Law and Fact in Administration

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Over the course of the twentieth century, the administrative state grew under the auspices of a functionalist understanding of constitutional and statutory provisions allocating decisions among the three branches of the federal government. That understanding eschewed well-defined limits on the roles of the branches in favor of a flexible approach that allowed the branches to adapt more or less cooperatively to the demands of a complex world. In recent decades, the Supreme Court has gradually, tentatively begun to roll back these accommodations and draw sharper lines around the branches' respective powers.

The law-fact distinction is an important tool for allocating decisions between agencies and the courts. What has gone underappreciated is the extent to which the modern conception of the law-fact distinction makes it an awkward tool for the Court's project. It was forged alongside the modern administrative state, using the realist premises that blended the powers the Court is now striving to separate. Unrevised, the law-fact distinction will react with the new formalist doctrines to produce unstable compounds. The reaction will distort the authorities on which the Court relies and undermine the rule-of-law values that administrative law is meant to serve.

This Article identifies two approaches to distinguishing law from fact. It shows that a functional approach that marginalizes factfinding pervades administrative-law doctrines across time. And it suggests that an alternative, formalist approach—one that defines "law" more narrowly—will make the Court's recent formalist turn more feasible and legally defensible.

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Introduction

In *Securities and Exchange Commission v. Jarkesy*, the Supreme Court held that defendants in SEC enforcement actions have a right to proceed "before a jury in federal court" rather than "before the agency."[1] In-house enforcement actions like the one at issue in *Jarkesy* have been going on for more than fifty years; enforcement by means of agency adju-

1. 603 U.S. 109, 115 (2024).

dication, for more than a century.[2] The Court relied on the Seventh Amendment, which does not reach all matters adjudicated by agencies.[3] But there can be no doubt that its decision casts a pall over practices as old as the administrative state itself.[4]

Jarkesy is part of a trend of recent decisions revisiting the division of authority between the judiciary and the administrative state.[5] The disputed authority is, at bottom, the authority to apply the law.[6] Courts apply the law in the "Cases" and "Controversies" parties bring to them.[7] Agencies apply the law to regulated parties in enforcement actions and other adjudications (like licensing and permitting), and they also apply the law categorically when they specify general statutory provisions through regulations and guidance documents.[8]

Because applying law involves relating it to a concrete set of facts, law and fact are traditional units for dividing and distributing courts' and agencies' shared authority. We understand the stakes of the choice between court and agency in terms of law and fact, too. As Chief Justice Roberts noted of that choice in *Jarkesy*, "these forums differ in who presides and makes legal determinations, what evidentiary and discovery rules apply, and who finds facts."[9]

This Article is about the law-fact distinction. Given the distinction's centrality to administrative law, it is a standby of administrative-law schol-

2. William Yeatman, SEC v Jarkesy*: The Past, Present, and Future of Administrative Adjudication*, 2023-2024 CATO SUP. CT. REV. 57, 57 (2024).

3. *Jarkesy*, 603 U.S. at 127.

4. Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, 103 TEX. L. REV. 1013, 1019 (2025). Administration has been around since the early days of our republic. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 3-6 (2012). But I use "administrative state" here to refer to the modern administrative apparatus whose construction began with the foundation of the Interstate Commerce Commission in the late nineteenth century. *Id.* at 4.

5. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412-13 (2024) (rejecting *Chevron* deference and emphasizing that courts, not agencies, have the final say in statutory interpretation); Axon Enter., Inc. v. FTC, 598 U.S. 175, 189-96 (2023) (holding that statutory review schemes under the Securities Exchange Act and Federal Trade Commission Act do not displace federal courts' federal-question jurisdiction over constitutional challenges to the structure of the FTC and SEC); West Virginia v. EPA, 597 U.S. 697, 720-35 (2022) (rejecting EPA's interpretation of the Clean Air Act under the major questions doctrine).

6. Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 766 (2022); Robert M. Cooper, *Administrative Justice and the Role of Discretion*, 47 YALE L.J. 577, 580 (1938).

7. U.S. CONST. art. III, § 2.

8. *See, e.g.*, United States v. Florida East Coast Ry. Co., 410 U.S. 224, 245-46 (1973) ("Here, the incentive payments proposed by the Commission . . . were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act."); Columbia Broadcasting Sys. v. United States, 316 U.S. 407, 420-22 (1942) (holding that regulations operate upon the rights of all who are within their terms); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1856) (comparing "administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law" to "judicial act[s]").

