different statute and with a different fact pattern. The *O'Leary* Court first observed that all parties agreed that the APA determined the standard of review to be applied in the case. See 340 U.S. at 508. The Court then declared that the appropriate standard of review in a case involving the application of an imprecise statutory term to a specific situation is the "substantial evidence" standard in § 706(E), as that standard was interpreted in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). See *O'Leary*, 340 U.S. at 508. This may be somewhat confusing to modern readers who tend to associate the "substantial evidence" standard with review of factual determinations. Indeed, as the *O'Leary* Court pointed out, the agency had characterized the disputed issue as one of "fact." *Id.* at 507. However, although the Court seemed to accept that framing for purposes of determining the standard of review, the Court clarified that in this context, issues of "fact" include not only disputes over "simple, external, physical event[s]" but also "the inferences drawn from" those facts under the "applicable [legal] standards." *Id.* The Court thus appeared to hold that the standard of review for issues involving the application of law to facts (including in cases where the facts themselves are uncontested) is the same as the standard of review for "pure" factual questions. The Court did not even hint at the possibility that § 706 might require a more demanding standard of review. (It is perhaps also relevant here that, in the pre-APA case law, the "substantial evidence" standard was regularly applied to "mixed questions of law and fact." See, e.g., *ICC v. Union Pacific R.R.*, 222 U.S. 541, 547–48 (1912).) Thus Professor Davis, in his influential treatise, concluded that *O'Leary* had confirmed "[t]hat the doctrine of *Gray v. Powell* has survived the APA." DAVIS, *supra* note 50, § 246, at 885 (italics added).

Bright as implicitly accepting that the *Gray* doctrine is compatible with § 706, even if the *Chevron* doctrine—which, as the *Loper Bright* majority stressed, emerged “decades later”²²⁴—is not.

But the waters are muddied by the fact that *Loper Bright* characterized the prevailing pre-APA approach to judicial review as one in which the courts resolved statutory ambiguities without deference to agencies.²²⁵ That

In the lower courts, there was relatively little discussion of what impact, if any, the APA had on the *Gray* doctrine, but most of the lower court opinions that did touch on the matter treated the *Gray* doctrine, and the cases associated with it, as consistent with § 706. *See, e.g.,* U.S. v. ICC, 198 F.2d 958, 964 (D.C. Cir. 1952) (treating the APA as embracing the same standard of review as the one applied in *Gray* and *Rochester Telephone*); *Am. Airlines v. Civ. Aeronautics Bd.*, 231 F.2d 483, 486 & n.3 (D.C. Cir. 1956) (citing both *Aragon* and the APA for the proposition that courts reviewing agency action should inquire as to whether that action has a reasonable basis in law); *Hanly v. Kleindienst*, 471 F.2d 823, 828–29 (2d Cir. 1972) (declaring that although § 706 requires the reviewing court to decide all questions of law, the Supreme Court has “authorized” the use of a rational basis test for mixed questions of law and fact, citing *Hearst*); *Pre-Fab Transit Co. v. U.S.*, 306 F. Supp. 1247, 1250 (S.D. Ill. 1969) (citing *Gray*, *Universal Camera*, and § 706 of the APA together for the proposition that the appropriate standard of judicial review for questions of law is “whether the judgment of the [agency] has warrant in the record and a rational basis in the law”); *International Union of Operating Engineers, Local 627 v. Arthurs*, 355 F. Supp. 7, 16–17 (W.D. Okla. 1973) (reciting the *Gray-Hearst* standard and the § 706 standard in consecutive paragraphs in a manner that implies they embody the same standard of review); *Sierra Club v. U.S. Postal Serv.*, 386 F. Supp. 1102, 1104 (N.D. Cal. 1973) (concluding that the deferential standard of review announced in *Bates & Guild* is consistent with § 706). *But see* *Rafal v. Flemming*, 171 F. Supp. 490, 494 (E.D. Va. 1959) (stating that although the APA “did not drastically revise the concept of judicial review,” the APA made clear “that courts are no longer conclusively bound by any administrative interpretation of an Act, and the *Gray* and *Hearst* cases may be considered modified to this extent” (italics added)).

224. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2260 (2024); *see also id.* at 2261–62 n.4 (emphasizing that *Chevron* embraced a deference doctrine that “the courts had never . . . applied [before the APA’s enactment]—and would not apply for several decades to come”); Rappaport, *supra* note 50, at 1297–306 (emphasizing the difference between the *Chevron* doctrine and the law on judicial review that had prevailed at the time of the APA’s enactment).

225. *See Loper Bright*, 144 S. Ct. at 2261 (claiming that “[t]he APA . . . codifies for agency cases the unremarkable . . . proposition . . . that courts decide legal questions by applying their own judgment”); *id.* (declaring that the APA was not “intended to [be a] depart[ure] from the settled pre-APA understanding” of judicial review, but characterizing that understanding as one in which “deciding [legal] questions was ‘exclusively a judicial function’” (quoting *U.S. v. Am. Trucking Ass’ns*, 310 U.S. 524, 544 (1940))); *id.* at 2262 (noting, with apparent approval, the DOJ’s contemporaneous view that the APA “merely ‘restate[d] the present law as to the scope of judicial review,’” but asserting “[t]hat ‘present law’ . . . adhered to the traditional conception of the judicial function” (quoting DEPT. OF JUSTICE, ATTORNEY

characterization could be taken to suggest that *Gray* is not in fact compatible with the *Loper Bright* majority's understanding of § 706, given that the *Gray* doctrine calls for courts to give *deference*, not merely respect or weight, to agency resolutions of statutory ambiguities in certain cases—a point that the *Loper Bright* Court acknowledged and then denied within the span of three pages.²²⁶ Adding further to the confusion, at one point the *Loper Bright* majority seemed to suggest that *Gray*, *Hearst*, and related cases were anomalies that did not fit into the broader tradition of independent judicial review that the APA codified,²²⁷ but in the course of the same few paragraphs the Court characterized these cases as recognizing a legitimate though narrowly-drawn qualification or exception to the general principle that statutory interpretation is for courts rather than agencies.²²⁸ In that same section of the opinion, *Loper Bright* asserted that *Gray* and *Hearst* are consistent with the “traditional rule” that courts are responsible for interpreting statutes, but the Court then declared in the next sentence that *Gray* and *Hearst* endorsed “a different approach . . . where application of a statutory term [is] sufficiently intertwined with the agency’s factfinding.”²²⁹ Of course, it might be possible to assert

GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947))). At other points in the opinion, though, *Loper Bright* characterized that pre-APA understanding in a way that is more compatible with the *Gray* doctrine. *See id.* at 2263 (stating that the “traditional conception of the judicial function that the APA adopts” includes the idea that “[w]hen the best reading of a statute is that it delegates discretionary authority to an agency,” the court “fulfills [its] role by . . . ‘fix[ing] the boundaries of [the] delegated authority’” and ensuring the agency has remained within those boundaries (quoting Monaghan, *supra* note 117, at 27)); *id.* at 2263–64 (declaring that the case-by-case approach to “identif[y]ing delegations of discretionary authority to agencies” is consistent with the traditional approach codified by the APA, and that it was *Chevron* that “triggered a marked departure” from that approach).

226. *Compare id.* at 2259 (characterizing *Gray* and *Hearst* as involving “deferential review”) and *id.* at 2259–60 (same), with *id.* at 2259 n.3 (declaring that *Gray* and *Hearst* endorsed giving only “appropriate weight,” not “outright deference,” to the agency’s interpretation) (internal quotation marks omitted).

227. *See id.* at 2259–60 (suggesting that the deferential approach adopted in *Gray* and *Hearst* was only occasionally and inconsistently applied).

228. *See id.* (distinguishing *Gray* and *Hearst* from *Chevron* on the grounds that the deferential approach of the former cases “was cabined to factbound determinations” involving “how a broad statutory term applied to specific facts,” and that this more constrained approach to deference was quite different from the broad *Chevron* presumption that emerged decades later); *id.* at 2259 (noting that *Gray* and *Hearst* “applied *deferential* review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts” (emphasis added)).

229. *See id.* at 2260. The context in which the *Loper Bright* Court declared that *Gray* and *Hearst* did not “purport[] to refashion the longstanding judicial approach to questions of law”

both that the pre-APA approach to judicial review included *Gray*'s deferential framework and also that the APA repudiated that framework; at times the *Loper Bright* opinion appears to gesture in that direction.²³⁰ But the *Loper Bright* Court never made such a claim explicitly. Rather, the majority emphasized the APA's continuity with pre-APA practice and assumptions.²³¹

Similar uncertainty pervades *Loper Bright*'s discussion of the period between the APA's enactment and the *Chevron* decision. *Loper Bright* claimed that after the APA's passage, "courts generally continued to review agency interpretations of the statutes they administer by independently examining each statute to determine its meaning."²³² If by this the Court meant that during this period, reviewing courts consistently eschewed treating statutory ambiguities as implicit delegations—and therefore gave only respect, never deference, to agency interpretations—then the claim is flatly and demonstrably wrong.²³³ But the *Loper Bright* majority probably did not mean this,

and "did not disturb the traditional rule" that statutory questions are for courts to resolve is the observation that in both *Gray* and *Hearst*, although the Court deferred to the agency's application of a broad statutory term to a specific situation (what the *Loper Bright* Court referred to as "factbound determinations"), the Court exercised independent, non-deferential judgment on what the *Loper Bright* opinion described as "pure legal question[s]." *Id.* at 2259–60. This is indeed an important limit on the scope of deference under the *Gray* doctrine, as discussed previously. See *supra* text accompanying notes 155–161 and Part I.C. Understood that way, the *Loper Bright* Court's discussion is consistent with the conclusion that the APA preserved the *Gray* doctrine. *Loper Bright* introduced confusion, however, by proceeding to equate "pure legal question[s]" with "questions . . . [involving] statutory interpretation." *Loper Bright*, 144 S. Ct. 2244, 2259–60 (internal quotation marks omitted). A key feature of the *Gray* doctrine—recognized, implicitly but clearly, in both *Gray* and *Hearst*—is that some questions involving the application of imprecise statutory terms to undisputed facts *are* "questions of statutory interpretation" but *are not* pure legal questions in the relevant sense. See *Gray v. Powell*, 314 U.S. 402, 412–13 (1941); *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130–31 (1944).

230. Notably, the majority cited John Dickinson's view that § 706 of the APA requires reviewing courts to decide all questions of law using their own independent judgment, without deference to the responsible agencies. See *Loper Bright*, 144 S. Ct. at 2262 (quoting Dickinson, *supra* note 218, at 516). But Professor Dickinson's article argued that the ABA *changed* the standard of judicial review, see Dickinson, *supra* note 218, at 516–17, a claim that appears at odds with the *Loper Bright* majority's assertion that the APA merely *restated and codified* the traditional approach to judicial review that prevailed at the time of the APA's enactment. See also *Loper Bright*, 144 S. Ct. at 2303 n.4 (Kagan, J., dissenting) ("[I]f the majority really wants to rely on Professor Dickinson, it will have to give up the claim . . . that the law before the APA forbade deference.").

231. See *Loper Bright*, 144 S. Ct. at 2261 (majority opinion).

232. *Id.* at 2263.

233. For this claim, the *Loper Bright* majority cited—with a "*cf.*" signal—Merrill, *Executive*

because in the very next sentence of the opinion, the Court cited Justice Scalia's observation that, prior to *Chevron*, "courts . . . identified delegations of discretionary authority to agencies on a 'statute-by-statute basis.'"²³⁴ This appears to be an acknowledgement that when the *Loper Bright* majority said that courts in the pre-*Chevron* period "independently examin[ed] each statute to determine its meaning," the majority understood that this "meaning" could be—and often was—that the statute, by virtue of its imprecision, implicitly delegated discretionary authority to the responsible agency.²³⁵

What are we to make of these mixed signals? It is certainly possible to argue that *Loper Bright* implicitly held that the APA repudiated the *Gray* doctrine along with the *Chevron* doctrine. But it is also possible to read *Loper Bright* as holding only that § 706 is incompatible with *Chevron*, and that § 706 did

Precedent, *supra* note 13, at 972–75. The *cf.* is a tell that the Court was aware that this source does not quite support the claim to which it is attached. Indeed, if the Court is understood as claiming that during the pre-*Chevron* period courts typically did not defer to agency interpretations, Professor Merrill's article comes close to saying the exact opposite. See *id.* at 972 (declaring that prior to 1984, "deference could range over a spectrum from 'great' to 'some' to 'little'," and that although "[t]he default rule was one of independent judicial judgment," a court would defer if it "could identify some factor or factors that would supply an affirmative justification for giving special weight to the agency views").

It is worth noting that, with all appropriate respect to Professor Merrill and his extraordinary contributions to administrative law scholarship in this piece and others, his article did not mention *Gray*, cited *Heast* only briefly and in passing, and omitted any mention of other important and influential cases on deference during the pre-*Chevron* period, such as *Aragon*, *Drum*, *Cardillo*, and *Hardin*, so one may reasonably be skeptical as to whether his summary of the pre-*Chevron* case law is sufficiently comprehensive to justify broad conclusions about what the "default rule" actually was in this period. In fairness to Professor Merrill, this article focused primarily on the decade immediately preceding *Chevron*. The *Loper Bright* Court, however, cited his piece to make a more sweeping claim about the nearly forty years between the APA's enactment and the *Chevron* decision, which the piece did not really address.

Loper Bright also claimed that courts did not consistently adhere to the *Gray* doctrine in the post-APA period. See *Loper Bright*, 144 S. Ct. at 2259–60. But the Court did not go so far as to suggest that this inconsistency shows that *Gray* had been repudiated or abandoned—an untenable claim in any event, see *supra* Part I.D—so the (alleged and overstated) inconsistency in the application of the *Gray* doctrine would not establish that prior to *Chevron* courts consistently decided all questions of law without deference to agency judgments.

