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DELEGATION AND THE ADMINISTRATIVE STATE: FIRST STEPS TOWARDS FIXING OUR RULE OF LAW PARADOX

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I. THE UNDERESTIMATED INFLUENCE OF THE NONDELEGATION DOCTRINE BEFORE *AMERICAN TRUCKING*

Over the last millennium, the rule of law became the lodestar for successful polities. Magna Carta, Harrington's *Oceana*, Montesquieu's *Spirit*, Hume's *Essays*, John Adams' draft of Massachusetts' revolutionary-era constitution, and later works articulated predicates for constraining government to protect liberty through a

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"government of laws, not of men."[1] The essential elements of the rule of law are limited but powerful: conduct can be regulated only through laws of general applicability announced in advance by the legitimate law-making authority and enforced through processes that guard against biases of enforcers.[2] These elements promote qualities of legitimacy and "principled predictability" — they restrict the ambit of control over our lives, allow us to know the rules we must live by, and conform rules-in-practice to the first-order written rules.[3]

The rule of law encompasses concepts of due process and separated powers, concepts instrumental to a government where law rules. Yet, the rule of law is not coextensive with all concepts associated with just rule. The rule of law does not guarantee justice or conformity to any particular substantive vision of the good. It does not,

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[1] *See* Magna Carta, ch. 39 (1215); MASS. CONST., art. XXX (1780); JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA 35 (J.G.A. Pocock ed., Cambridge Univ. Press 2012) (1656); DAVID HUME, ESSAYS: MORAL, POLITICAL AND LITERARY 94 (Eugene Miller ed., 1985) (1742); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 185–223 (Dublin ed., G. & A. Ewing & G. Faulkner 1751) (1748). Although the concept traces back at least 1,500 years before the Magna Carta, these writings stand out in the time frame in which rule-of-law values became enshrined in governments.

[2] For discussion of the essential predicates of the rule of law, *see, e.g.*, RONALD A. CASS, THE RULE OF LAW IN AMERICA 2–20 (2001) [hereinafter CASS, RULE OF LAW].

[3] *See, e.g.*, RANDY E. BARNETT, THE STRUCTURE OF LIBERTY 89–90 (1998); CASS, RULE OF LAW, *supra* note 2, at 4–5, 7–12; LON L. FULLER, THE MORALITY OF LAW 38–39 (2d ed. 1969); F. A. HAYEK, THE ROAD TO SERFDOM 80–81 (50th Anniversary ed. 1994); MICHAEL OAKESHOTT, *The Rule of Law*, *in* ON HISTORY AND OTHER ESSAYS 119, 130–32, 136–40 (1983); JOSEPH RAZ, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW 210, 213–14 (1979); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989). *See also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14–17, 19 (1959). These rule of law components also form the essential predicates of due process. *See, e.g.*, THOMAS E. SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 16–17 (2013); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE. L.J. 1672, 1679–1726 (2012). For discussion of the nature of legal rules, and particularly of first order and second order (primary and secondary) rules, *see, e.g.*, HANS KELSEN, THE PURE THEORY OF LAW 99–100 (Max Knight trans., 2d ed., 1967); FREDERICK SCHAUER, PLAYING BY THE RULES 199 (1991).

for example, guarantee laws based on Aristotelean or Aquinian ideals or implementation based on Solomonic wisdom.

But the rule of law's limitations on official discretion vastly improve prospects for liberty and diminish risks of tyranny. That is why societies' success in providing the requisites for human flourishing broadly correlates with their commitment to the rule of law, not the law of rulers.[4]

This essay explains how the United States' national governance comports with the rule-of-law ideal, particularly with respect to rule-making authority exercised by administrators and related constraints on official discretion. And, while it paints a less than entirely flattering picture, it suggests that one expected change may make things better.

II. OUR ADMINISTRATIVE STATE: THE RULE OF LAW IN EXILE

Looking at the United States from a rule-of-law vantage reveals a paradox. The nation is quite law-obsessed — probably more than any other nation, ever. As Alexis de Tocqueville commented almost two centuries ago, almost every major issue in American life ends up before judges.[5] And, despite the increasingly strong consensus to the contrary in academia and much public commentary, judging in America strongly (though not universally) conforms to the rule of law.[6] Yet, critical aspects of American governance are in tension (if not wholly at odds) with the rule of law — largely those concerned with the operation of the administrative state.