9. SEC v. Jarkesy, 603 U.S. 109, 117 (2024).

arship.[10] But few have acknowledged its close conceptual tie to the separation-of-powers doctrines that draw headlines. The choice to label a question one of "law," and to assign it to one actor or another, reflects implicit assumptions about where the lawmaking and law-interpreting powers reside. This Article examines that connection and, in the process, reveals a previously unobserved contradiction between the current Court's position on who bears the final responsibility for making and interpreting law, and the Court's theory of what is "law" and what is "fact." This contradiction explains many of the tensions other scholars have observed in modern administrative-law doctrine.

The rise of the administrative state coincided with a fundamental shift in thinking about law. Practitioners and scholars lost faith that fixed legal norms determine legal conclusions in specific cases.[11] Rather, they believed the law gains content through judgment-laden application to the facts of the case.[12] The process is not mechanical, and it is shot through with policymaking.[13]

These realist premises laid the groundwork for reforming the law-fact distinction along functionalist lines. Legal doctrine now treats at least some matters once allocated to the factfinder as "questions of law," and it acknowledges in the newly expanded terrain of "law" a once-foreign form of political decision.[14]

This approach was all well and good when the prevailing approach to the separation of powers was also functional. One can define the concepts of "law" flexibly when one is also flexible in applying rules about who bears the responsibility for making and interpreting the law. The Supreme Court has become increasingly *in*flexible about applying those rules in the administrative-law context, however. It has begun to insist on greater formality in defining the constitutional and statutory authority of the branches: Con-

10. *See, e.g.*, Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940-41 (2011); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513-14; LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546-50 (1965); Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 244-46 (1955); Bernard Schwartz, Gray vs. Powell *and the Scope of Review*, 54 MICH. L. REV. 1, 1-2 (1955); EMMETTE SHELBURN REDFORD, ADMINISTRATION OF NATIONAL ECONOMIC CONTROL 331-36 (1952); Marvin B. Rosenberry, *Administrative Law and the Constitution*, 23 AM. POL. SCI. REV. 32, 42-43 (1929); JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES viii, 50-51 (1927); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 1-4 (1922); Roscoe Pound, *The Administrative Application of Legal Standards*, 1919 A.B.A. SEC. PUB. UTIL. L. REP. 2-6.

11. Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50, 50-51 (Martin P. Golding & William A. Edmundson eds., 2005).

12. JAFFE, *supra* note 10, at 246.

13. *Id.* at 244-45.

14. *See infra* Section I.C.

gress makes the law;[15] agencies assist the President in executing it;[16] the courts interpret it.[17]

The problem is that the Court has not simultaneously rethought its approach to the law-fact distinction. If the new, formal separation-of-powers doctrines internalize the broad, functional definition of "law," then the powers to make and to interpret the "law" grow. The result may be undue constraint on executive discretion, or else, if the Court is unwilling to follow its doctrines to their logical conclusion, a (partial) return to functionalism. Sometimes both.[18]

Consider *Jarkesy*. The in-house enforcement action was one manifestation of the functionalist philosophy that shaped the administrative state: "[a]dministrators could decide, but the courts would correct."[19] Congress could provide for agencies to find facts and draw preliminary legal conclusions, so long as a court could review those conclusions for conformity with the law. Doing so spared courts a burdensome workload and allowed the experts to handle technical factual questions, while still guaranteeing regulated parties a judicial guardian of their rights.[20]

In repudiating that model, *Jarkesy* is decidedly formalist: convenient or not, the law says Mr. Jarkesy is entitled to an Article III court with a jury, and an Article III court with a jury is what he shall receive.[21] He could resort to an Article III court on questions of law even under the old system, so the key difference here pertains to questions of fact. Now, the court—more precisely, the jury—will answer *those* questions, too.

Or will it?

The answer seems to be obviously "yes." *Jarkesy* requires SEC to bring the enforcement action in court as an original matter. The agency never gets an opportunity to decide *anything*, fact or law. But turn back to the start of the opinion.[22] That's where the Chief Justice recites the law that will govern the enforcement action, presumably now in court. Of the "three antifraud provisions" Jarksey was charged with violating, two come from SEC regulations.[23] The SEC promulgated these regulations, according to the Court, to "implement" provisions of the Securities Exchange Act and the Investment Advisors Act.[24]

15. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 327 (2014).
16. Seila L. LLC v. CFPB, 591 U.S. 197, 203-04 (2020).
17. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 385 (2024).
18. *See infra* Section IV.B.
19. REDFORD, *supra* note 10, at 327.
20. *See* Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977).
21. SEC v. Jarkesy, 603 U.S. 109, 140-41; *see* Chad Squitieri, *Administrative Virtues*, 76 ADMIN. L. REV. 599, 632 (2024) (defining separation-of-powers formalism).
22. *Jarkesy,* 603 U.S. at 116.
23. *Id.* at 116, 119.
24. *Id.* at 116.