234. See *Loper Bright*, 144 S. Ct. at 2263–64 (quoting Scalia, *supra* note 13, at 516). That statement is both true and misleading: It is true insofar as courts during this period sometimes found implicit delegations of discretionary authority (and hence deferred) and sometimes did not; it is misleading insofar as it might be taken to suggest that courts did this haphazardly or randomly, without any doctrinal guideposts. That is an inaccurate characterization, notwithstanding a handful of outlier cases. See *supra* Part I.D.

235. *Loper Bright*, 144 S. Ct. at 2263–65.

not override the judicial practice that prevailed in the years leading up to the APA's enactment and that persisted in the decades that followed.²³⁶ Given the unclear, equivocal language of the *Loper Bright* opinion, the more judicious approach would be for lower courts to proceed on the assumption that *Loper Bright* did *not* hold that the APA rejected the *Gray* doctrine.

That conclusion does not automatically imply that the *Gray* doctrine survived *Loper Bright*, however. Even if *Loper Bright* did not hold that the APA repudiated the *Gray* doctrine back in 1946, it is still possible to read *Loper Bright's* rejection of *Chevron* as necessarily entailing a rejection of the *Gray* doctrine *now*. The case for this position might run something like this: *Loper Bright* repeatedly called for courts to exercise “independent judgment” when reviewing agency interpretations of statutes, and although the Court conceded the possibility that a statute might implicitly delegate interpretive authority to an agency, the tone and tenor of the majority opinion implied that this would be a rare, exceptional situation. Incorporating the *Gray* doctrine—as that doctrine was understood and applied from the 1940s through the early 1980s—into *Loper Bright* would produce quite a bit of judicial deference to agency interpretations. That result, the argument would continue, is contrary to the world that the *Loper Bright* Court seemed to envision, in which the usual approach is a non-deferential (though possibly respectful) review of agency interpretations.²³⁷

The thrust of this argument is conveyed, perhaps inadvertently, by Justice Kagan's *Loper Bright* dissent. After discussing the deferential approach embraced by *Gray* and *Hearst*, Justice Kagan observed that the majority minimized the significance of those precedents by insisting that they only call for deference in cases “involving the application of a legal standard to a set of facts” rather than cases involving “pure legal question[s].”²³⁸ If, Justice Kagan continued, “the majority intends to confine its holding to the pure type

236. It is also possible that the *Loper Bright* majority simply did not reach a firm conclusion on this issue—perhaps due to an inability to reach consensus, or perhaps because the majority preferred to leave undecided many of the questions regarding the contours of the newly established *Loper Bright* doctrine.

237. See *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 420 (6th Cir. 2024) (insisting that *Loper Bright* only permits deference when the statute includes explicit discretion-conferring language, reasoning that “[i]f broad language alone triggered deference, we’d unwittingly return to construing less than precise words as implicit delegations,” and that this “can’t be right,” because “[t]he case that declared ‘*Chevron* is overruled’ didn’t quietly reinstate it”); Sunstein, *Our Marbury*, *supra* note 1, at 1900 (observing that “what we might call the music of *Loper Bright*, its chorus, its refrain,” is that there should be “independent judicial review of legal questions”).

238. *Loper Bright*, 144 S. Ct. at 2305 (Kagan, J., dissenting) (citing *id.* at 2259 (majority opinion)).

of legal issue—thus enabling courts to defer when law and facts are entwined—I’d be glad. But,” she continued, “I suspect the majority has no such intent, because that approach would preserve *Chevron* in a substantial part of its current domain.”²³⁹ After all, Justice Kagan pointed out, “[i]t is frequently in the consideration of mixed questions [of law and fact] that the scope of statutory terms is established and their meaning defined.”²⁴⁰ Though Justice Kagan’s objective was to criticize the majority’s overruling of *Chevron*, one might repurpose her line of reasoning to object to the notion that *Loper Bright* is compatible with *Gray*. If the *Gray* doctrine is incorporated into the *Loper Bright* framework, the argument would go, then much of *Chevron* would survive—in practice though not in name—because most of the cases in which courts would defer under *Chevron* are also cases in which courts would defer under *Gray*. But, the argument would continue, such a result cannot be squared with *Loper Bright*’s sweeping condemnation of *Chevron*.

This argument is unpersuasive for two reasons. First, overruling by implication is disfavored,²⁴¹ and although *Loper Bright* tried to minimize the significance of *Gray*, *Hearst*, and other cases in that line, nothing in the *Loper Bright* opinion requires that implicit delegations generally, or the specific sort of “factbound” interpretive decisions at issue in cases like *Gray* and *Hearst*, must

239. *Id.* at 2305–06.

240. *Id.* at 2306.

241. *See, e.g.*, *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18–19 (2000); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2038 (2023); *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 507 (6th Cir. 2004); *Herron v. Fannie Mae*, 861 F.3d 160, 168 (D.C. Cir. 2017). That is not to say that the Court never implicitly overrules its precedents—it does. But if a Supreme Court opinion is susceptible to different readings, one of which would imply the overruling of a line of earlier cases and one of which would not, the latter reading is generally preferred.

One might be tempted to object that *Chevron* already overruled the cases in the *Gray* line. But that is not so, at least with respect to those cases’ holding that courts should defer to an agency’s line-drawing decisions. The *Chevron* doctrine *subsumed* those cases by calling for deference in a broader set of circumstances, but *Chevron* never suggested those earlier cases were wrongly decided. Instead, *Chevron* built on their foundation. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–45, 844 n.14 (1984) (favorably citing, among other cases, *Hearst*, *Aragon*, *Chenery II*, and *Morton*). *Loper Bright*’s rejection of that expansion does not logically entail a rejection of the foundation. Indeed, some of the Court’s post-*Chevron* cases continued to cite earlier cases in the *Gray-Hearst* line as good law. *See, e.g.*, *NLRB v. Action Auto., Inc.* 469 U.S. 490, 495–96 (1985) (citing *Hearst*’s deferential standard of review); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (same); *Conn. Dep’t of Income Maint. v. Heckler*, 471 U.S. 524, 532 n.21 (1985) (favorably citing *Aragon*’s endorsement of deferential review).

be rare. The Justices in the *Loper Bright* majority may have assumed that such cases would be rare, but that assumption might turn out to be wrong. It would be inappropriate to treat an established doctrine as overruled simply because the Justices incorrectly predicted that this doctrine would not be relevant all that often.

Second, and more importantly, it is just not true that incorporating the *Gray* doctrine into *Loper Bright* would preserve almost all of *Chevron* under another name. As discussed above, the *Gray* doctrine only treats a subset of statutory ambiguities—those that involve the boundaries of imprecise statutory categories—as implicit delegations to agencies.²⁴² *Chevron*, by contrast, called for treating all statutory ambiguities that fall within *Chevron*'s domain as implied delegations.²⁴³ The subset of interpretive issues to which *Gray* deference applies may not be as small as the *Loper Bright* majority seemed to assume, but neither is it so large as to converge with *Chevron*, as Justice Kagan seemed to assume. Embracing the *Gray* doctrine would not render *Loper Bright*'s rejection of *Chevron* a practical nullity, so this cannot serve as a sufficient basis to read *Loper Bright* as rejecting *Gray*.²⁴⁴

242. See *supra* Part I.D.

243. See, e.g., Scalia, *supra* note 13, at 516.

244. A critic who sees *Loper Bright* as incompatible with *Gray* might advance a supplementary argument that draws on the *Loper Bright* majority's discussion of the reasons why the *Chevron* doctrine was "unworkable." In making that case, *Loper Bright* asserted (1) that *Chevron* required a subjective and standardless threshold determination of "ambiguity," 144 S. Ct. at 2270–71; (2) that to avoid an overly broad presumption of deference the Court had found it necessary to fashion an ever-increasing number of ad hoc limitations on *Chevron*'s domain, see *id.* at 2271–72; and (3) that *Chevron* fostered uncertainty rather than predictability by allowing agencies to change their positions on the meaning of unclear statutory language, see *id.* at 2272. All of these criticisms could conceivably be leveled at the *Gray* doctrine as well. But the suggestion that this demonstrates an implicit rejection of *Gray* proves too much. After all, the above criticisms could be leveled at *any* doctrine that allows courts to find, at least sometimes, that a statute implicitly delegates interpretive authority to an agency, because that doctrinal possibility (1) will require courts to decide when such implied delegation should be found; (2) may be constrained by other limits on the scope of the deference doctrine; and (3) would typically permit agencies to reconsider and then alter how they exercise the discretion that they have been delegated. As already noted, *Loper Bright* permits a finding of implicit delegation at least in some cases. So *Loper Bright*'s criticisms of *Chevron*'s workability cannot, without more, function as a repudiation of *Gray*.

Additionally, with respect to two of the Court's three workability objections, the *Gray* doctrine might be less problematic than the *Chevron* doctrine. First, although it may not always be straightforward to distinguish pure or abstract legal questions from so-called mixed questions (which might better be described as applied line-drawing questions), at least this is a qualitative distinction between *types* of ambiguity resolution, rather than a more subjective

Before proceeding, it is worth noting that the Court's most significant post-*Loper Bright* decision on judicial review of agency compliance with statutory obligations—*Seven County Infrastructure Coalition v. Eagle County*²⁴⁵—is more consistent with a version of *Loper Bright* that integrates the *Gray* doctrine than with narrower, less deferential understandings of *Loper Bright*. *Seven County* considered the standard of review that a court should apply when deciding whether an agency has fulfilled its responsibilities under the National Environmental Policy Act (NEPA). NEPA requires that when a proposed agency action would “significantly affect[] the quality of the human environment,” the agency must prepare a “detailed statement” (known as an Environmental Impact Statement, or EIS) that identifies, among other things, the “reasonably foreseeable environmental effects of the proposed action” and discusses a “reasonable range of alternatives . . . that are technically and economically feasible.”²⁴⁶ Deciding whether an agency has complied with its NEPA obligations may entail interpreting various statutory terms: Which environmental effects are “significant”? What does it mean for an alternative to be “feasible”? How much and what sort of information must the EIS contain for it to be considered “detailed”? Which environmental effects are “effects of the proposed action,” as opposed to effects that are too attenuated or indirect to be attributed to the proposal under consideration?

assessment of whether a statute is sufficiently unclear to qualify as “ambiguous” for *Chevron* purposes. Second, although it is true that the *Gray* doctrine allows agencies to change their minds, this poses less of a threat to the *Loper Bright* Court's understanding of the rule of law than did the *Chevron* doctrine. In *Loper Bright*, the objection to agencies altering their position on statutory meaning is derivative of the concern that many statutory ambiguities could not plausibly be characterized as delegations. *See id.* (objecting that “[u]nder *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes,” even though the mere presence of a statutory ambiguity “is not a reliable indicator of actual delegation of discretionary authority to agencies” (emphasis added)). But the particular sort of statutory ambiguity that triggers deference under the *Gray* doctrine—the use of an inherently imprecise term that the agency must apply to specific types of fact situations—could well be seen as a reliable indicator of an intent to delegate discretionary authority. To be clear, both of these points are contestable. But for present purposes, the only question on the table is whether the *Loper Bright* Court's objections to the *Chevron* doctrine necessarily apply with the same force to the *Gray* doctrine. If the answer is no, then one cannot insist that *Loper Bright*'s rejection of *Chevron* entails a rejection of *Gray*, especially in light of the presumption against implicit overruling of past cases. *See supra* note 241. That there are plausible distinctions between the two doctrines is thus sufficient to rebut the claim that *Loper Bright* repudiated *Gray*.

245. 145 S. Ct. 1497 (2025).

246. 42 U.S.C. § 4332(C).

The *Seven County* Court was unequivocal in holding that, when passing on such questions, the reviewing court should defer to the agency's reasonable judgments.²⁴⁷ In explaining why such deference is consistent with *Loper Bright*, Justice Kavanaugh's opinion for the Court emphasized that although "judicial review of [an] agency's interpretation [of a statute] is *de novo*," in those cases where "an agency exercises discretion granted by a statute," the court should review the exercise of that discretion deferentially, asking "only whether the agency action was reasonable and reasonably explained."²⁴⁸ The sorts of questions noted above regarding NEPA compliance—whether a given environmental effect is "significant," whether that effect qualifies as an effect "of [the] proposed action," whether an alternative is "feasible," and whether the EIS is "detailed"—are, according to the *Seven County* Court, all questions that NEPA delegates to the agencies, and reviewing courts should therefore defer to agencies' reasonable answers to these questions.²⁴⁹ In language that recalls *Gray* (though without citing that case or any of the other cases in the *Gray* line), *Seven County* emphasized that on such questions "agencies possess discretion and must have broad latitude to draw a manageable line."²⁵⁰ It would therefore be inappropriate, the Court explained, for reviewing courts to "micromanage" the agency's choices "about the length, content, and level of detail of [its] EIS."²⁵¹

That conclusion is eminently sensible. It is also consistent with the approach advocated in this Article—incorporating the *Gray* doctrine into *Loper Bright*'s implicit delegation prong.²⁵² The *Seven County* Court, however, did not explain its reasoning in those terms. As a result, the Court had difficulty

247. 145 S. Ct. at 1511–15.

248. *Id.* at 1511. That Justice Kavanaugh was the author of this opinion—and presumably this passage—is intriguing. Although Justice Kavanaugh joined the *Loper Bright* majority opinion, he has repeatedly emphasized, both before and after *Loper Bright*, that, notwithstanding the flaws with an expansive version of the *Chevron* doctrine, deference to agencies is still proper when a statute uses sufficiently capacious language. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2152 (2016) [hereinafter Kavanaugh, *Fixing*]; Brett M. Kavanaugh, *Remarks at Notre Dame Law School*, 98 NOTRE DAME L. REV. 1849, 1850–51 (2023); Kavanaugh & Alicea, *supra* note 37, at 5 (remarks of Justice Kavanaugh). It is possible to read the *Seven County* opinion as consonant with this general approach, though the opinion does not make the link explicitly.