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[4] *See, e.g.*, CASS, RULE OF LAW, *supra* note 2, at xi. *See also Economic Freedom, Overall Index – Country Rankings*, THEGLOBALECONOMY.COM (last visited Apr. 4, 2023) [http://perma.cc/P8BC-7CRE]; *GDP Per Capita by Country 2023*, WORLD POPULATION REVIEW (last visited Apr. 4, 2023) [https://perma.cc/3CUD-FZ5C] (relatively strong correlation between economic freedom and per capita GDP).

[5] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272 (Alfred A. Knopf 1945) (1835).

[6] *See, e.g.*, STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 34–36 (2021); CASS, RULE OF LAW, *supra* note 2, at 35–45, 82–83, 85, 97, 150–51.

Consider a summary rule-of-law account of administrative governance in America today.

The obvious starting point is how our administrative state fits with the U.S. Constitution, our basic (and supreme) framework of law. Our Constitution is invoked with such frequency as the ultimate authority on a host of topics that it has been referred to as our secular Bible. At a minimum, the administrative state should conform to fundamental constitutional rules.

Nonetheless, at first pass, it is hard to square the current administrative state with the Constitution's most fundamental rules for the national government — the tripartite division of federal powers.[7] The Constitution's language vests lawmaking in Congress, administration in the Executive Branch under the President's direction, and judicial power in the courts. Much of the national administrative apparatus, however, appears to function outside its assigned lane.

Appointed officials in federal government agencies issue thousands of regulations each year that now account for more than 180,000 pages worth of rules in the Code of Federal Regulations — rules that purport to operate with binding authority, compelling or forbidding innumerable acts by private individuals, and threatening criminal liability in many instances for those who fail to obey.[8] This looks a great deal like lawmaking, although manifestly *not by* Congress and *not by means of* bicameral approval and presentment to the

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[7] This focus is not intended to minimize the importance of the division of powers between the national government and the states. Addressing departures from constitutional rules respecting that division, however, would take considerably more space than is available for this essay. It is a project for another time.

[8] *See, e.g.*, Clyde Wayne Crews, Jr., *Ten Thousand Commandments, 2022: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTERPRISE INSTITUTE (Oct. 26, 2022) [https://perma.cc/94F3-UQAK]; MAEVE P. CAREY, CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF RULEMAKING, AND PAGES IN THE FEDERAL REGISTER, 1, 7, 19–20, 22–23 (2019) [https://perma.cc/K4T4-4VLL].

President. Further, at times this is done by officials insulated from both congressional and presidential control.[9]

Agencies in the federal government also decide contests over the fate of those who are accused of violating the rules, issuing thousands of decisions following administrative adjudications.[10] In many instances, the officials who make these decisions are employed by the agency that is prosecuting (literally or effectively) the individuals and entities on the other side of the dispute. Mirroring the problem of lawmaking, these adjudications look like exercises of judicial power, *not by* Article III judges.

Aside from questions of constitutional conformity, both the discretion over rules and the power given to resolve contests over their application on their face are redolent of the sort of untrammeled power of a Star Chamber — the essence of unchecked official power that led our founding fathers to frame rules for governance designed to check and channel official authority. In Professor Philip Hamburger's phrasing, it seems that our administrative law is unlawful.[11] But perhaps that judgment is a bit hasty. Perhaps.

III. QUALIFYING CONCERNS OVER RULEMAKING AND ADJUDICATION

In fairness, administrative rulemaking is not always the functional equivalent of (and substitute for) law-making, and agency adjudication is not always a substitute for exercises of judicial power assigned to Article III courts. Both rulemaking and adjudication can

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[9] *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197-98 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 509-12 (2010); Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 633-35 (5th Cir. 2022). This essay doesn't look at the problem of "unsanctioned" presidential lawmaking, as that raises separate (though related) issues.

[10] *See, e.g.*, Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1652 (2016); Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 10 (2018).

[11] *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 16-25 (2014).

be adjuncts to valid exercises of executive authority, a point clearly explained in Justice Scalia's dissent in *Mistretta v. United States*.[12] Rulemaking can be an appropriate adjunct to executive activity, for example, in specifying the way that parole or pardon or licensing authority should be carried out by subordinate officials. So, too, adjudication can be ancillary to executive action, determining whether certain requisites have been met for access to public facilities or public benefits, for example.