All of which is to say that the SEC will be deciding *something* in Jarkesy's case. What is it? Law or fact?

One possibility is that it is deciding "law." After all, "the law" is what its regulations "implement."[25] But this conclusion does not sit well with another decision from the same term. *Loper Bright v. Raimondo* reaffirmed that "[i]t is emphatically the province and duty of the *judicial department* to say what the law is," even when the law comes from a statute administered by an agency.[26] It is doubtful that the Court would give in *Jarkesy* what it took away in *Loper Bright*.

Perhaps the Securities Exchange Act and the Investment Advisors Act are examples of statutes whose "meaning" is "that the agency is authorized to exercise a degree of discretion."[27] In fact, they almost certainly are.[28] Rather than *interpreting* the statute, which would be the province of the court, the regulations "give meaning" to it.[29] So understood, they supply some of the "law" to be applied in the enforcement action against Jarkesy. *Loper Bright* instructs courts to respect regulations that are the product of such delegations, "subject to constitutional limits."[30]

But here we run into the problem of what those constitutional limits are. According to the nondelegation doctrine, the legislative power must remain where the Constitution fixes it: with Congress.[31] And the legislative power is the only pertinent source of the power to make "law" in a constitutional sense.[32] True, "a certain degree of discretion . . . inheres in most executive or judicial action."[33] In the course of applying law made by Congress, agencies and courts alike must exercise judgment or discretion, and agency rulemaking promotes the rule of law by regularizing that exercise with a set of rules to which regulated parties can conform their behavior.

25. *Id.*

26. 603 U.S. 369, 385, 412 (2024) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) (emphasis added).

27. *Id.* at 394. *See generally* Matthew C. Stephenson, *The* Gray *Area: Finding Implicit Delegation to Agencies After* Loper Bright, 78 ADMIN. L. REV. 99 (2026) (offering a theory for how courts should identify such delegations).

28. *See* 15 U.S.C. § 78j(b) (2024) (making it unlawful "[t]o use or employ . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors"); *id.* at § 80b-6(4) (making it unlawful "to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative," and providing that the "Commission shall, for the purposes of this paragraph . . . by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business . . . .").

29. *Loper Bright*, 603 U.S. at 394.

30. *Id.* at 395; *see* John F. Duffy, Chevron, *De Novo: Delegation, Not Deference*, 31 GEO. MASON L. REV. 541, 553-54 (2024).

31. Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

32. U.S. CONST. art. VI, cl. 2. The Supremacy Clause makes the Constitution and treaties the "supreme Law of the Land" too, but of course executive regulations are neither treaties nor amendments to the Constitution.

33. Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (emphasis omitted).

At least, that is the theory under which SEC promulgates its regulations.[34] The realists who shaped the administrative state were willing to call what the SEC is doing "lawmaking," but should a Court that has recommitted itself to a more formal understanding of government powers do so?[35]

If the exercise of judgment that inheres in law application is not law-making, then what is it? Perhaps most pertinent to *Jarkesy*, there is good evidence that it was traditionally the province of the jury in its role as fact-finder.[36] If so, then the SEC regulations the Court blithely quotes at the beginning of *Jarkesy* may well settle matters of "fact" that would otherwise be decided by the jury that will eventually hear the SEC's case against Jarkesy.

In short, by instructing courts how the law applies to certain types of conduct, the SEC regulations would seem to do one of three things: usurp courts' interpretive function, make "law," or settle "questions of fact" that are the traditional province of the jury. Before today's Court, that should put the regulations between a rock and two hard places, at least when jury-trial rights are at stake.

Yet the Court quotes the regulations without comment because the Court has grown accustomed to two conventions of a functionalist approach to the law-fact distinction. First, it is willing to treat matters of "fact" as matters of "law." This works in the SEC's favor in *Jarkesy* if it means that SEC regulations become a Trojan Horse within which the agency can smuggle findings of fact into the jury trial. But *outside* the context of a jury trial, converting "fact" into "law" usually takes powers away from the agency because determinations of "law" are subject to more exacting forms of judicial review than are determinations of "fact."[37] Second, the Court indulges the idea that the Executive may make "law" because, once the Court defines "law" broadly to include matters of judgment involved in law application, how could it not?

Defining law broadly forces the Court to dilute the nondelegation doctrine, while also giving it an avenue to review agency decisions more searchingly. Thus, by using a law-fact distinction built on functionalist premises, the Court is simultaneously overextending and truncating the formalist doctrines it adopts. This Article explains why.