249. See *Seven Cnty.*, 145 S. Ct. at 1507, 1512–13.

250. *Id.* at 1513 (citations and quotation marks omitted); see also *id.* at 1517.

251. *Id.* at 1513.

252. See also Adrian Vermeule, *Yes, There Will Be No Loper Bright "Revolution"*, NEW DIGEST (May 30, 2025), <https://thenewdigest.substack.com/p/yes-there-will-be-no-loper-bright> [<https://perma.cc/32Z6-B2YU>] (arguing that "although the [*Seven County*] Court does not expressly refer to *Hearst*," the Court's approach "is in substance the same as the *Hearst* approach").

articulating a coherent and consistent reason *why* courts should defer to agency judgments on these matters.²⁵³ It is hard to defend the Court’s holding if one insists that deference is only appropriate if the statute contains specific and explicit language that assigns the relevant determinations to the agency, because NEPA contains no such language.²⁵⁴ It is also difficult to explain the result in *Seven County* if one interprets *Loper Bright* to permit a finding of implied delegation only if the statute uses extremely subjective and amorphous terms such as “reasonable” or “appropriate.” True, one could argue that terms like “significant” and “feasible” are open-ended and subjective in the same way that “reasonable” and “appropriate” are, even though “significance” and “feasibility” suggest assessments along more specific dimensions. But what about “detailed”? *Seven County* insisted that “the meaning of ‘detailed’ is a question of law to be decided by a court,”²⁵⁵ but the Court then declared that a reviewing court should defer to the agency on the question whether the EIS at issue counts as “detailed.” The Court explained that deference is appropriate here because the question of “what details need to be included in [a] given EIS” is a question of fact rather than of law.²⁵⁶ That reasoning is confusing, or perhaps confused: The relevant “facts” would presumably be the contents of the EIS report. But in most cases those facts will not be in dispute—anyone can read the report and see what it says. The relevant legal question is not what the contents of the EIS *are*, but whether those contents—their length, specificity, and so forth—meet the *statutory requirement* that the EIS be “detailed.” *That* question—whether the level of detail in this particular EIS meets the statutory requirement—is not a pure

253. The Court suggested in passing that “the fact that NEPA is a *purely procedural statute*” that “imposes no *substantive* constraints on the agency’s ultimate decision” may be part of the reason for greater judicial deference. 145 S. Ct. at 1511. But it is hard to see why that would be the case. Indeed, the case for judicial deference is usually thought to be *weaker*, and the case for independent judicial judgment *stronger*, when the question is whether an agency has complied with procedural requirements. See Melissa M. Berry, *Beyond Chevron’s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 579–80, 601 (2007).

254. Indeed, the *Seven County* decision repudiated—implicitly but clearly—the Sixth Circuit’s holding in *Moctezuma-Reyes* that a court may not infer from broad language an implicit delegation to the agency unless that language is “pair[ed] . . . with words that expressly empower the agency to exercise judgment,” for example an explicit statement that a given determination is left to the “judgment” or “opinion” of the agency. 124 F.4th 416, 420–21 (2024). NEPA does not contain any language of that sort, but rather *imposes on agencies* certain obligations with respect to when they must prepare EIS reports and what those reports should contain. Yet *Seven County* called for judicial deference to an agency’s reasonable interpretations of those requirements.

255. *Seven Cnty.*, 145 S. Ct. at 1512.

256. *Id.*

question of fact. Rather, that question concerns the application of law to facts. The Court's suggestion that the *reason* for deference is that the relevant question is factual rather than legal is therefore misleading and unhelpful.²⁵⁷ Nevertheless, the *Seven County* Court had the right idea: On this sort of question, which calls for assessing whether a given item (here, the EIS) scores high enough on a particular dimension (here, the quantity and specificity of the information presented) to fall within some statutory category (here, "detailed" reports), it is most plausible to assume that Congress implicitly delegated to the agency the authority to make reasonable judgments about how much is enough.

Similarly, *Seven County* also called for deference on the question whether a given environmental effect is too indirect or attenuated to count as an effect of the proposed agency action.²⁵⁸ *Seven County* squarely held that "courts should defer to agencies' decisions about where to draw the line—including (i) how far to go in considering indirect environmental effects from the project at hand and (ii) whether to analyze effects from other projects separate in time or place from the project at hand."²⁵⁹ On that latter point, the Court emphasized that as a matter of law, the agency's EIS only needs to consider environmental impacts of the proposal the agency is evaluating, not of separate projects that might "foreseeably be built or expanded in the wake of the current project."²⁶⁰ The Court acknowledged that "in certain circumstances, other projects may be interrelated and close in time and place to the project at hand," and perhaps they might all be considered part of "a single project."²⁶¹ But, the Court stressed, if a case falls into the "gray area in defining the project at hand," the reviewing court "should defer to [the] agency so long as the agency drew a reasonable and 'manageable line,'" even if the

257. We've seen this movie before. In the early twentieth century, courts were in the habit of using the label "question of fact" when the issue was whether a particular fact situation, or class of fact situations, fell within a statutory category, even if the facts themselves were not contested. The use of the "question of . . . fact" label appears to have been a way to rationalize or justify judicial deference in such cases. See DAVIS, *supra* note 50, § 245, at 875. Later commentary adopted the term "mixed questions of law and fact" to describe this sort of situation, though that terminology is problematic. See *id.*; Sunstein, *Our Marbury*, *supra* note 1, at 1901–02 n.42. The *Gray* doctrine provides a much clearer route to a similar result, dispensing with the confusing and misleading legal fiction that the question whether a given situation falls within a statutory category is solely a question of fact rather than a question of law, and instead treating this legal determination as one that the statute implicitly delegates to the responsible agency.

258. *Seven Cnty.*, 145 S. Ct. at 1512–13.

259. *Id.* at 1513.

260. *Id.* at 1517.

261. *Id.*

court “think[s] that NEPA would support drawing a different line.”²⁶² Although the Court did not cite *Gray* or frame the rationale for deference in quite the same terms as the cases in the *Gray* line, it is striking how similar this discussion is to *Gray*’s rationale for deferring to the Coal Commission’s decision that Seaboard was not a coal producer: In some cases, it will be obvious that an environmental effect follows directly from the project under review; in other cases, it will be equally obvious that an environmental effect is due to an entirely separate project, with only attenuated and indirect links to the project under review. But “[b]etween the[se] two extremes are the innumerable variations that bring the arrangements closer to one pole or the other.”²⁶³ And it is reasonable and appropriate to presume that Congress entrusted the agency “[t]o determine upon which side of the median line [a] particular instance falls.”²⁶⁴

In short, although *Seven County* did not discuss the *Gray* doctrine or justify NEPA deference in quite the same terms, the *Seven County* Court’s reasoning is more compatible with the approach advocated in this Article than with a narrower, more demanding interpretation of *Loper Bright* that insists on “independent judicial judgment” for these sorts of line-drawing issues. *Loper Bright* called for independent judicial resolution of pure or abstract questions of law, but as *Seven County* recognized, applying statutory terms to particular situations—and deciding whether a given item or arrangement fits within a statutory category—will “invariably [entail] . . . fact-dependent, context-specific, and policy-laden choices,” and on such choices, “[c]ourts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness.”²⁶⁵ Exactly. And although *Seven County*’s holding was specific to NEPA, the Court’s reasoning would apply more generally. The Supreme Court—and lower courts—could add substantial clarity and coherence to the doctrine by extending the analysis and reasoning of *Seven County* to expressly incorporate *Gray* and the associated line of pre-*Chevron* case law.

In sum, although neither the APA nor *Loper Bright* is entirely clear, the better reading of the APA—as interpreted by *Loper Bright*—is that it did not repudiate the *Gray* doctrine, at least not in the distilled form in which that doctrine has been presented in this Article. It is therefore plausible, indeed better, to read *Loper Bright* as permitting the integration of the *Gray* doctrine into *Loper Bright*’s implicit delegation prong. Embracing such an incorporation

262. *Id.*

263. *Gray v. Powell*, 314 U.S. 402, 413 (1941).

264. *Id.*

265. *Seven Cnty.*, 145 S. Ct. at 1513.

would mean that a reviewing court confronted with a challenge to an agency's interpretation of a statute would proceed in the following steps:

At step one, the court would ask whether the statute expressly delegates to the agency the authority to define or interpret the contested provision of the statute. If so, then the court should uphold the agency's interpretation as long as that interpretation is reasonable. If not, then the court should proceed to step two.

At step two, the court should exercise its independent judgment to resolve all statutory ambiguities that take the form of pure or abstract questions of law. Such questions typically involve a choice among two or more discrete alternatives, and this choice can be made through textual and structural analysis of the statute. These sorts of interpretive decisions would include the resolution of grammatical ambiguities (such as which object a modifier modifies, or whether a list is exhaustive or illustrative), figuring out whether a term is being used in its ordinary sense or a more specialized sense, and deciding whether the agency, in construing the statute, has ignored a required factor or considered a prohibited factor. Although the reviewing court should respectfully consider the agency's views on these sorts of questions—especially if those views are evidence of the statute's original public meaning or shed light on how experts in the field would read terms that seem obscure or confusing to a layperson—these are all questions of law and are therefore the responsibility of the court.

The resolution of this set of statutory ambiguities may be sufficient to decide the case. If so, then the reviewing court's job is done. But it is possible that even after the court resolves all pure questions of law, some residual ambiguity remains. In particular, the contested statutory term may be inherently imprecise, with a continuum of related meanings, such that resolving the issue at hand requires deciding where to draw the line between those items that fall into the relevant statutory category and those items that do not. If this is indeed the case, the reviewing court's analysis proceeds to step three.

At step three, the court must decide if the statute's use of an imprecise term constitutes an implied delegation of line-drawing authority to the agency. Although the default presumption is that it does, there are some specific situations in which the presumption of implied delegation would be inappropriate, even on a line-drawing issue. The reviewing court should typically decline to find such an implied delegation if the agency has announced its view in a non-binding statement that was not issued pursuant to relatively formal procedures (such as a notice-and-comment rulemaking or a formal hearing). The reviewing court should also decline to treat the statutory imprecision as an implied delegation to the agency if the statutory provision is not one that the agency is responsible for administering, or if the particular question before the court—whether to include or exclude a specific item

from the scope of a statutory term—is of such extraordinary significance that it is inconceivable that Congress lacked a specific intent on the proper classification of that item.²⁶⁶ If any of these conditions applies, then the court must decide for itself whether the agency’s line-drawing decision is correct. As with the resolution of the sorts of pure legal questions addressed at step two, the court may give due respect to the agency’s views, but the court should treat the decision as one that has been assigned to the judiciary, not one that has been delegated to the agency.

If, however, none of the aforementioned limits applies—if the agency has announced its line-drawing decision on a matter within the agency’s jurisdiction in an authoritative document (such as a rule or formal order) issued pursuant to relatively formal (often adversarial or quasi-adversarial) procedures, and the issue does not fall within the narrow exception for major questions—then the court should treat the statutory imprecision as an implicit delegation to the agency and proceed to step four.

At step four, the court should uphold the agency’s line-drawing decision as long as that decision is reasonable. At this step, the reviewing court gives the agency’s decision *deference*, not merely respect or weight, because the court has concluded that the statute, through its use of an inherently imprecise term, has implicitly delegated the relevant line-drawing decision to the agency. This does not mean that the reviewing court has no meaningful function at this step. As with explicit delegations, the court must still police the boundaries of the statutory delegation by ensuring that the agency’s decision is reasonable. But as long as the court is satisfied that the agency has stayed within those boundaries, the court should approve the agency’s exercise of its discretion to decide how an imprecise statutory term ought to apply.

That approach to judicial review of agency statutory interpretations would be consistent with the APA, with *Loper Bright*, and with several decades’ worth of pre-*Chevron* case law, which can provide useful guidance going forward.

266. This statement assumes that the Court’s major questions doctrine remains relevant after *Loper Bright*. Some commenters have suggested that, because the major questions doctrine was developed primarily as a means of cabining *Chevron*, *Loper Bright*’s overruling of *Chevron* means that the Court can and should jettison the major questions doctrine. See Richard J. Pierce, Jr., *Two Neglected Effects of Loper Bright*, REGUL. REV. (July 1, 2024); Jamie Conrad, *Looks Like We Don’t Need the “Major Questions” Doctrine Any More*, YALE J. ON REG. NOTICE & COMMENT (July 3, 2025). Elsewhere I have criticized the current Court’s version of the major questions doctrine, and so I would be sympathetic to arguments for curtailing it. See Freeman & Stephenson, *supra* note 35. But the approach taken in this Article is to treat existing law, including Supreme Court precedent, as given, and the Supreme Court has not yet signaled any inclination to reconsider the major questions doctrine. For this reason, the main text’s characterization of the limits on the scope for deference under the *Gray* doctrine incorporates the major questions doctrine.

Although this is not the only way to understand and implement the *Loper Bright* framework, it is substantially better than the alternatives, both as a matter of law and, as the next section will explain, as a matter of policy.