Not every rule *must* be made by Congress and not every adjudication *must* be decided by Article III judges, only rules that constitute exercises of the legislative power and adjudications that constitute exercises of the judicial power. Standing alone, neither agencies' use of the mechanisms of rulemaking and adjudication nor the fact that agencies do far more rulemaking than Congress does lawmaking and far more adjudication than courts do deciding cases and controversies is conclusive evidence of a breakdown of the rule of law.

In addition, agencies are not making rules and adjudicating disputes about rules' (or related statutes') application free from control by other branches. Congressional oversight mechanisms, including the threat of funding reductions or restrictions — deployed or merely looming in the background — influence officials' behavior. So, too, vehicles for Presidential oversight include the Office of Information and Regulatory Affairs' rulemaking review[13] and budget processes that run through the Office of Management and Budget, exerting

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[12] 488 U.S. 361, 417–19 (1988) (Scalia, J., dissenting).

[13] For discussion of the operation of the Office of Information and Regulatory Affairs (OIRA), *see, e.g.*, Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 15, 23 (2011); Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 903-04 (2010); Susan E. Dudley & Brian F. Mannix, *Improving Regulatory Cost-Benefit Analysis*, 34 J.L. & POL. 1, 2-3 (2018); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1839 (2013).

influence on a broader range of conduct,[14] along with the magnetic pull of possible future presidential appointments. These influences, while undoubtedly *checking* the exercise of official discretion, may align official conduct more or less closely with *legal* standards — political considerations, not legal ones, are the focus for politically responsive actors.

The third rail of oversight — judicial review — however, *is* charged with keeping agency conduct within the bounds of law. Although some official acts are exempt from review, most rulemakings and adjudications are reviewable. Generally, courts review exercises of discretion for arbitrariness or abuse of discretion. They typically review *interpretation* of laws without deferring to administrators but generally give deference to particular choices in the *application* of laws, even if those choices are framed by administrators in law-interpretation language, so long as judges read the relevant law as granting administrators discretion.

Of course, the Supreme Court's *Chevron* jurisprudence[15] complicates this story, as *Chevron* — despite the case's actual direction — led to confusion respecting when discretion is committed to an agency (especially on matters related to interpretation) and how courts assess the boundaries of that discretion.[16] Over time, *Chevron*

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[14] The Office of Management and Budget (OMB) broadly superintends (and to a substantial degree controls) agencies' budget requests to Congress, and it also coordinates other aspects of executive branch operation.

[15] The reference, of course, is to the Supreme Court's decision in Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), and its progeny.

[16] *See, e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 618-619 (2009); Aditya Bamzai, *Judicial Deference and Doctrinal Clarity*, 82 OHIO ST. L.J. 585, 594, 607 (2021); Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57, 67-68 (Dean Reuter & John Yoo eds., 2016); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1183 (2008); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 719 (2007); Michael

gave impetus to greater deference, including in some cases where a statute-based grant of discretion seemed to be a stretch, while failing to halt judicial intervention in some instances where statutory language supported administrative discretion.[17] The related development of *Auer* deference — to an agency's reading of its own rule — similarly allowed departures from statutory instructions regarding the authorized scope of agency decisions and even from constitutional limitations.[18]

Both *Chevron* and *Auer* can be cast as developments in the law of judicial review that undercut the rule of law through a process designed to support it, reducing the congruence of judicial review with

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Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 682 (2002); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 759-60 (2017); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1817 (2010); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 606 (2009); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 194 (2006).

[17] Massachusetts v. EPA is the most notorious example of judicial intrusion where deference was statutorily commanded—an intrusion commanding an expansion of administrative power that could not fit within the statutory framework. *See* Massachusetts v. EPA, 549 U.S. 497, 558-560 (2007) (Scalia, J., dissenting). The disconnect between the power the Supreme Court read into the law and the relevant statutory framework led EPA later to "tailor" the law by substituting rules that altered express statutory provisions, for example by changing numerical criteria from 100 or 250 ton-per-year triggers to 100,000 or 75,000 ton-per-year triggers. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325 (2014).