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34. *See infra* Section II.B; *see, e.g.*, Columbia Broad. Sys. v. United States, 316 U.S. 407, 421 (1942) (exemplifying this reasoning).

35. Five members of the Supreme Court have expressed dissatisfaction with the state of the nondelegation doctrine on formalist grounds. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 86 (2015) (Thomas, J., concurring in the judgment); Gundy v. United States, 588 U.S. 128, 148-49 (2019) (Alito, J., concurring in the judgment); *Gundy*, 588 U.S. at 163-65 (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., dissenting); Paul v. United States, 589 U.S. 1087, 1087 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

36. Haley N. Proctor, *Law, Fact, Form, and Function*, 94 U. CHI. L. REV. (forthcoming 2027) (manuscript at 25-28) (on file with author).

37. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 391-96 (2024).

Part I provides theoretical background on the law-fact distinction and describes two alternative approaches to distinguishing law from fact: one formalist and the other functionalist. The formalist approach limits "law" to rules of decision that can be derived from an authoritative source other than the will of the immediate decision-maker. This means no lawmaking in the course of law-applying, which tracks the constitutional separation of powers: Congress makes the law; the President (and agencies) and the courts apply it.

The functionalist approach, by contrast, defines "law" more broadly to include some exercises of judgment involved in law-application. The broader conception of "law" is consistent with legal realism. The precise lines this approach draws shift based on functional considerations like institutional competency and the costs of trading flexibility for stability.

I present these two approaches more fully in another article,[38] but this Article defends their special relevance to administrative law. The functionalist approach grew alongside the administrative state. It was compatible with the doctrines that facilitated the administrative state's rise, which were also realist and functionalist in their premises. Yet it has persisted in administrative-law jurisprudence, even as that jurisprudence has otherwise become more formalist. Parts II and III track the growth and persistence of the functionalist approach across four doctrinal areas: the nondelegation doctrine, and standards of review for law, fact, and policy, respectively.

Some of this account will be familiar to scholars and practitioners of administrative law, who widely recognize the realist-functionalist foundations of administrative law.[39] Scholars have also remarked on a tension in recent administrative-law jurisprudence,[40] and this Article offers an explanation centered on the law-fact distinction.

In doing so, it owes a debt to two works in particular. *Neoclassical Administrative Law*, by Professor Jeffrey Pojanowski, also uses the law-fact distinction as an organizing principle for understanding the tensions in the Supreme Court's present-day administrative-law doctrine.[41] Whereas *Neoclassical Administrative Law* focuses on the intensity of review *within* the categories of law, fact, and policy, this Article focuses on methods for distinguishing those categories. *Scope of Review of Federal Administrative*

38. *See* Proctor, *supra* note 36.

39. *See, e.g.*, Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 41; Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1093 (2022); Adrian Vermeule, *Neo-?*, 133 HARV. L. REV. F. 103, 108 (2020).

40. *See, e.g.*, Emerson, *supra* note 6, at 764; David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REGUL. 708, 709-10 (2020); Metzger, *supra* note 39, at 41; Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 349 (2016); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 204-05 (1991); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

41. Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 897-98 (2020).

Action, by Professor Kenneth Culp Davis, was also written at an important turning point in administrative law, when courts were settling into review under the Administrative Procedure Act.[42] That article, like this one, identifies two approaches to distinguishing law, fact, and policy and provides critical insights into the thinking that underpins the functionalist approach to the law-fact distinction. The difference between our respective approaches is well captured by the analytical label we would affix to the questions that sit at the junction of law and fact. Davis would label them "questions of law."[43] Pojanowski's neoclassical approach would label them "questions of policy."[44] The formalist approach that I identify in this Article would label them "questions of fact." These labels have important implications for allocating the questions, and for the force their answers exert.

The Article concludes by examining the practical and constitutional problems that could follow if the formalist project is fully realized with a functionalist approach to the law-fact distinction at its heart. The practical problems may be acute enough that the Court abandons or checks its objectives. The major questions doctrine may be an early manifestation of the Court's wavering will. To the extent that the Court sees the project through, however, it may find itself placing functions on the "wrong" side of the constitutional lines it has drawn—allowing courts, for example, to second-guess decisions properly belonging to the Executive.[45]

A formalist approach to the law-fact distinction better coheres with the new doctrines of administrative law because it accepts those doctrines' premises about the nature and allocation of governmental powers. It treats as "law" only those rules formulated by actors permissibly wielding the "legislative power." Strong rules about who may formulate, and who may conclusively declare, the "law" would apply narrowly. This would make it easier for a Court committed to the nondelegability of legislative power to enforce a rule that only Congress may make law. And the branches would be freer to distribute factfinding and judgment-exercising functions with sensitivity to the practical demands of governance.