B. Incorporating the Gray Doctrine into the Loper Bright Framework Would Be a Good Idea

The preceding discussion explained why the better reading of the APA, and of *Loper Bright*, is that the *Gray* doctrine—including the presumption that agencies have the authority to make the line-drawing decisions inherent in the implementation of imprecise statutory terms—is compatible with the standard-of-review provision in § 706. To briefly recap: Although the meaning of § 706’s text is not entirely clear, the weight of the evidence indicates that the APA was understood to preserve the approach to judicial review that existed at the time of the APA’s enactment,²⁶⁷ and the *Gray* doctrine was a centerpiece of that approach.²⁶⁸ Furthermore, to the extent that the APA did not conclusively settle the question, decades of subsequent judicial practice endorsed and applied the *Gray* doctrine.²⁶⁹ Thus, even if one stipulates that adherence to the APA entails rejecting *Chevron* (as *Loper Bright* held), adherence to the APA would also entail embrace of *Gray*.

If that legal analysis is persuasive, it may be enough to settle the matter, without any need to entertain pragmatic considerations or policy arguments. Yet it is worth considering such arguments, for three reasons. First, as noted above, the argument that § 706 preserved the *Gray* doctrine is not airtight as a matter of text, and the practical implications of *Gray* may plausibly shed light on the best way to read the statute, especially if one adopts the classic Legal Process presumption that “the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”²⁷⁰ Second, although the dominant view at the time of the APA’s enactment was that § 706 endorsed and preserved the approach to judicial review that had been established as of 1946, it is also possible to understand the APA as delegating to the judiciary a degree of discretion to further develop and adapt the standard of review

267. See *supra* notes 217–218 and accompanying text.

268. See *supra* notes 219–220 and accompanying text; see also *supra* text accompanying notes 44–55 and note 52.

269. See *supra* text accompanying notes 221–223 and notes 222–223; see also *supra* text accompanying notes 88–114.

270. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

doctrine.²⁷¹ On that understanding, courts engaging in the further development of that doctrine could and should consider policy and pragmatism. Third, although *Loper Bright* focused on the meaning of the APA, the opinion also suggested the relevance of practical considerations, particularly those that concern the appropriate allocation of authority as between courts and agencies.²⁷²

It is therefore worth asking not only whether integrating the *Gray* doctrine into *Loper Bright* would be legally permissible, but also whether doing so would be a good idea. One cannot answer this sort of question in the abstract; one must always ask, “A good idea compared to what?” The most obvious alternative to integrating the *Gray* doctrine into *Loper Bright*’s implied delegation prong would be to construe *Loper Bright*’s “implied delegation” category much more narrowly, such that a reviewing court would only find an implied delegation if the statutory provision at issue uses extremely broad, subjective terms like “reasonable,” “appropriate,” or their near-synonyms (such as “suitable,” “proper,” or “in the public interest”). Another alternative would be to allow for the possibility that other imprecise terms (such as “employer,” “producer,” “area,” and the like) *might* be implicit delegations, but to require the reviewing court to conduct a statute-specific inquiry into whether there are additional clear indicators that such delegation was intended, rather than *presuming* that imprecise terms implicitly delegate line-drawing authority to the implementing agency.²⁷³

271. See Shepherd, *supra* note 217, at 1665 (concluding that, with respect to the standard of review and several other matters, the APA was intentionally ambiguous, with the resolution of key issues left to the courts to sort out). Of course, *Loper Bright* rejected the strong version of this argument, according to which the § 706 language is open-ended enough to permit the judiciary to develop the *Chevron* doctrine. But it is still possible to understand the APA as giving the judiciary some degree of flexibility to shape (and reshape) the contours of the doctrine.

272. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) (asserting that courts are more competent than agencies in resolving statutory ambiguities); *id.* at 2266–67 (discussing issues of comparative institutional competence).

273. The Sixth Circuit appears to have embraced a demanding version of this approach, one that focuses on the statutory text. In *Moctezuma-Reyes v. Garland*, the Sixth Circuit declined to defer to the BIA’s interpretation of the statutory phrase “exceptional and extremely unusual hardship,” because even though this is admittedly “broad language,” the statute does not include “words that expressly empower the agency to exercise judgment.” 124 F.4th 416, 420 (6th Cir. 2024); see also *id.* at 421 (declaring that although “there are rare circumstances where a court may have to defer to an agency[,] . . . [t]he actual delegation of authority to the agency must be clear: imprecise wording alone won’t cut it”).

In the scholarly literature, Professor Ronald Levin has endorsed a more capacious, purposive, multi-factor version of the statute-by-statute approach, arguing that when

As compared to these alternatives, embracing the *Gray* doctrine has distinct advantages. Perhaps most importantly, courts simply lack the capacity and institutional competence to second-guess the agency's line-drawing decisions in the relevant set of cases. Typically, the imprecise text—even when read with due regard to statutory structure and semantic context—does not and cannot provide an answer to the question of where to draw the line in the intermediate zone between the obvious polar cases. Consider, as an illustration, the Marine Mammal Protection Act, which authorizes the Interior Department to issue permits authorizing the non-lethal harassment of “small numbers” of protected marine mammals.²⁷⁴ Harassment that affects less than 1% of the total population of a given species—say, right whales—would clearly qualify as harassment that affects only a “small number[]” of such whales, while harassment that affects more than half of the total population clearly would not. What about activity that would harass 30% of the population? Is 30% a “small number” of whales? What about 5%? Or 15%? Or 18.3%? The statute provides no textual or structural basis for determining the proper threshold for “small[ness].”²⁷⁵ Any such

determining whether or to what extent a statute has delegated a question of law application to an agency, the court should take into account a variety of indicators of congressional intent, including “the terms of the statute, its legislative history, [and] its general purposes,” as well as “policy considerations” and “[p]ragmatic arguments.” Levin, *supra* note 87, at 41–42.

Though approaches embraced by the Sixth Circuit and Professor Levin are clearly quite different, they are nevertheless similar in that they both insist on a statute-specific inquiry into whether there are sufficient indicia of a congressional intent to delegate interpretive authority, rather than adopting a general presumption that the open-ended nature of the relevant statutory terms implies that such a delegation was intended.

274. 16 U.S.C. § 1371(a)(5)(A)(i).

275. During the *Chevron* era, courts deferred to the responsible agency (the U.S. Fish and Wildlife Service) on the number or proportion of animals that would qualify as a “small number” of animals under the statute. *See, e.g.,* Ctr. For Biological Diversity v. Salazar, 695 F.3d 893, 902–07 (9th Cir. 2012); *Melone v. Coit*, No. 21-cv-1171, 2023 WL 5002764, at *22 (D. Mass. Aug. 4, 2023), *aff'd*, 100 F.4th 21 (1st Cir. 2024). Under the *Gray* doctrine, deference would likely also be appropriate because of the inherent imprecision of the term “small numbers,” although the question of the *criteria* used to assess smallness—for example, whether “small” is to be measured in percentage terms or in absolute terms, *see Salazar*, 695 F.3d at 905–07—might plausibly be an issue of law for judicial determination under *Gray*.

It is worth noting that the objection raised in the main text to courts determining the precise boundaries of vague terms such as “small” is not an objection to judicial line-drawing as such. After all, deferential doctrines like *Gray* and *Chevron* do not obviate the need to police a vague boundary line, because those doctrines still require courts to reject *unreasonable* agency decisions that *clearly* contravene the statutory text. So, while the *Gray* doctrine would not require the reviewing court to police the dividing line between “small” and “not small,” that

determination would presumably have to balance conflicting policy goals—safeguarding the welfare of marine mammals without unduly obstructing socially valuable activities—while also considering the interest in efficient implementation. A court *could* make this sort of determination, just as courts sometimes give more definite content to amorphous terms like “reasonable.”²⁷⁶ But it is more natural and appropriate to think of these sorts of

doctrine would still require the court to police the dividing line between “clearly small” and “not clearly small,” as well as the line between “clearly not small” and “not clearly not small.” (Philosophers of language refer to this difficulty as the problem of “higher-order vagueness.” See, e.g., TIMOTHY A.O. ENDICOTT, *VAGUENESS IN THE LAW* 35 (2001); Roy Sorensen, *Borderline Hermaphrodites: Higher-Order Vagueness by Example*, 119 *MIND* 393, 394 (2010); Jeesoo Nam, *Lenity and the Meaning of Statutes*, 96 *S. CAL. L. REV.* 397, 429–32 (2022).) As the main text emphasizes, the rationale for the *Gray* doctrine is that the conventional statutory interpretation toolkit equips judges to police the latter sort of line reasonably well (even if judges will inevitably disagree sometimes), but does not provide much guidance in drawing the former sort of line (even if judges can do it if they have no other option). And for that reason, it is sensible to presume that Congress entrusted the agency with making first-order line-drawing decisions (“small” versus “not small”) and entrusted the judiciary with making the second-order line-drawing decisions (“clearly small” versus “not clearly small” and “clearly not small” versus “not clearly not small”).

276. For example, courts have developed criteria for assessing whether an attorney’s fee is “reasonable,” as that term is used in various fee-shifting statutes. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 429–30, 433–37 (1983) (determining the meaning of “reasonable attorney’s fee” in 42 U.S.C. § 1988 by reference to previous case law and the legislative history of the statute, and deriving from these sources a multi-factor test for calculating a “reasonable” fee); see also Shon Hopwood, *Second Looks & Second Chances*, 41 *CARDOZO L. REV.* 83, 101 n.85 (2019) (observing that “Congress has . . . delegated to the judiciary [the authority] to define what constitutes a ‘reasonable attorney’s fee’ under the various civil rights statutes”). There are a number of other contexts in which courts have also developed more specific criteria to give content to the statutory term “reasonable.” See, e.g., *Van Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 542–43 (7th Cir. 1995) (explaining the criteria for determining what accommodations are “reasonable” within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12113); *Elliotts, Inc. v. Comm’r*, 716 F.2d 1241, 1245–48 (9th Cir. 1983) (laying out a five-factor test for assessing the meaning of the term “reasonable” in a provision of the tax code providing that the deduction for business expenses may include “a reasonable allowance for salaries or other compensation for personal services” (quoting 26 U.S.C. § 162(a)(1))).

The fact that courts can develop and apply their own interpretations of broad terms like “reasonable” is important in light of *Loper Bright*’s explicit conclusion that when a statute empowers an agency to promulgate “reasonable” regulations, this language is best understood as implicitly delegating discretionary authority to the agency. See *Loper Bright*, 144 S. Ct. at 2263; see also Kavanaugh, *Fixing*, *supra* note 248, at 2152 (arguing that if a statute were to instruct “an agency to issue rules to prevent companies from dumping ‘unreasonable’ levels of certain pollutants,” it would be appropriate for the reviewing court to defer to the agency’s

policy-based line-drawing decisions as the province of the executive branch, given that executive branch agencies have greater expertise and are, through their connection to the President, more politically accountable for making the inevitable trade-offs.

This justification may sound familiar, as it was one of the main justifications for the *Chevron* doctrine.²⁷⁷ Although *Loper Bright* rejected *Chevron*, this rejection need not and should not entail a general rejection of the concern about comparative institutional competence. As noted above, *Chevron* called for deference in cases that do not involve a line-drawing problem but instead require a (difficult, non-obvious) choice between discrete alternatives.²⁷⁸ In this latter situation, the traditional tools of statutory construction might be able to provide an answer, even if the question is a hard one and competent judges acting in good faith might arrive at different conclusions. But with respect to the sorts of line-drawing decisions for which *Gray* counsels deference, the issue is not merely that the question is hard. In the cases that involve those sorts of decisions—where the choice, as the *Gray*

position on “what rises to the level of ‘unreasonable,’” because that is really “a policy decision” that Congress has implicitly delegated to the agency). Elsewhere in the *Loper Bright* opinion, the majority suggests that the “best reading”—and therefore the only permissible reading—of an ambiguous statutory term is “the reading the court would have reached if no agency were involved.” *Loper Bright*, 144 S. Ct. at 2266. But that cannot be right. If it were, then a statute that authorized an agency to promulgate regulations prohibiting the discharge of “unreasonable” levels of certain pollutants would leave the agency with no discretion; the agency would have to interpret “reasonable” in the same way that the court would have interpreted that term if a statute did not involve an agency but instead simply enacted a direct prohibition on discharging an “unreasonable level” of those pollutants. After all, if Congress were to pass the latter sort of statute, a court reviewing an alleged violation would not “throw up [its] hands,” *id.*, but would instead articulate and apply its own criteria for assessing reasonableness, much as courts have done in the context of fee-shifting statutes, the ADA, the Internal Revenue Code, and elsewhere.

The best way to resolve what seems like an internal inconsistency in the *Loper Bright* opinion is to understand the Court as saying that although a reviewing court always *can* come up with its own interpretation of ambiguous statutory language, in *some cases* the better reading of the statute is that this language is meant as a delegation to the agency. *See id.* at 2263 (“In a case involving an agency, . . . the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion.”). The same reasons that led the *Loper Bright* Court to conclude that a broad term like “reasonable” is best understood as an implicit delegation should lead to a similar conclusion with respect to other imprecise statutory terms, where the necessary line-drawing decisions cannot be derived from text or structure, but would instead require more purposive and pragmatic reasoning.

277. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); *see also Loper Bright*, 144 S. Ct. at 2299–2300, 2310–11 (Kagan, J., dissenting).

278. *See supra* Part I.C.

Court put it, concerns where to draw the “median line” in the intermediate domain between two poles²⁷⁹—the problem is that the Court’s preferred textual and structural tools of interpretation really do “run out,” in the sense that they provide no basis for drawing the line in one place rather than another. Therefore, when a statute that delegates authority to an agency contains these sorts of imprecise terms, there is a strong case for deferring to the agency’s line-drawing decisions, on grounds of comparative institutional competence.²⁸⁰

279. *Gray v. Powell*, 314 U.S. 402, 413 (1941).