[18] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (declaring that an agency interpretation of [its own regulation] "is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'"); Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 535 (2018) [hereinafter Cass, *Auer Deference*].

statutes that govern terms of review and the consistency of review.[19] It's not a fairy tale law story, but the story doesn't end here.

IV. INTERPRETIVE DANCES: RULE OF LAW COURSE CORRECTION'S FIRST STEPS?

In large measure, both *Chevron* and *Auer* were accidents. *Chevron* was an effort to clarify one aspect of the general understanding — codified in law — respecting the scope of judicial review. It did not direct deference to administrators' interpretations of *law* but rather endeavored to explain how to read laws to determine whether it is reasonable to conclude that administrators have been given a measure of *policy discretion* in implementing a given law. However, *Chevron*'s much-referenced language about how to make that determination — especially when taken out of context — gave too much room for reading statutory ambiguity as a general commitment to administrative discretion.[20]

Auer was a different sort of accident. The Supreme Court reasonably agreed with the Secretary of Labor's reasonable view of the meaning and application of its rule implementing legal provisions that give substantial implementation discretion to the Department of Labor. Moreover, it did this in a case where the Labor Department was not involved but instead responded to the Court's request for its

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[19] *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why it Can and Should Be Overruled*, 42 CONN. L. REV. 779, 795 (2010); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 261 (1988); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 233 (1992); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 121 (2018). The Administrative Procedure Act (APA) generally provides the statutory framework for judicial review, although the dispute in *Chevron* was governed by the Clean Air Act's separate review terms that roughly mirror the APA's.

[20] *See, e.g.*, THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 101–119 (2022) (exploring ambiguities and indeterminacies of the *Chevron* formula, as implemented by the courts).

views — in other words, a case in which there was no prospect of administrative manipulation of its construction of the rule to support its position in the litigation. But the Court added a quote tracing back to its 1945 *Seminole Rock* decision that an agency's interpretation of its own regulation is "controlling" unless "plainly erroneous or inconsistent with the regulation."[21] The line was unnecessary to *Seminole Rock*, unnecessary to *Auer*, and a mistake as to the governing law.[22]

In relatively short order, however, justices, including *Auer*'s author, Justice Scalia, began signaling their unease with this broad statement and in a series of decisions cut back on its breadth. By 2019, the Court had completely abandoned its commitment to the *Auer* doctrine, even though a majority declined to admit that its reformulated version (incorporating and somewhat expanding every restriction on the doctrine expressed in subsequent Court decisions) was *Auer* in name only.[23]

Although *Chevron* has not suffered the same fate, it, too, has fallen out of favor. The Supreme Court has stopped citing the decision, even when deferring to administrative judgments that fall within *Chevron*'s domain. Further, the most noteworthy recent decisions reviewing administrative actions justified as implementing statutory authority have given reasons not to defer to administrators, even when agreeing with them. This rise in judicial skepticism about deferring to assertions of administrative authority is especially visible in decisions concerning administrative actions that address "major questions" of regulatory authority.

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[21] *Auer*, 519 U.S. at 461.

[22] *See, e.g.*, Cass, *Auer Deference, supra* note 18, at 551.

[23] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2423 (2019); *id.* at 2425 (Gorsuch, J., concurring).

What now is referred to as the major questions doctrine began as a sensible canon of construction: changes in law that would substantially expand the scope of regulatory authority should be made clearly, not inferred from minor changes in statutory language or first discovered decades after a law's enactment — especially by an agency that has long denied that it possessed that authority.[24] The epigrammatic explanation for this canon is Justice Scalia's observation that "Congress ... does not, one might say, hide elephants in mouseholes."[25] This canon advances the rule of law by resisting improbable assertions of broad, discretionary authority not plainly granted by the legitimate lawmaking body in the form of enacted law.

More recently, the Supreme Court expanded the major questions doctrine to fit more general skepticism respecting claims of expansive discretionary regulatory authority. Decisions in several cases in the Court's 2021 Term, most prominently *West Virginia v. EPA*, although at times referring to the absence of a clear statutory commitment of the authority asserted by an agency, were consistent with broader doubts not only about the authority *claimed* for an agency but also the legitimacy of *grants* of such authority.[26] Picking up the language from earlier major questions cases, *West Virginia* noted that the regulatory program at issue implicated "agency decisions of vast

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[24] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000) (explaining that courts should not infer grants of regulatory authority having major economic and political significance from ambiguous text, especially in the absence of advertence to that authority in adoption of the relevant law); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) (same, with respect to major question of deregulatory discretion).