The main takeaway from this analysis is that the Court's adherence to a functionalist law-fact distinction is preventing it from completing its march toward formalism. Some support that march; others would gladly see the Court abandon it. It is not this Article's purpose to defend one choice between going forward and turning back.[46] All it suggests is that the Court must choose. Right now, the formalist project is not only incomplete, it is incoherent. It is to the latter problem that the Article addresses itself.

42. Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 562-63 (1950).

43. *Id.* at 564-65; *see infra* Section I.D.

44. Pojanowski, *supra* note 41, at 888; *see infra* Section IV.C.

45. *See infra* Section III.C.2.

46. To be candid, I believe the formal approach is the legally correct one. But I mostly leave the defense of that position for another day.

One caveat: this Article is agnostic on questions about how courts should go about deriving legal norms from authoritative sources of law. It posits that there is a discernible point at which a decisionmaker ceases explicating an independent source of law ("law declaration") and begins exercising his or her own judgment about how best to resolve the case ("law application"),[47] but it takes no position on the methodology by which the decisionmaker should arrive at that point. In the same vein, the Article takes no position on the contested definitions of interpretation and construction, or the question how much construction properly belongs to the task of declaring the law, as distinguished from the task of applying it.[48]

I. Two Views of Law and Fact

This Part begins by introducing the concepts surrounding the law-fact distinction and describing the challenges of using that distinction to parcel out the process of legal decisionmaking. It then describes two ways of thinking about the law-fact distinction: one formalist, and the other functionalist. I develop and defend these ideas in greater detail elsewhere.[49] The final Section of this Part relates these ideas to administrative law.

A. The Trouble with Law and Fact

When a decision-maker applies law to fact, he must figure out what happened, and then assess what legal consequences follow from what happened. The law-fact distinction exists to disaggregate the analytical components of that decision for the purpose of allocating and regulating them. For example, a judge may determine what the law is, while a jury finds the facts. Or a single decision-maker may decide everything using distinct methods—legal research for law, evidentiary analysis for facts.

47. For example, Professor Gary Lawson and Stephen Kam identify this point as the point at which the decision-maker shifts from deductive to inductive reasoning. Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 16 (2013).

48. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 118 (2010) (explaining the distinction); Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 706 (2020) (advancing a related theory that is ambivalent about the interpretation/construction distinction). For the same reason, it does not engage any "meta-interpretive" questions about what interpretation is or what it is doing. *See generally* Bill Watson, *What Are We Debating When We Debate Legal Interpretation?*, 105 B.U. L. REV. 1407 (2025) (considering the nature of the debate between various theories of interpretation and arguing the debate can be framed around "Hartian Positivism"); Francisco Urbina, *Reasons for Interpretation*, 124 COLUM. L. REV. 1661 (2024) (arguing that interpretive choices are based on normative reasons alone); Charles F. Capps, *What Interpretation Just Is and Why It Matters*, 101 NOTRE DAME L. REV. (forthcoming 2027) (on file with author) (arguing that interpretation means "forming a judgment about what [a thing's] author intended to communicate"). The point is that there is a difference between "the law," whatever that is, and the legal consequences that flow from a given set of facts under the law.

49. *See* Proctor, *supra* note 36.

The law-fact binary does not capture all of the decisions one must make in the course of applying a rule of decision in a particular case. That is because there are actually three distinct analytical steps: ascertaining a rule of decision (law), ascertaining what happened (fact), and drawing a conclusion about what consequences follow from what happened under the rule of decision (what I call a "law-application conclusion").[50]

Sometimes, that final step is syllogistic, as when the law prescribes a single consequence for the facts as found, and the decision-maker knows (or can make a sufficiently educated guess) what that single consequence is. If I am sufficiently confident that the law entitles a reservist to differential pay during a declared national emergency, and I am sufficiently confident that Petty Officer Feliciano served during a declared national emergency, then that final step—the conclusion that he is entitled to differential pay—is mechanical.[51]

But sometimes, that final step is not so easy. Perhaps the law does not prescribe a single consequence for every conceivable set of facts, or perhaps the decision-maker charged with figuring it out does not know what that consequence is. Then the task of bridging the gap may require an exercise of normative judgment that is not easily classified as either law or fact.[52] If all I can tell you is that "adjacent" means "in proximity, contiguous or near to," then you may need to exercise judgment to decide whether a point five miles distant from the line of a forty-mile railroad is "adjacent" to the railroad's right-of-way.[53]