280. During the *Chevron* era, several scholars advanced a similar argument, based on the same sort of distinction between *types* of statutory unclarity. See, e.g., Slocum, *supra* note 19, at 235 (asserting that courts should independently determine “whether the [statutory] provision has a mandatory semantic meaning,” but that in cases of “semantic indeterminacy”—where there “is no mandatory semantic meaning”—“the court should presume that the agency’s construction of the provision is correct”); *id.* at 242 (arguing that “[t]he presumption . . . of semantic indeterminacy . . . reflects the institutional competencies of agencies and courts,” because “courts are experts at statutory interpretation and agencies statutory implementation”); Herz, *supra* note 19, at 1898–99 (suggesting, in the *Chevron* context, that questions of statutory “ambiguity” (in the technical linguistic sense) are more appropriate for judicial resolution, while deference to the agency is more appropriate in cases of statutory “vagueness,” because when a provision is vague, “no amount of staring at the text or rummaging in legislative history can make the penumbra less penumbral”); Solum & Sunstein, *supra* note 19, at 1468 (proposing, when *Chevron* was still good law, that *Chevron* deference should apply only in cases involving statutory “construction”—defined as situations involving the “determin[ation of] the legal effect of [a] statute, through implementation rules, specification, and other devices”—not in cases that involve statutory “interpretation” in the narrow sense of “discerning the meaning” of the statute); *id.* at 1470–71 (arguing that deferring to an agency’s decisions regarding the implementation of a vague or open-textured statute “is supported by powerful and familiar pragmatic arguments,” such as the agency’s superior expertise, and that this sort of deference does “not imping[e] on the judicial responsibility to interpret any statute”); *id.* at 1476 (suggesting that deference on a question of linguistic meaning is more problematic); Solum, *supra* note 19 (developing this line of argument further); Daniel A Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1208 n. 261 (2008) (suggesting that “the need for judicial deference to an administrative decision is greater when [a] statute is . . . susceptible to a variety of possible meanings . . . than when it is . . . susceptible to two different meanings” (emphasis omitted)); Wurman, *supra* note 19, at 694–95 (suggesting a related distinction between the “interpretation” of a statute, which calls for independent judicial judgment, and the “specification” of a statute’s applications, which is a job for the agency); Pojanowski, *supra* note 19, at 1086–87 (critiquing *Chevron* for “elid[ing] law and policy,” and arguing that “[a]bolishing *Chevron* would reestablish and put pressure on [the] distinction” between “questions of statutory interpretation that, from the perspective of traditional lawyerly argument, are unclear” and “questions where standard lawyerly argument does not get you far, if anywhere at all,” because “applying

We can see this more clearly by considering what a reviewing court would do if it did *not* defer to the agency in such cases. A court that declines to treat these sorts of line-drawing decisions as delegated to the agency—and instead insists on exercising “independent judgment” as to what the statute requires—would need to embrace one of three alternative approaches, none of which is appealing.

The first option would be to assume that the statutory silence constitutes an implicit delegation of discretion to the *judiciary*, and to decide the case based on what the court views as the best policy. To be sure, some statutes *do* implicitly delegate to the judiciary.²⁸¹ But when the statute in question is administered by an agency, then if one takes the position that the use of an imprecise term is an implicit delegation to *someone*, it is hard to see a good reason to treat the statute as implicitly delegating to the court rather than implicitly delegating to the agency. Indeed, a frank acknowledgment that the issue calls for policy discretion rather than legal expertise would seem to lead to the opposite conclusion.

The second option would be for the court to consult extra-textual sources, such as the statute’s legislative history, to ascertain the congressional policy and purpose, and use that additional information to decide whether the agency’s line-drawing decision was legally correct. We see an illustration of this approach in the dissenting opinion in *Gray*. Although Justice Roberts’ dissent acknowledged that the term “producer” did not have a specific technical meaning, and he therefore conceded that the Court could not resolve the legal question on the basis of statutory text alone, he nonetheless argued that the Court could have and should have independently determined whether the Commission’s rejection of Seaboard’s application was lawful by considering “the purpose[s] of the [Bituminous Coal] Act” as revealed by the

[the] legal standards” in the latter setting “will turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities and likely outcomes”). This Article embraces this prior scholarship as offering compelling reasons to preserve the *Gray* doctrine as part of *Loper Bright*.

281. See *supra* note 21; see also *supra* note 276 (discussing judicial determination of criteria for assessing “reasonableness” under various statutes). At one point in the *Loper Bright* opinion the Court seemed to deny this, asserting that a statutory ambiguity in a non-agency case “is not a delegation to anybody,” but rather a legal issue for the reviewing court to resolve. 144 S. Ct. at 2266. It is hard to know what to make of this; perhaps the best way to understand it is as an insistence that courts only determine statutory meaning by applying interpretive tools designed to reveal Congress’s (objectified) intent, and this intent is never to give the courts a degree of discretion. But that seems implausible. See *supra* notes 21, 276. In any event, if the Court does indeed reject that possibility that a statute might delegate discretionary authority to the judiciary, then this first option would be unavailable.

Act's "legislative history."²⁸² Many interpreters would find such reliance on extra-textual indica of statutory policy and purpose congenial. But that approach would be problematic (to put it mildly) for the current Supreme Court's super-majority of textualist and textualist-adjacent Justices.²⁸³ Additionally, as the *Gray* and *Chevron* Courts both recognized, if the question is which of several candidate interpretations would best serve the statute's policy objectives—in a situation where there is no direct evidence of congressional intent on the specific question at issue—then the agency would appear better positioned than a court to make such a determination.²⁸⁴

Third, the reviewing court could insist that the usual tools in the textualist toolkit—language, structure, semantic context, and the like—really can and do produce determinate answers to the sorts of factbound line-drawing questions that the *Gray* doctrine would leave to agencies. The problem is that in many cases this will simply not be true, and insisting otherwise will be asking these tools to carry more weight than they can bear.²⁸⁵ This approach also invites judges to smuggle in policy arguments or purposive considerations disguised as textual analysis, threatening the integrity and credibility of the Court's preferred textualist approach to statutory interpretation.²⁸⁶ True, in cases where textualist interpretive tools fail to provide an answer to the question at issue, a reviewing court could decide the case by giving substantial weight or respect to the agency's view. This would be a way for courts to

282. *Gray*, 314 U.S. at 420–21 (Roberts, J., dissenting); see also *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 16 (1968) (Harlan, J., dissenting) (objecting to the Court's decision to defer to the agency's judgment as to the meaning of "area" in the TVA Act, and asserting that although "[n]either the statute nor the pertinent legislative history provides any formula for" making this determination, the agency's approach contravenes "Congress' clear purpose").

283. Notably, Justice Gorsuch's concurring opinion in *Loper Bright* favorably cited Justice Roberts' declaration, in his *Gray* dissent, that the Court had improperly abandoned its reviewing function, but Justice Gorsuch neglected to mention Justice Roberts' acknowledgement that discharging that function in *Gray*, or similar cases, would involve using the legislative history and other extra-textual materials as guides to likely congressional intent. See *Loper Bright*, 144 S. Ct. at 2284 (Gorsuch, J., concurring) (citing *Gray*, 314 U.S. at 420–21 (Roberts, J., dissenting)).

284. See *Gray*, 314 U.S. at 413; *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

285. As Ryan Doerfler has insightfully explained, the combination of a commitment to textualism and a rejection of judicial deference (or other doctrines of judicial nonintervention) tends to produce textualist analysis that is implausibly wooden and mechanical. See Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267 (2022).

286. Cf. Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275 (2020) (documenting the tendency of textualist judges to smuggle purposivist reasoning into their decisions); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 296–307 (2020) (advocating a more "formalistic textualism" as a way to preserve the Court's legitimacy).

pretend to resolve the issue independently while actually deferring to the agency. The results would mostly be the same as they would under the *Gray* doctrine, but it is unclear what is gained by this ruse.

In short, even if one rejects the comparative institutional competence justification for *Chevron*—as the *Loper Bright* Court did, for better or worse—that consideration still justifies *Gray* and counsels integrating the *Gray* doctrine into the *Loper Bright* framework. Additionally, although the *Gray* presumption, like the *Chevron* presumption, may be something of a legal fiction, the presumption that Congress intended an imprecise statutory term as delegation of authority to the agency is more empirically plausible, and therefore more defensible, in the *Gray* context than in the *Chevron* context.²⁸⁷ When Congress delegates to an agency the power to apply imprecise statutory language to particular situations, it is natural to assume that Congress intended and understood the statute as giving the agency the authority to make the inevitable line-drawing decisions regarding the scope of those imprecise terms.²⁸⁸

287. Strikingly, *Loper Bright* rejected the idea that *Chevron* could be justified as an interpretive presumption, because according to the majority, interpretive presumptions are permissible “only to the extent that they approximate reality.” *Loper Bright*, 144 S. Ct. at 2265. Even more strikingly, Justice Kagan’s dissent did not directly contest that general claim but instead insisted that the *Chevron* presumption *did* “approximat[e] reality.” *See id.* at 2301 (Kagan, J., dissenting). The claim that interpretive presumptions are only legitimate when they capture likely congressional intent is contestable. Many such presumptions—such as the rule of lenity and the various canons designed to protect the prerogatives of state governments—may not accurately capture likely congressional intent; instead, these presumptions promote certain values. Indeed, some interpretive canons are traditionally defended not as means for advancing likely congressional intent but as partly *offsetting or resisting* excessive congressional enthusiasm for particular kinds of problematic legislative action. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 36–42 (2008). It is not entirely clear, then, how literally one should take the *Loper Bright* majority’s broad declaration that interpretive presumptions are only valid if they “approximate reality.” Nevertheless, the Court did indicate that the realism of the interpretive presumption is relevant at least in the context of presumptions related to implied delegation.

288. *See* Ryan D. Doerfler, *Mead as (Mostly) Moot: Predictive Interpretation in Administrative Law*, 36 CARDOZO L. REV. 499, 500–01 n.4 (2014) (asserting that the “claim of implicit delegation is far more plausible with respect to instances of [statutory] vagueness . . . than with respect to instances of ambiguity”); Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398 (2017) (asserting that “*Chevron* deference, or something much like it, is a necessary consequence of and corollary to Congress’s longstanding habit of relying on agencies to exercise substantial policymaking discretion to resolve statutory details”).

III. THE APPROACH ILLUSTRATED

The preceding discussion explained why it would be both legally permissible and practically desirable to integrate the *Gray* doctrine into the *Loper Bright* framework by adopting the presumption that imprecise statutory language—language that requires drawing a “median line” that sorts “innumerable [factual] variations” into categories²⁸⁹—qualifies as language that “leaves [the responsible agency] with flexibility” and therefore “authorize[s that agency] to exercise a degree of discretion.”²⁹⁰ This final Part illustrates what the proposed approach might look like in practice, using as examples the four *Chevron*-era cases that Justice Kagan highlighted in her *Loper Bright* dissent.²⁹¹

Applying the framework proposed in this Article to these real-world cases serves three useful functions. First, the examples demonstrate that the proposed approach, though not exactly simple, is straightforward and workable. The distinctions that the *Gray* doctrine requires are ones that judges (and others) can make with reasonable confidence, at least in ordinary cases. Second, the examples confirm that the proposed approach would *not* simply replicate the *Chevron* doctrine.²⁹² Third, the examples illustrate how the proposed approach achieves an appropriate allocation of responsibilities, enabling the judicial branch to exercise independent judgment on those questions for which the Court’s preferred textualist tools of statutory interpretation could plausibly supply a resolution, while allowing agencies to exercise discretion on those questions that textual analysis—even when considered together with statutory structure and semantic context—simply cannot answer.

A. Example One: What Is a “Protein”?

Justice Kagan’s first example involved a dispute over the meaning of the term “protein” in a provision of the Public Health Service Act (PHSA).²⁹³ The context for the dispute was as follows: The Food and Drug Administration (FDA) regulates “drugs” under the Food, Drug and Cosmetics Act (FDCA) but regulates “biological products” under the PHSA, a separate statutory scheme.²⁹⁴ That latter statute defines “biological product[s]” as including, among other things, “protein[s]” and therapeutic products that are

289. *Gray*, 314 U.S. at 413.

290. *Loper Bright*, 144 S. Ct. at 2263 (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

291. *Id.* at 2296–97 (Kagan, J., dissenting).

292. *See supra* Part I.C.

293. *Loper Bright*, 144 S. Ct. at 2296 (Kagan, J., dissenting) (citing *Teva Pharms. U.S.A., Inc. v. U.S. FDA*, 514 F. Supp. 3d 66 (D.D.C. 2020)).

294. *See Teva*, 514 F. Supp. 3d at 74–77.

“analogous” to proteins.²⁹⁵ The FDA promulgated a rule that defined proteins as complex polymer chains that have a minimum of forty amino acids in a “specific, defined sequence.”²⁹⁶ The FDA’s rule did not specifically define “analogous product[s],” but the FDA indicated elsewhere that amino acid polymers which do not satisfy the above definition of “protein” would not be considered “analogous” to proteins.²⁹⁷

A pharmaceutical company manufactured a product that used a compound called glatiramer acetate to treat multiple sclerosis; the company sought to compel the FDA to classify this product a “biological product” rather than as a “drug.”²⁹⁸ The sequences of amino acids in glatiramer acetate are not pre-determined—there is no DNA template—but these sequences are also not completely random, because the reaction chemistry in their creation produces recurring patterns of amino acids in the polymer chains.²⁹⁹ The FDA rejected the company’s petition on the grounds that, notwithstanding these recurring patterns, the amino acid chains in glatiramer acetate do not meet the “specific, defined sequence” requirement, and so cannot be classified as “proteins” or as “analogous” to proteins.³⁰⁰

In the real case, the court deferred to the FDA under *Chevron*. The court found that the term “protein” is ambiguous with respect to the question whether a polymer must have a specific, defined sequence of amino acids.³⁰¹ The court also concluded that “analogous product” is similarly ambiguous.³⁰² Given these ambiguities, the court held that this was a straightforward case for *Chevron* deference.³⁰³

A court faithfully applying the *Gray* doctrine, as incorporated into *Loper Bright*, would review some of the relevant issues without deference to the agency but would treat other matters as implicitly delegated to the FDA.