[25] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001).

[26] West Virginia v. EPA, 142 S. Ct. 2587, 2607–10 (2022); Nat'l Fed'n of Indep. Bus. v. Dep't. of Lab., 142 S. Ct. 661, 665–66 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

economic and political significance."[27] The Court's decision added: "[w]e presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"[28] The quoted language originally was tied to the notion that the Constitution commits significant policy decisions — that is, *lawmaking* — to Congress to be accomplished by constitutionally prescribed means.

While the majority opinion in *West Virginia* spoke in terms that could raise that concern, the concurring justices were clear that the concern over delegation of non-delegable legislative authority is at the root of their insistence, at a minimum, on a clear delegation by Congress.[29] The questions left behind by *West Virginia* are first, whether the major questions doctrine will function as a mini-nondelegation doctrine and, second, whether the Court is prepared to embrace a more robust nondelegation doctrine, independent of the clarity of the legislative instruction.

The answers, to some degree, may be interdependent: if the Court adopts a strong nondelegation doctrine, it may not have reason to deploy major questions doctrine as a quasi-nondelegation tool. At the same time, if its major questions doctrine eliminates most cases in which broader delegation issues would be raised, it reduces the return from a strong delegation doctrine. Whether a serious

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[27] *West Virginia*, 142 S. Ct. at 2605 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). Reference to the "economic and political significance" of an assertion of regulatory authority goes back to the *Brown & Williamson* decision, which rejected FDA regulations of tobacco products in part because of the improbability that authority to regulate tobacco would have been granted without discussion in language not expressly referencing that fact. *See Brown & Williamson*, 529 U.S. at 133, 147.

[28] *West Virginia*, 142 S. Ct. at 2609 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc)).

[29] *See id.*; *id.* at 2617–18 (Gorsuch, J., concurring); *see also* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 203-05 (2023).

nondelegation doctrine is in the cards and what that would mean for the rule of law are the next steps in this dance.

V. CONFRONTING DELEGATION: DEMOCRACY AT THE LIMITS OF LAW

Although separate issues still attend adjudication and other exercises of administrative power, enforcement decisions prominently among them, the rule of law question at the heart of most debates over the administrative state is whether judges will enforce limits on what authority Congress can devolve on administrative agencies — especially limits on discretion associated with the ability to frame regulatory rules.

Those who wrote and ratified the U.S. Constitution manifestly did not contemplate creation of a vast administrative state of appointed officials and their assistants crafting rules to govern an even more vast domain of private conduct. The Constitution is not consistent with that version of the administrative state.

Half of the Constitution is devoted to elaboration of the limited domain for lawmaking, the mechanisms for lawmaking, and the requirements for collaboration among those who make the law.[30] This reveals the importance the Framers attached to the specific, limited means for creating law for the nation.

Constitutional requisites for national lawmaking were designed so that laws, permitted only with respect to a limited set of subjects, would demand consensus. To that end, requirements of bicameralism and presentment restrict lawmaking to matters on which there is consent from officials selected at different times for different terms from different constituencies and from different parts of the nation.

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[30] *See* U.S. CONST. art. I; *id.* art. III., § 2 cl. 2; *id.* art. III, § 3.

The legitimacy of a national law depends on that consensus. No other process can satisfy constitutional command.[31]

The obvious rule of law problem for the administrative state is that the full sweep of administrative government cannot exist if courts require lawmaking only by Congress. Arguments supporting delegation of lawmaking power are at odds with the understanding of consent given to national government at the founding, the logic of limited government, and the history of the nation.[32] Revisionist accounts of that history, endeavoring to show that early American politics embraced broad administrative rulemaking power, exaggerate the scope or misdescribe the nature of the rules that were accepted — or, in the alternative, were understood to be congressionally required — in the nation's first century and beyond.[33]

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[31] *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1036–38, 1041–45 (2007); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 148–51 (2017) [hereinafter Cass, *Delegation Reconsidered*]; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–34 (2002); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1464–68 (2015); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–28, 1240–41 (1985).