That is why it is helpful to separate the "law-application conclusion" as a distinct analytical component of the decision. Yet procedural doctrines often fail to do so. Those that do usually use the term "mixed question of law and fact," though that term is imprecise.[54]

A second reason it is difficult to distinguish law from fact is that they at least seem to describe propositions that exist on a spectrum of generality.[55] A statement of law can be made more and more specific until it resembles the law-application conclusion to be drawn from the facts of the case. Thus, if asked what an employee is under the common law, I might say that "anyone who performs services for you is your employee if you can control what will be done and how it will be done." This is a proposition of law. I might also advise, as the IRS does in online guidance on the definition of "employee":

50. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 375 (1958); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985).

51. *See* Feliciano v. Dep't of Transp., 605 U.S. 38, 44-56 (2025).

52. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1856) (describing judicial and administrative functions as "involv[ing] an exercise of judgment upon law and fact").

53. *See infra* text accompanying notes 217-23.

54. Proctor, *supra* note 36 (manuscript at 11, 16).

55. Monaghan, *supra* note 50, at 233.

> Donna Lee is a salesperson [for] Bob Blue, an auto dealer. She works 6 days a week and is on duty in Bob's showroom on certain assigned days and times. She appraises trade-ins, but her appraisals are subject to the sales manager's approval. Lists of prospective customers belong to the dealer. She has to develop leads and report results to the sales manager. Because of her experience, she requires only minimal assistance in closing and financing sales and in other phases of her work. She is paid a commission and is eligible for prizes and bonuses offered by Bob. Bob also pays the cost of health insurance and group-term life insurance for Donna. Donna is an employee of Bob Blue.[56]

Stated as a hypothetical, it is merely a statement of law: an expression of a legal rule that precisely fits the hypothetical facts of a hypothetical Donna's case. But it is also identical to the law-application conclusion one would draw in a case in which a real Donna's employment status is at issue.

The same progression occurs on the fact side of the spectrum. As one particularizes a law-application conclusion, it gradually loses its conclusory quality and becomes more and more factual. Thus, I might describe the relationship between a real Donna and a real Bob by saying that Donna is Bob's "employee," or I might describe the details of their arrangement (as in the first eight sentences of the paragraph quoted above) without characterizing it in the language of the law. Both are statements of fact about Donna and Bob's relationship, but the former statement points to a law-application conclusion, as well. It is more general in the sense that it is easier to connect to other relationships that exist in the world, while the latter, purely factual statement is highly specific to Donna and Bob.

Distinguishing when one moves from factfinding to conclusion-drawing, or from law to its application, is often difficult. Thus, courts have described questions like whether someone is an "employee" as legal, factual, or mixed, depending on the context.[57]

To complicate matters further, when a political actor applies law to fact, a fourth type of decision sometimes enters into the picture: what to do in light of the legal consequences one has determined. Thus, if Congress authorizes an agency to act "in the public interest," the agency's law-application conclusion that a given action is "in the public interest" is conceptually distinct from its choice to take that action versus some other action that would also be "in the public interest." The choice among legally permissible actions is discretionary and informed by policy considerations, as

56. *Id.*

57. *See, e.g.*, Packard Motor Car v. NLRB, 330 U.S. 485, 488 (1947) (law); Crowell v. Benson, 285 U.S. 22, 54 (1932) (fact); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 431 (2024) (Gorsuch, J., concurring) (mixed).

distinguished from law-application judgment.[58] Mixed questions and questions of policy differ, but the judgment one exercises to answer them often rests on similar normative and empirical considerations: what is in the "public interest," how effective is this policy at advancing the public interest, what are its costs, etc.[59]

Distinguishing these four types of decisions—law, fact, law-application conclusion, and political decision—is important because under a wide range of procedural rules, different decisionmakers bear primary responsibility for them. For example, in a federal case tried before a jury, the judge declares the law, the jury finds the facts and applies the law, and political decision should not enter the equation.[60] This Article is about how these four decisions are allocated and reviewed when a federal administrative agency applies the law, and Parts II–IV will examine that division of authority in greater detail. For now, suffice it to say that how one draws lines between law, fact, law-application conclusion, and political decision may—and does under current law—matter for that perennial question of administrative law: "who decides?"[61]

The traditional view of law and fact held that discernable lines separate these analytical processes from one another, which allows for a determinate allocation of authority among decisionmakers. Realism, however, dissolved conceptual barriers between law, fact, law-application conclusion, and political decision, and in doing so, prepared the ground for a functionalist redistribution of authority. The next two Sections describe these competing approaches to the law-fact distinction generically. The final Section relates them to the rise of the modern administrative state.