First, the question whether having a “specific, defined sequence” of amino acids is a defining feature of a “protein,” as that term is used in the PHSA, would be a question of law for the court. The court would first need to decide whether “protein,” as used in the PHSA, should be understood in the way that it is typically understood in the scientific community, or whether the term has a special, distinctive definition under the PHSA. Assuming the

295. *See id.* at 77–78 (discussing 42 U.S.C. § 262(i)(1)).

296. *See id.* at 79–81.

297. *See id.* at 81.

298. *Id.* at 74.

299. *See id.* at 81.

300. *Id.* at 84.

301. *See id.* at 97–106.

302. *See id.* at 111–17.

303. *See id.* at 116–17.

former, the court would then need to decide whether the ordinary understanding of “protein” in the scientific community entails a specific, defined sequence of amino acids, or whether this is not a *defining* characteristic of a protein, even though it is a *common feature* shared by many proteins. In the real case, the court noted that the scientific literature was not entirely clear on this—some scientific definitions of “protein” included the “specific, defined sequence” requirement, but others did not (though no source rejected it).³⁰⁴ This lack of a clear consensus was sufficient for the court to defer to the agency under *Chevron*, on the grounds that the FDA’s inclusion of the “specific, defined sequence” requirement “falls within the range of scientifically accepted meanings of ‘protein’.”³⁰⁵ Under *Loper Bright/Gray*, however, the court would need to decide which interpretation of “protein” is *better*. Even acknowledging that reasonable people could disagree on this point, this is a “pure” legal question: Does “protein,” as used in the PHS Act, include a “specific, defined sequence” requirement or not? The court might give considerable weight to the FDA’s view on this question, especially in light of the FDA’s extensive consultation with the scientific community in formulating its definition, but ultimately the court would need to use its independent judgment to resolve the issue.

If the court concludes that the best (and therefore the legally correct) definition of protein *does* require that the amino acids appear in a “specific, defined sequence,” the court would next need to decide whether to uphold the FDA’s determination that glatiramer acetate does *not* have such a specific, defined sequence. That conclusion does not follow automatically: As noted above, the amino acid sequences in glatiramer acetate are not identical across batches of the drug, but they are not completely random either. The company argued that glatiramer acetate *does* have a “specific, defined sequence” of amino acids, because “while the overall sequence of each individual polymer within the glatiramer acetate mixture may differ both within a single batch and batch-to-batch, the conservation of local amino acid sequences among the polymers reflects a sufficiently specific and defined sequence to qualify as a ‘protein’.”³⁰⁶ The FDA rejected this argument, because the amino acid sequences in glatiramer acetate are driven by reaction chemistry rather than a pre-defined template, and “reaction chemistry . . . generates recurring but not identical or pre-defined results across batches.”³⁰⁷

On this issue, the *Gray* doctrine likely *would* counsel deference to the FDA’s view: Deciding just how closely a given polymer must fit the definitional

304. *See id.* at 100–02.

305. *Id.* at 102.

306. *Id.* at 84.

307. *Id.* at 107 (internal quotation marks omitted).

characteristics of a protein is a factbound line-drawing matter that is implicitly delegated to the agency. If the amino acids in a set of polymer chains always appear in *exactly* the same sequence, there is no question that the amino acids appear in a “specific, defined sequence”; if the amino acids sequences across polymer chains are entirely uncorrelated, then there is no plausible claim that the amino acids appear in a “specific, defined sequence.” But between these easy polar cases is a range of possibilities as to where to draw the line separating those polymers where the amino acid sequences across chains are similar *enough* to assert that the acids appear in a “specific, defined sequence” from those cases in which the correlation across chains is too weak to support such an assertion. Under the *Gray* doctrine, the court should defer to the agency’s decision as to where to draw that line.

We see something similar with respect to the question, also present in the real case, whether glatiramer acetate, even if not a “protein,” could nonetheless be considered “analogous” to a protein.³⁰⁸ The FDA concluded, as a general matter, that if an amino acid polymer would not qualify as a “protein,” then that polymer could not count as “analogous” to a protein.³⁰⁹ In the FDA’s view, the only products that are “analogous” to proteins are substances (including mixtures) that *contain* proteins, even if those proteins are present only in low or unknown levels.³¹⁰ The company argued, by contrast, that “analogous” as used in this statute means analogous with respect to the product’s effect on the body’s immune response.³¹¹ In the real case, the court applied *Chevron*, decided that the statute was ambiguous on the meaning of “analogous,” and deferred to the FDA.³¹² Under *Loper Bright/Gray*, that would not be the right approach. The preliminary question as to whether “analogous” means analogous with respect to immunological effect, or whether it means analogous with respect to chemical composition, or whether it means “similar” in some more open-ended sense, is a pure question of law for the court to resolve, giving due respect, but not deference, to the agency’s view.

Once the court makes that determination, though, the question whether a given product is analogous to a protein (in the legally relevant sense) would, under the *Gray* doctrine, be an issue for the agency to resolve, and would be reviewed by the court only for reasonableness. Suppose, for example, that the court concluded that “analogous” neither requires nor excludes consideration of chemical composition, immune response, or anything else, but

308. *See id.* at 112.

309. *See id.* at 115–17.

310. *See id.* at 112.

311. *See id.* at 113.

312. *See id.* at 113–17.

merely entails some broad notion of “similarity.” In that case, the determination whether a given product is “analogous” to a protein is a classic line-drawing decision that, under *Gray*, is implicitly delegated to the FDA. If the court decides that “analogous” means analogous with respect to a specific characteristic, there would still be room for *Gray* deference. For example, suppose the court holds, as a matter of law, that a polymer without a specific, defined amino acid sequence may still be “analogous” to a protein if the polymer has a similar impact on the immune response as a protein. Suppose further that, on remand, the FDA applied this standard and determined that glatiramer acetate’s immunological effect is not sufficiently similar to that of a protein to be considered “analogous.” As long as that determination is reasonable, then under the *Gray* doctrine the court should uphold it.

One more thing to note: The FDA’s rule required that an amino acid polymer contain a sequence of at least forty amino acids to be considered a “protein” under this PHSA.³¹³ The FDA acknowledged that this cutoff (which was not challenged in the real case) was motivated by the need for a “bright-line” rule rather than by any scientific consensus as to the minimum number of amino acids in a protein.³¹⁴ Under the *Gray* doctrine, if this cutoff were challenged, it should be upheld as long as it is reasonable: This is exactly the sort of line-drawing decision that is best understood as an implicitly-delegated policy choice for the agency to make. Every competent scientist might agree that a single amino acid is not a protein; every scientist might also agree that a chain of 300 amino acids is definitely long enough to qualify as a protein. If there is no clear consensus among scientists as to where the dividing line is between these poles, *Gray* counsels that this is a judgment call for the agency, one that a court should not second-guess.

The analysis of the case would be different under an interpretation of *Loper Bright* that rejects the *Gray* doctrine and instead limits findings of implicit delegation to those statutes that use extremely capacious language like “reasonable” or “appropriate.” The relevant section of the PHSA does not use such language, so on that reading of *Loper Bright*, the court would not only need to exercise its independent judgment with respect to whether a “protein” must have a specific, defined sequence of amino acids, but (if the answer to that question is yes) the court would also need to decide independently whether the recurrence of amino acid sequences in glatiramer acetate is sufficiently consistent to qualify as “specific [and] defined.” With respect to the “analogous product” language, the court would not only need to decide whether the determination of “analogousness” should be based only on immunological effects, but (if the answer is yes) the court would also have to decide

313. *Id.* at 79–80.

314. *See id.* at 78–79.

whether the immunological effects of a non-protein are sufficiently similar to those of a protein to qualify as “analogous.” With respect to the length of the polymer chain, a version of *Loper Bright* that rejects the *Gray* doctrine would obligate the reviewing court to exercise its independent judgment to decide whether a given polymer chain is long enough to count as a protein. What if a litigant asserts that a chain with thirty-nine amino acids is long enough to count as a protein within the meaning of the statute? Or what if a litigant asserts that a polymer chain with forty amino acids (which meets all the other relevant criteria) is too short to count as a protein? Under the *Gray* doctrine, these cases are easy: The court can reject such challenges on the grounds that by using a term (protein) that is inherently imprecise on the relevant dimension (chain length), the statute implicitly delegated to the agency the authority to decide on a cutoff. Without the *Gray* doctrine, the court would need to decide this issue as a matter of law. But it is not clear how a court could do this if, as the court in the real case seemed to assume, there is no scientific consensus on how long an amino acid chain must be in order to qualify as a protein.³¹⁵

B. Example Two: What Is a “Species”?

Justice Kagan’s second example involved a provision of the Endangered Species Act (ESA).³¹⁶ That provision defines a “species” as including “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”³¹⁷ The dispute in the case turned on the meaning of “distinct population segment” (DPS). The Fish and Wildlife Service (FWS) adopted a policy that set out two factors that the agency would consider when determining whether a given population of animals qualifies as a DPS: (1) the “[d]iscreteness of the population segment in relation to the remainder of the species to which it belongs,” and (2) the “significance of the population segment to the species to which it belongs.”³¹⁸ The agency declared that a population would only be classified as a DPS if it is *both* discrete *and* significant.³¹⁹ The FWS policy elaborated further that the “discreteness” prong would be satisfied if the population segment is “separated from other

315. *See id.* at 79.

316. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2296–97 (2024) (Kagan, J., dissenting) (citing *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140–45, 1149 (9th Cir. 2007)).

317. 16 U.S.C. § 1532(16).

318. *Nw. Ecosystem All.*, 475 F.3d at 1138 (quoting Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996)).

319. *Id.* at 1138.

populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors,” or international borders, while the “significance” prong would be evaluated according to four factors: whether the population persists in a unique or unusual ecological setting; whether the loss of the population would cause a “significant gap” in the taxon’s range; whether the population is the only surviving natural occurrence of the taxon; and whether the population’s genetic characteristics are “markedly” different from the rest of the taxon.³²⁰

Several conservation groups petitioned FWS to classify the western gray squirrel in Washington State as a DPS, but the agency denied the petition on the grounds that, even if this population satisfied the “discreteness” prong of the DPS test, the Washington western gray squirrel population was not “significant” in the relevant sense.³²¹ In their lawsuit, the petitioners argued that any population segment that is “discrete” is necessarily “distinct” within the meaning of the ESA, and that the agency lacked the authority to add an (allegedly) extra-statutory “significance” requirement.³²²

In the real case, the court analyzed the issue under *Chevron* and concluded that the term “distinct” was ambiguous: Distinct can mean “discrete,” but it can also mean “notable” or “unusual.”³²³ The court considered the petitioners’ objections that the agency’s “significance” prong was inconsistent with the structure and purpose of the statute, but the court concluded that these arguments did not demonstrate a sufficiently clear congressional intent to preclude the agency’s interpretation.³²⁴ The petitioners also argued that, even if the agency may properly consider “significance” when making a DPS classification, the Washington population of western gray squirrels *is* significant under the agency’s own criteria.³²⁵ The court framed this argument as a claim that the agency had acted arbitrarily and capriciously; rejecting this challenge, the court concluded that the agency’s significance determination was substantively reasonable and adequately explained.³²⁶

Under the *Gray* doctrine, as incorporated into *Loper Bright*, the analysis would be different in some respects and similar in others. The preliminary question as to whether the statutory term “distinct,” as applied to a population segment, means *only* that the population is geographically or

320. *Id.* at 1138 (quoting Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996)).

321. *See id.* at 1139–40.

322. *See id.* at 1143.

323. *See id.*

324. *See id.* at 1143–45.

325. *See id.* at 1148.

326. *See id.* at 1145–50.

behaviorally separate from the rest of its taxon, or whether the discrete population must also be “significant” to the taxon in order to qualify as distinct, is a pure question of law for the court, not a line-drawing question that is implicitly delegated to the agency. A court applying the *Gray* doctrine would presumably consider the same factors that the real court considered in the real case, but instead of considering only whether these textual, structural, and purposive arguments were sufficient to overcome the *Chevron* presumption in favor of the agency’s view, the court would need to decide which reading of “distinct” is *better* and therefore legally correct. To simplify a bit, the court would need to decide whether, in the context of the ESA, “distinct” means “discrete” or “notable.”