[32] *See, e.g.*, Hamburger, *supra* note 11, at 83–85; Alexander & Prakash, *supra* note 31, at 1036; Cass, *Delegation Reconsidered*, *supra* note 31, at 148–49; Lawson, *supra* note 31, at 340–44; Michael B. Rappaport, *A Two-Tiered and Categorial Approach to the Nondelegation Doctrine*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT 195, 195–208 (Peter J. Wallison & John Yoo eds., 2022) [hereinafter ADMINISTRATIVE STATE]; David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 355–58 (1987); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021).

[33] For fuller explanations of this, *see, e.g.*, Hamburger, *supra* note 11, at 109–110; Cass, *Delegation Reconsidered*, *supra* note 31, at 155–58; Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 688–90 (2021); Lawson, *supra* note 31, at 340–44; Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388, 1399 (2019); David Schoenbrod, *Consent of the Governed: A Constitutional Norm that Should Be Substantially Enforced by the Court*, 43 HARV. J.L. & PUB. POL'Y 213, 266–72 (2022); Ilan Wurman, *supra* note 32, at 1538–53. Some of the

The Supreme Court initially understood the importance of insisting that legislative power be exercised only by Congress, but also recognized a distinction between matters that could be regulated either by Congress or by an agency or court if authorized by Congress. Chief Justice Marshall explained in *Wayman v. Southard* that the distinctive province of lawmaking addressed "important subjects, which must be regulated by the legislature itself," unlike "those of less interest" for which Congress may make a "general provision" while giving others power "to fill up the details."[34] This line may be conceived, in Marshall's terms, as between more and less important matters or as between regulation of private conduct and management of public resources and similar matters. But wherever it is drawn, the legitimate, constitutionally empowered lawmaking authority must be Congress acting in the constitutionally prescribed lawmaking mode.

Chief Justice Taft, however, recast the test as simply requiring Congress to articulate "an intelligible principle" for administrators to implement.[35] Even though the Court, not long afterwards, struck down two laws as unconstitutionally delegating legislative authority, in the following almost 90 years — 87 and counting — no authorization of administrative power that came before the Court failed the intelligible principle test.

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early experiences discussed by those whose accounts are at odds with historical understanding that I have referred to as the "delegation-light" account — that delegation of authority to adopt rules regulating private conduct were either absent or extraordinary in early American experience — can be credited as providing either the rare counterexample or as demonstrating the blending of managerial and regulatory authorities at the margin, *see, e.g.*, Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulation Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 (2021). These examples, however, do not prove a more general acceptance of administrative lawmaking of the sort objected to as contravening constitutional strictures.

[34] Wayman v. Southard, 23 U.S. 1, 43 (1825).

[35] *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

Nonetheless, the *Gundy* decision[36] — especially if read together with Justice Alito's concurring opinion in the *American Railroads* case[37] and positions taken by newer members not participating in *Gundy* — signaled a likely majority's willingness to restore a more vigorous nondelegation test. A reinvigorated nondelegation doctrine would not eliminate the majority of administrative exercises of discretion.[38] It would, however, limit administrative authority to make important policy decisions, at least with respect to rules governing private behavior rather than rules managing public properties or benefits.

A robust nondelegation doctrine is not a panacea. A viable nondelegation doctrine would limit policy-driven lawmaking to more publicly visible and more democratically constrained mechanisms, replacing administrative mechanisms many academic writers associate with beneficial expertise. It would be opposed by forces that support the current administrative state, including businesses that benefit from rules constraining competition, most academic commentators, and anyone else who favors regulation unlikely to be mandated by clear legislative command. It may or may not play well with the broader populace.

Yet, whatever its immediate popularity, especially together with the major questions canon, returning lawmaking to lawmakers would improve the fit between the administrative state and the rule of law, increasing the legitimacy of lawmaking and the predictability of law application. It's not a bad start.

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[36] Gundy v. United States, 139 S. Ct. 2116, 2129–30 (2019).

[37] Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 56–66 (2015) (Alito, J., concurring).

[38] *See, e.g.*, Cass, *Delegation Reconsidered*, *supra* note 31, at 187–92; Saikrishna Prakash, *The Sky Will Not Fall: Managing the Transition to a Revitalized Nondelegation Doctrine*, *in* ADMINISTRATIVE STATE, *supra* note 32, at 274, 280–94, 300–02.