B. The Formalist Approach to the Law-Fact Distinction

One solution to the challenges just described is to draw the line demarcating "law" wherever the legal norm supplied by some authoritative source (such as a statute) ends. What lies on the other side of that line? A strict formalist would say that the legal norm always meets (or almost always meets) the facts of the case, but the formalist approach to the law-fact distinction does not depend on this premise. Where the norm identified stops short of the facts—whether due to the norm's intrinsic general-

58. *See* Haley N. Proctor, "*One Step Too Many": Deference in* Bruen*,* Loper Bright*, and* Rahimi, 78 SMU L. REV. 369, 376 (2025). Courts also sometimes make discretionary decisions, as when they make rules of practice, issue scheduling orders, or fashion remedies. In these cases, they are making the fourth type of decision I describe here.

59. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2587 (2006); Rosenberry, *supra* note 10, at 44. *See generally* Pound, *supra* note 10, at 5 (describing subconscious administrative judgments in judicial decision); Scalia, *supra* note 10, at 513 (policy evaluation is not foreign to judicial decisionmaking).

60. Haley N. Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 955, 995 (2024).

61. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 121 (2022) (Gorsuch, J., concurring).

ity, or the law-declarer's inability to convey the complete legal norm to the law-applier[62]—it is up to the decision-maker drawing the law-application conclusion to bring the case up to the norm's level of generality, through a combination of factfinding and judgment. Law declaration ends where the decision-maker can no longer claim to be describing a rule of decision created by a lawmaker. Past that point, the judgment involved in bridging law to fact belongs to the factfinder.[63]

By "formalist," I do not mean an approach that treats "law" and "fact" as ontologically distinct propositions.[64] In the context of an adjudication, pure propositions of "law" and "fact" alike are, philosophically speaking, factual.[65] The labels are conventions we use for procedural purposes: labeling a proposition as "law" or "fact" determines who will decide and by what means.[66] The formalist approach is formalist in that it tracks the Constitution's allocation of powers by treating as "law" only those propositions that can be derived from outputs of a constitutionally authoritative lawmaking process. On this account, the law-fact distinction is not a theory of epistemology but a theory of authority.

Treating the line between found rule of decision and everything else as the salient line for classification and allocation purposes echoes the constitutional allocation of powers. The source of the legal norm is the lawmaker (e.g., Congress). The source of the legal conclusion (with its admixture of factfinding and judgment) is the law-applier (e.g., agency or court). Treating exercises of judgment by the law-applier as "law" would grant that law-applier lawmaking power and so blur this division of authority. To avoid blurring the limits of each branch's powers, the formalist approach holds the line at the edge of found law.[67]

This approach characterizes much of the thinking about the law-fact distinction throughout the late eighteenth and nineteenth centuries. But it is not the project of this Article to establish that it was the exclusive or in any sense authoritative approach to law and fact in these years. The more important point is that this *is* an approach to law and fact, that it is formalist in its premises about law and power, and that it stands in contrast to the law-fact distinction that has come to dominate administrative law in the twentieth century.

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62. Proctor, *supra note* 36 (manuscript at 11-14).

63. *See generally id.* (manuscript at 18, 20-29) (describing the features of the formalist approach).

64. *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1790 (2003) (denying that such a distinction exists).

65. *See* Gary S. Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 862-65 (1992).

66. *See* Proctor, *supra* note 36 (manuscript at 3-4, 9).

67. *See id.* (manuscript at 29-31).

C. The Functionalist Approach to the Law-Fact Distinction

The twentieth century brought with it a fundamental shift in thinking about how government actors apply the law.[68] By the end of the nineteenth century, legal theorists and practitioners alike were losing faith in the ability of the concepts and rules that characterized contemporary legal thought to order a complex world.[69] Conceptual categories lost their definition under an onslaught of new borderline cases.[70] Rules supplied by enacted law were found either to stop well short of determining particular cases, leaving their appliers to bridge the gap with unregulated choice, or, meeting those cases, to produce aberrant results.[71]

These observations contributed two distinct, formative ideas to modern thinking about law and fact. The first, which I will refer to as "realism" without intending to capture the legal realist movement in all its particulars, was the descriptive claim that law is less determinate than was previously believed, and that government actors who apply the law must (and do) supply the deficit with normative judgments.[72] The second, which I will refer to as "functionalism" without intending to provide a comprehensive definition of that concept,[73] was the normative claim that government actors who apply the law should do so flexibly, with sensitivity to the law's effect in relation to the policies behind it.[74] One expression of functionalism that will be central to this Article is the idea that courts should consider a variety of institutional values (competence, accountability, balance of powers, etc.) in enforcing rules allocating decisions among different deci-

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68. Sunstein, *supra* note 59, at 2591.