Having made that determination, the court would then defer, under *Gray*, to the agency’s decision as to whether a particular population is sufficiently different to be considered “discrete.” If the court determined that “significance” is indeed an element of the “distinctness” inquiry, the court would also defer to the agency’s decision as to whether a particular population segment is sufficiently important to the species to be considered distinct. Additionally, if both discreteness and significance are relevant, then under *Gray* a court would defer to the relative weight the agency put on each of these factors when classifying any individual population segment, so long as the agency’s approach is reasonable. All these determinations are classic line-drawing exercises. Under a version of *Loper Bright* that incorporates the *Gray* doctrine, “distinct” is a term that “leaves [the] agenc[y] with flexibility,” in much the same way (though not to the same degree) as terms like “reasonable” and “appropriate.”³²⁷

Under a version of *Loper Bright* that rejects *Gray*, the court would need to exercise its independent judgment not only on the question whether the “distinctness” inquiry can incorporate significance as well as discreteness, but also on the question whether a given population segment is in fact “distinct” when evaluated according to the correct criteria. Suppose, for example, that the court, after exercising its independent judgment on the question regarding the general meaning of “distinct,” concludes that to be “distinct” within the meaning of the ESA, a population must be both discrete and significant. The court would then have to assess the agency’s determination that the Washington population of western gray squirrels is *not* significant. Even if the court defers to the agency’s factual findings, a rejection of the *Gray* doctrine would mean that the court could not defer to the agency’s ultimate judgment that, on these facts, this population is not significant (and therefore not “distinct”). The court might give the agency’s view weight or respect

327. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

under *Skidmore*, but the court would need to decide for itself whether the Washington subpopulation of western gray squirrels is significant to the western gray squirrel species overall. That seems like a daunting task for a court, to put it mildly, and not one that the statutory text can help with. A court might therefore be tempted to assert that the question whether the Washington western gray squirrel population is significant is a question of fact rather than a question of law.³²⁸ But that is not so, at least not if one is using the term “fact” to mean an “assertion[] that can be made without significantly implicating the governing legal principles.”³²⁹ The relevant “facts” in this case would be things like how many western gray squirrels there are, where they live, and the genetic and other traits of the western gray squirrels in Washington and elsewhere. The question whether, on these facts, the Washington western gray squirrel population is “distinct” is a question involving the *application of law to facts*, not a dispute over the facts themselves. And if the court does not treat that line-drawing decision as implicitly delegated to the FWS, the court would need to decide for itself whether the Washington western gray squirrel population is “distinct” within the meaning of the ESA—a determination for which the tools in the traditional textualist toolkit are ill-suited.

C. Example Three: What Is a “Geographic Area”?

Justice Kagan’s third example concerned how the Department of Health and Human Services (HHS) calculates reimbursements to hospitals under the Medicare program.³³⁰ Medicare reimburses hospitals for the costs of providing covered services to eligible patients. Under the original version of the program, hospitals were reimbursed for their actual costs in treating Medicare beneficiaries, but in 1983 Congress amended the statute such that

328. Cf. *supra* note 50 (discussing how early twentieth century cases sometimes justified judicial deference to agencies’ law application decisions by (mis)characterizing these decisions as factfinding); note 223 (observing that the Court’s *O’Leary v. Brown-Pac.-Maxon, Inc.* decision, 340 U.S. 504, 508 (1951), rationalized deference to an agency’s law application decision by expanding the category of “fact” to include legal inferences drawn from empirical facts); text accompanying notes 256–257 (noting that the Court’s recent decision in *Seven County Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497, 1512 (2025), justified deferring to agencies’ understanding of their obligations under NEPA—such as what qualifies as a “detailed” report on environmental impacts—on the (implausible) grounds that these determinations only involve factual issues).

329. Monaghan, *supra* note 121, at 235 (emphasis omitted) (internal citation omitted); see also LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548 (1965) (defining a “finding of fact” as “the assertion that a phenomenon has happened . . . or will be happening independent of or anterior to any assertion as to its legal effect”) (emphasis omitted).

330. *Loper Bright*, 144 S. Ct. at 2296 (Kagan, J., dissenting) (citing *Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163 (2d Cir. 2006)).

hospitals would henceforth be reimbursed at fixed rates for specific categories of treatment.³³¹ The amended statute specified that these rates should vary from region to region in order to reflect differences in labor costs. More specifically, the statute instructed HHS to adjust hospitals' reimbursement rates to reflect "differences in hospital wage levels by a factor . . . reflecting the relative hospital wage level in the geographic area of the hospital compared to the national average hospital wage level."³³² The statute did not further define "geographic area." HHS chose to equate "geographic area[s]" under the Medicare statute with the Metropolitan Statistical Areas (MSAs) that the Office of Management and Budget (OMB) formulates and uses for a range of other purposes, even though, as HHS acknowledged, MSAs are not a perfect proxy for regional labor markets.³³³ A group of hospitals sued, arguing that HHS's use of the OMB's MSAs to define "geographic area" was inconsistent with the Medicare statute.

In the real case, the court analyzed the issue under *Chevron* and concluded that the term "geographic area" is ambiguous. "[B]ased only on the literal language of the provision," the court observed, a geographic area "could be as large as a several-state region or as small as a city block."³³⁴ The court then noted that the agency's discretion was cabined somewhat by purpose of the provision, as illuminated by the legislative history: The geographic area "must be small enough to actually reflect differences in wage levels" and must be large enough to "include enough hospitals that their costs can be meaningfully averaged and individual hospitals do not get reimbursed for their own actual costs."³³⁵ Within those limits, the court concluded, the agency has discretion, and the MSAs are "geographic areas" that satisfy both of the two limitations just noted.³³⁶

How should the case be analyzed under a version of *Loper Bright* that incorporates the *Gray* doctrine? The answer is—most likely—that the court should proceed in essentially the same way that the real court analyzed the case under *Chevron*. There did not seem to be any serious argument that the term "geographic area" is a term of art with a specific meaning in this context. (If such a claim were made, the court under *Loper Bright/Gray* would analyze it independently, without deference to HHS.) Assuming that the issue is as the court in the real case described it—the statute implicitly requires a "geographic area" to be small enough to meaningfully reflect

331. See *Bellevue Hosp. Ctr.*, 443 F.3d at 168.

332. 42 U.S.C. § 1395ww(d)(3)(E)(i).

333. See *Bellevue Hosp. Ctr.*, 443 F.3d at 169.

334. *Id.* at 175.

335. *Id.*

336. *Id.*

geographic differences in wage levels and large enough to average costs across multiple hospitals, but the statute does not provide any further guidance on how to select from among the geographic area definitions that meet those requirements—then this is precisely the sort of case where the *Gray* doctrine would treat the interpretive issue as one that has been implicitly delegated to the agency. The term “geographic area” is one that leaves the agency with flexibility, in *Loper Bright*’s sense.

If a court applying *Loper Bright* were to reject that approach and instead decide to use its “independent judgment” to determine what “geographic area” means, then it is not at all clear how the court would go about doing this. It does not seem that the statute provides any textual or structural clues that would shed additional light on the meaning of the term “geographic area” or enable a court to confidently distinguish among the many possible definitions of that term. Determining the meaning of “geographic area” in this context appears to be a discretionary decision, and any conclusion a court might reach regarding the “correct” meaning of that term would need to be based (implicitly if not explicitly) on policy considerations rather than textual or structural analysis.

D. Example Four: What Does “Natural Quiet” Mean?

Justice Kagan’s fourth example involved a provision in a statute called the Overflights Act, which, as relevant here, instructed the Federal Aviation Administration (FAA), acting on recommendations submitted by the National Park Service (NPS), to promulgate rules that regulate aircraft flights over the Grand Canyon National Park.³³⁷ The Act specified that these rules should “provide for substantial restoration of the natural quiet and experience of the park.”³³⁸ Although the statute did provide some additional constraints and requirements, it did not further define the key term “natural quiet.”³³⁹

The NPS determined that “natural quiet” should be understood to mean that, for at least 75% of the day, at least 50% of the park has no audible aircraft noise.³⁴⁰ The NPS and FAA further determined that aircraft noise would be audible if it increased the ambient noise level by three decibels, which (the agencies stated) is the smallest change in sound levels that the

337. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2296 (2024) (Kagan, J., dissenting) (citing *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455 (D.C. Cir. 1998)).

338. Pub. L. 100-91, § 3(b)(1), 101 Stat. 674, 676 (1987).

339. *See id.*

340. *Grand Canyon Air Tour*, 154 F.3d at 461–62 (citing NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, REPORTS ON THE EFFECTS OF AIRCRAFT OVERFLIGHTS ON THE NATIONAL PARK SYSTEM 182 (1995) [hereinafter NPS REPORT]).

human ear can detect.³⁴¹ The FAA then promulgated a set of specific flight regulations that the FAA had concluded would restore the park's "natural quiet" under this definition.³⁴²

A coalition of firms that operate Grand Canyon air tours brought a legal challenge to these rules. The challengers argued, first, that the agencies' definition of "natural quiet and experience of the park" was too restrictive; they objected in particular to the fact that the agencies' definition focused on detectable sound rather than irritating noise.³⁴³ The coalition argued that instead of measuring absence of quiet by changes in decibel levels, the agencies should have looked at surveys of park visitors that asked those visitors whether they heard aircraft noise during their visits, and if so whether they were disturbed by that noise.³⁴⁴ The challengers also argued that it was not reasonable to require that 50% of the park be noise-free without considering how many visitors would be in the affected sections of the park.³⁴⁵

In the real case, the court applied *Chevron* and deferred to the FAA's interpretation. The court first noted that there was nothing in the statute "that requires the FAA to define ["natural quiet"] by survey results rather than decibel level," and concluded that the agency's choice to focus on the former was reasonable.³⁴⁶ The court further observed that "nothing in the statute instructs the FAA to create only one or more locations of quiet and to herd all visitors into those quiet zones."³⁴⁷ The court noted that the modifier "substantial" (in "substantial restoration of the natural quiet") is "inherently ambiguous," and the court held that the FAA had acted reasonably in deciding to take into account the experience not only of "those visitors who prefer to congregate at visitors' centers, but also of those who prefer to see the back-country."³⁴⁸

The approach would be different under *Gray*. A court applying the *Gray* doctrine—integrated into *Loper Bright*—would first need to decide the question whether "natural quiet" should be assessed objectively (by decibel level) or subjectively (as measured, perhaps, by visitor surveys). As noted above, in the real case the court considered the statute to be ambiguous on the question whether "quiet" should be understood in terms of objectively measured

341. *Id.* (citing NPS REPORT at 60 and FAA, U.S. DEP'T TRANSP., ENVIRONMENTAL ASSESSMENT: SPECIAL FLIGHT RULES IN THE VICINITY OF GRAND CANYON NATIONAL PARK 4.4–5 (1996)).

342. *Id.* at 462–63 (citing Special Flight Rules in the Vicinity of Grand Canyon National Park, 61 Fed. Reg. 69,302, 69,317 (Dec. 31, 1996)).

343. *Id.* at 465–67.

344. *Id.* at 466.

345. *Id.*

346. *Id.* at 466–67.

347. *Id.* at 467.

348. *Id.*

sound levels or in terms of subjective perceptions of unpleasant noise, and so the court deferred under *Chevron*. Under *Loper Bright/Gray*, the reviewing court would likely have to exercise its independent judgment as to whether the absence of “natural quiet” requires a subjective perception of noise, whether decibel levels alone are sufficient to determine whether “natural quiet” has been achieved, or whether both factors are relevant. Similarly, the reviewing court would need to decide, as a matter of law, if the assessment of whether there has been a “substantial” restoration of natural quiet must take into account *where* in the park aircraft sounds are audible (in particular, whether the sound affects the sections of the park with the most visitors), or if the agency may focus on the proportion of the park’s total area that is affected by aircraft noise, without consideration of the number of visitors in different locations.

Once the court has made those determinations, though, the *Gray* doctrine counsels deference as to where the agency draws the lines distinguishing the state of “natural quiet” from the absence of that state. Suppose, for example, that the court first determined that the agency was legally correct to conclude that deviations from “natural quiet” should be measured by objective changes in decibel levels. In other words, suppose that, as in *Hearst*, the court first addressed a pure question of law and determined that the agency’s reading of the statute was in fact correct, though without deference to the agency. As in *Hearst*, this would not end the case, because the court would then need to assess the agency’s application of the relevant criteria. Recall that the NPS had decided that aircraft noise that increases the ambient sound level by at least three decibels in more than 50% of the park for more than 25% of the day is inconsistent with “natural quiet.” Under *Gray*, the court should defer to the agency’s selection of those thresholds. The statute, on this view, implicitly delegated to the agency the authority to decide how much of a change in sound levels counts as the absence of “quiet”; the agency chose a difference of three decibels, but it might have chosen 3.2 or 3.6 or 4.1 or some other number in the reasonable range.³⁴⁹ Similarly, the agency’s determination that aircraft noise interferes with the “natural quiet” of the park if the noise affects at least 50% of the park for at least 25% of the day is also the sort of line-drawing choice that is entitled to deference under the *Gray* doctrine. The agency could have allowed a more pervasive impact (say, setting the threshold at 60% of the park for more than 35% of the day) or it could have required a less pervasive impact (say, by prohibiting elevated noise that affects 40% of

349. The selection of a threshold of less than three decibels above the ambient noise level would arguably be unreasonable, even under the *Gray* standard, because (according to the agencies) the human ear cannot generally detect such small differences, at least not unless one is being especially attentive. See *supra* note 343.

the park for more than 15% of the day), and these choices might also have been reasonable. This is exactly the sort of line-drawing exercise that, under *Gray*, the court should presume Congress implicitly delegated to the responsible agencies through the statute's use of an inherently imprecise phrase.

Now suppose that the court decided that the agency had erred in focusing only on objectively measurable sound differentials, and the court held that the agency should instead have based its "natural quiet" determinations on visitors' subjective perceptions of excessive noise. On remand, the agency's decision about the threshold at which subjective reports of bothersome noise demonstrate an absence of "natural quiet" should get deference under *Gray*. In the real case, the challengers presented evidence that, according to visitor surveys, 34% of park visitors reported hearing aircraft during their visit, 10% of visitors said that the aircraft noise interfered with the park's natural quiet, and 5% of visitors reported that they found the aircraft noise annoying.³⁵⁰ Suppose the agency decided that the park lacks "natural quiet" if at least 30% of visitors reported being able to hear aircraft noise and at least 7% of visitors reported that the noise disturbed the park's "natural quiet," and the agency thus concluded that, even using the petitioner's surveys as the most relevant evidence, more stringent regulation of overflights was appropriate. Under the *Gray* doctrine, the court should uphold that determination so long as it is reasonable. If the agency had selected different thresholds—if, for example, the agency announced that the park has achieved "natural quiet" if fewer than half of visitors reported hearing aircraft noise and fewer than 15% of visitors reported that aircraft noise interfered with the park's natural quiet—then this determination, if reasonable, should also be upheld under *Gray*. Although the question whether the agency has considered the correct criteria is an abstract question of law that the court must decide independently, *Gray* instructs the reviewing court to presume that Congress implicitly delegated to the agencies the authority to apply those criteria to the situation at hand and to make whatever reasonable line-drawing decisions, along the legally relevant dimensions, the agency considers appropriate.

As with the previous examples, the alternatives to *Gray*-style deference on these line-drawing issues are unappealing. How is a court—especially a textualist court that eschews purposive analysis or reference to extra-textual sources—supposed to decide how much noise, however measured, is too much? Clearly there is no "natural quiet" if irritating aircraft noise is audible in all of the park for most of the day; clearly natural quiet has been restored if no aircraft are ever audible anywhere in the park. But as *Gray* recognized, "[b]etween the[se] two extremes are the innumerable variations that bring

350. *Grand Canyon Air Tour*, 154 F.3d at 466 & n.9 (citing NPS REPORT, *supra* note 340, at 139).

the [situation] closer to one pole or the other.”³⁵¹ *Gray*, then, would counsel courts to assume that the statute delegated this line-drawing exercise to the responsible agencies. A version of *Loper Bright* that rejects *Gray* and insists that there is a “single, best” answer to the question of what noise level is impermissible³⁵²—an answer that was “fixed at the time of [the statute’s] enactment”³⁵³—would need to provide an account of how, exactly, a court is supposed to come up with that answer. If no agency were involved—if, for example, a statute authorized civil suits against air tour companies whose overflights disturbed the “natural quiet” of national parks—then courts could, and presumably would need to, develop their own criteria for assessing “natural quiet”—in much the same way that courts sometimes need to develop their own criteria for assessing “reasonableness” when a statute uses the term “reasonable” and no agency is involved.³⁵⁴ The question is not whether it would be impossible for the courts to decide how many decibels, or how many irritated park visitors, are enough to render the park no longer “quiet.” The question, rather, is whether it is more sensible to read the Overflights Act as implicitly assigning this line-drawing decision to the responsible agencies rather than to the judiciary.³⁵⁵ And in this case—and cases like it—the answer is yes.

351. *Gray v. Powell*, 314 U.S. 402, 413 (1941).

352. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024).

353. *Id.* (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)).

354. *See supra* note 276.

355. Thus, even though the *Loper Bright* Court is correct that courts “routinely confront statutory ambiguities in cases . . . that do not involve agency interpretations,” and that in such cases courts “do not throw up their hands,” *Loper Bright*, 144 S. Ct. at 2266—and even if *Loper Bright* is also correct that all statutes “have a single, best meaning,” *id.*—this does not resolve the matter because, as *Loper Bright* forthrightly and correctly acknowledged, “the best reading of a statute [may sometimes be] that it delegates discretionary authority to an agency,” *id.* at 2263. It is therefore rather baffling that the *Loper Bright* Court declared, later in the opinion, that the best reading of a statute is “the reading the court would have reached if no agency were involved.” *Id.* at 2266 (internal citation and quotation marks omitted). That cannot be right, because that unqualified statement is irreconcilable with the *Loper Bright* Court’s earlier acknowledgement that the best reading of the statute could be that the statute delegates discretion to an agency, and that such a delegation could take the form of the use of a broad term like reasonable. If no agency were involved, a court interpreting a statute that contains a term like reasonable would need to come up with its own criteria for assessing reasonableness and would need to apply those criteria to specific cases. But the *Loper Bright* Court recognized that when an agency is involved, it may be far more sensible to construe the statute as delegating “reasonableness” determinations to the agency. *Id.* at 2263. The Overflights Act example illustrates the same basic point: Although a court *could* come up with its own criteria for deciding how much aircraft noise is too much (that is, how much noise disrupts the “natural quiet”), it is much more sensible to read the statute as delegating that line-drawing

CONCLUSION

Loper Bright is a sea-change in a core administrative law doctrine. But despite the Court's insistence that it merely restored the "traditional understanding" of the judiciary's primacy in matters of statutory interpretation,³⁵⁶ the opinion leaves open a number of important questions about what exactly this means in the context of legal challenges to agencies' interpretations of unclear statutory language. Indeed, it is likely that the Supreme Court, and the lower courts, "will be sorting out the consequences of the [*Loper Bright* decision], which has . . . replaced the *Chevron* doctrine, for years to come."³⁵⁷ One of the most important questions that agencies, other litigants, and judges will have to wrestle with in the coming years concerns the scope and content of the "implied delegation" category that the *Loper Bright* opinion leaves open. Should a court applying *Loper Bright* only find that statutory language "leaves agencies with flexibility" when the statute uses extremely broad amorphous language, such as "reasonable" and "appropriate"?³⁵⁸ Or does *Loper Bright* permit courts to find implicit delegation in a broader set of circumstances? If so, what are those circumstances? Is the determination whether a statute implicitly delegates interpretive discretion to the agency a determination that must be made on an ad hoc, case-by-case basis, or are there some general principles or presumptions that can help establish when an unclear statutory provision should—and should not—be treated as an implied delegation?

In fleshing out the contours of the *Loper Bright* doctrine, courts and litigants need not write on a blank slate. Decades of pre-*Chevron* case law established a framework, which this Article has termed the *Gray* doctrine, which, though admittedly imperfect, provides a reasonably straightforward method for making the distinctions that *Loper Bright* will now require. The *Gray* doctrine's key distinction is between, on the one hand, those questions of statutory interpretation that require the use of legal analysis to choose from a handful of discrete alternatives and, on the other hand, those questions of statutory interpretation that involve line-drawing questions regarding the scope and application of inherently imprecise statutory categories. Under the *Gray* doctrine, the former interpretive questions are for courts to resolve, giving respect but not deference to the responsible agency's views, while the latter issues are typically presumed to have been delegated to the agency

determination to the responsible agencies, even though the judiciary must still exercise independent judgment on abstract legal questions, such as the criteria by which natural quiet would be assessed.

356. *Id.* at 2258.

357. *Cf.* *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (internal citation omitted).

358. *See Loper Bright*, 144 S. Ct. at 2263.

responsible for implementing the statute, and thus the agency's reasonable resolution of such line-drawing questions is entitled to judicial deference.

Courts can and should integrate the *Gray* doctrine's traditional approach into *Loper Bright*'s "implied delegation" prong—embracing the proposition that those line-drawing issues that the *Gray* doctrine would classify as implicitly delegated to the responsible agency should also be treated as implicitly delegated to the agency under *Loper Bright*. That approach has a solid legal pedigree, one grounded in decades of both pre-APA and post-APA precedent on which courts can draw. Embracing the *Gray* doctrine, and integrating it into the *Loper Bright* framework, would also have significant practical advantages, especially given the Court's embrace of a textualist approach to statutory interpretation—an approach that is particularly ill-suited to providing determinate answers to the sorts of line-drawing problems that *Gray* leaves to agencies. Embracing the *Gray* doctrine, and its presumption of implied delegation for this subset of issues, would also be clearer, more analytically sound, and less confusing than repeating the early-twentieth-century approach of (mis)characterizing questions of law application as questions of fact.³⁵⁹

359. See *supra* text accompanying notes 256–265 and notes 50, 121, 223, and 257. A striking illustration of the conceptual confusion that results from trying to make the standard of review in cases involving “mixed questions” (that is, questions concerning whether a set of facts falls within some statutory category) turn on whether the issue is more “factual” or “legal” is the *Urias-Orellana v. Bondi* case, which was pending before the Supreme Court while this Article was in production. The question in *Urias-Orellana* concerns the appropriate standard of review that a court should use when assessing a BIA decision that the mistreatment an asylum seeker had suffered in his home country of El Salvador did not rise to the level of “persecution” within the meaning of the relevant section of the Immigration and Nationality Act. See *Urias-Orellana v. Garland*, 121 F.4th 327, 332–35 (1st Cir. 2024), cert. granted, 145 S. Ct. 2842 (2025). Notably, the BIA’s conclusion that the asylum applicant had not suffered “persecution” was not because the BIA did not believe his account of events. Indeed, the BIA accepted the Immigration Judge’s conclusion that the applicant’s testimony was credible. See *id.* at 332, 334. Rather, the Immigration Judge and the BIA decided that the incidents the applicant described were not sufficiently pervasive and severe to meet the legal standard of “persecution.” *Id.* at 334. The applicant urged the Supreme Court to reverse on the grounds that *Loper Bright* requires courts to review such conclusions de novo. See Brief for Petitioners at 16, *Urias-Orellana v. Bondi*, No. 24-777 (U.S. 2025), 2025 WL 2532581, at *16 (stating that the *Loper Bright* “principle, properly understood, extends to statutory determinations made by the BIA as to whether a given set of undisputed facts qualifies as ‘persecution’ under the law”); *id.* at *20–21 (asserting that “whether a given set of facts meets a particular legal standard is a mixed question of law and fact,” and that such an inquiry “is not a factual inquiry,” but instead “involves interpreting a rule of law as applied to a particular case”) (internal citations and quotation marks omitted). In response, the United States insisted that *Loper Bright*'s

It would therefore be advisable for litigants (especially agencies) and lower court judges to advance, in appropriate cases, the position that the *Gray* doctrine is an appropriate means for fleshing out *Loper Bright*'s implicit delegation category. The ideal vehicles for developing this approach would likely *not* be cases that involve aggressive agency interpretations of statutory provisions that implicate intense and highly salient political controversies. Such cases are obviously important, but they are not representative of the typical cases that lower courts are going to need to resolve under the *Loper Bright* doctrine,

call for de novo review is inapplicable in cases that “concern[] fact-bound applications of law to facts, [rather than] pure legal questions.” Brief for Respondent at 16, *Urias-Orellana v. Bondi*, No. 24-777 (U.S. 2025), 2025 WL 2916069, at *16 (contending that *Loper Bright* does not require de novo review of “fact-bound applications of law to facts” as distinct from “pure legal questions”); *see also id.* at *45 (asserting that the more deferential “substantial-evidence standard applies to fact-intensive applications of legal standards”).

In arguing for its position that deferential review is more appropriate in a case like this, the United States makes a powerful case that insisting on de novo review of agency decisions that a given set of historical facts satisfies (or does not satisfy) some statutory standard would “subject . . . almost all federal agencies[] to second-guessing of virtually every substantive, fact-bound decision other than discrete findings of historical facts,” and that this would be “unworkable.” *Id.* at *46. The difficulty, though, is that the United States’ brief insists on grounding its argument in the claim that resolving these sorts of “mixed question” cases inevitably entails resolving factual disputes that agencies are better positioned to assess than are courts. *See id.* at *44–45 (claiming that deferential rather than de novo review “is appropriate when a court reviews a primarily factual administrative application of law to fact that *involves weighing evidence or drawing factual inferences*” (emphasis added)); *id.* at *46 (asserting that the reason it would be “unworkable” to read *Loper Bright* as requiring de novo review in these sorts of cases is that doing so “would force courts of appeals to engage in *inherently factual inquiries* that they are poorly equipped to make” (emphasis added)). But as the petitioner’s brief repeatedly emphasizes, deciding whether a set of facts meets some legal standard—especially in a case like this, where the historical facts are not in dispute—does not actually involve any factfinding. *See* Brief for Petitioners, *supra*, at *16, *20–21, *27–28.

It seems that the United States, in its *Urias-Orellana* brief, is asking the Court to make the same move that the Court frequently made in the early twentieth century, justifying deference to an agency’s legal conclusion by (mis)characterizing that conclusion as a kind of factual determination. If the Court accepts this argument, then *Urias-Orellana* may end up being of a piece with *Seven County*, which similarly justified deference to the agency on the (analytically dubious) ground that the question whether a given set of facts satisfied a legal standard was a question of fact rather than law. *See supra* text accompanying notes 256–265. Justifying deference on such grounds may work in the near term, but this rationale is likely to prove unsatisfactory, both theoretically and practically, over the longer term. At least that is what the twentieth century history would suggest. The *Gray* doctrine’s presumption that imprecise statutory terms delegate line-drawing authority is a more coherent and sensible approach, one that will provide better and more stable (albeit inevitably imperfect) guidance to lower courts.

and they are more likely to trigger instinctive judicial skepticism of agency requests for deference. Cases similar to those that Justice Kagan offered up in her *Loper Bright* dissent, discussed in Part III of this Article, are more representative, and they also tend to highlight more clearly the benefits of incorporating the *Gray* doctrine into *Loper Bright*, especially when compared to other approaches. These advantages are likely to have considerable appeal across the ideological and jurisprudential spectrum, especially when the issue is presented in the context of ordinary cases with lower political salience. Notwithstanding the extent to which debates over *Chevron* doctrine became ideologically polarized in the decade-plus before *Loper Bright*,³⁶⁰ liberal and conservative judges can likely find common ground on the proposition that, even if abstract or general questions of law are now to be resolved by judges, deferring to agencies' line-drawing decisions regarding the boundaries of imprecise statutory categories has significant advantages, both for promoting efficient and effective government, and for sparing judges from the obligation to determine the "correct" answer to questions that traditional tools of legal interpretation—especially those tools favored by textualists—are simply not capable of answering.

Over the next few years, as the post-*Loper Bright* standard of review doctrine starts to take shape, there is a promising opportunity to develop that doctrine in a productive direction by recognizing the implicit wisdom in much of the pre-*Chevron* case law. This Article is intended as a contribution to that project, providing a general roadmap and a set of relevant precedents and arguments for incorporating the old *Gray* doctrine into the new *Loper Bright* doctrine.

360. See, e.g., Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 630, 641–42, 657–59 (2021); Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 523–25 (2022).