69. *See, e.g.*, Pound, *supra* note 10, at 5; Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 198-200 (1887).

70. *See, e.g.*, Pound, *supra* note 10, at 16-17. For a classic mid-century expression of this point, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

71. *See, e.g.*, Pound, *supra* note 10, at 16-18; BENJAMIN N. CARDOZO, THE NATURE OF JUDICIAL PROCESS 143-51 (1921); *cf.* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (doubting "that there is this outside thing to be found" in common-law context).

72. Metzger, *supra* note 39, at 41 (offering a similar definition); *see, e.g.*, Pound, *supra* note 10, at 9; Rosenberry, *supra* note 10, at 36; *see also* Leiter, *supra* note 11, at 50-51 (describing how the realists saw the law's as indeterminacy as a tool for decisionmaking, with its interpreters instead substituting "their sense of what would be 'fair'").

73. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950 (2011) ("No canonical definition of functionalism exists."); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21-22 (1998) (offering "no fewer than three ways" of contrasting constitutional formalism and functionalism).

74. *See, e.g.*, Glicksman & Levy, *supra* note 39, at 1093 (explaining that functionalism "eschews rigid categories and bright-line rules in favor of a flexible analysis that examines the circumstances of each case in relation to the values or purposes that underlie the law"); Pound, *supra* note 10, at 7 (explaining that "thinking of law functionally" means shifting the emphasis "from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficacy of the remedy to attain the ends for which the precept was devised").

sionmakers.[75] These two ideas worked in tandem. Realism purported to expose the law's indeterminacy; functionalism explained how to manage it.[76]

Realism and functionalism reshaped the law-fact distinction. The longstanding effort to draw a sharp conceptual line between law and fact gave way to a more policy-driven allocation of authority. As Professor John Dickinson famously put it: "Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right."[77]

Policy considerations that might inform the decision where to divide law from fact include, among others, the following factors:

- Capability: Who is better equipped in training, expertise, and tools to answer this type of question accurately?[78]
- Accountability: If this question calls for political decision, who is going to be more attuned to popular will on the choice?[79] If this question *should not* involve political considerations, who will be more independent of popular will?[80]
- Good-Government Values: Does the decision that turns on this question need to be made with energy and decisiveness? Is it better made on a case-by-case basis, with subtle course corrections as needed to achieve the desired policy goals? [81]

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75. *E.g.*, Manning, *supra* note 73, at 1951 ("[F]unctionalists view their job as primarily to ensure that Congress [in structuring the government under the Necessary and Proper Clause] has respected a broad background purpose to establish and maintain a rough balance or creative tension among the branches."); Metzger, *supra* note 39, at 44 ("[F]unctionalist analysis views powers as overlapping, emphasizes the overall balance among the branches, and focuses on the benefits of a particular governmental structure and that structure's impact on a branch's ability to perform its core functions.").

76. *See generally* Proctor, *supra* note 36 (manuscript at 30-36) (describing the interplay of realism and functionalism in shaping a new approach to legal decisionmaking).

77. DICKINSON, *supra* note 10, at 55; *see also* Merrill, *supra* note 10, at 974 (describing Dickinson's "comparative institutional analysis" and its influence); Schwartz, *supra* note 10, at 10 (reflecting that influence). Although Dickinson has sometimes been described as an anti-realist due to his opposition to some of realism's more extreme views about the law, he was a realist in the sense that that term is used in this Article. *See* Merrill, *supra* note 10, at 977.

78. *See, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 342 (2014) (Breyer, J., concurring in part); SEC v. Cogan, 201 F.2d 78, 84 (9th Cir. 1951); Lisa Schultz Bressman, *The Ordinary Questions Doctrine*, 92 GEO. WASH. L. REV. 985, 993 (2024); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Isaacs, *supra* note 10, at 7; Davis, *supra* note 42, at 581-84.

79. *See, e.g.*, Chevron v. NRDC, 467 U.S. 837, 865-66 (1984).

80. *See, e.g.*, Breyer, *supra* note 78, at 371.

81. *See, e.g.*, *Util. Air Regul. Grp.*, 573 U.S. at 341 (Breyer, J., concurring in part); Breyer, *supra* note 78, at 371; Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 84-85; Davis, *supra* note 42, at 588-90.

- "Rule of Law" Values: Who is better positioned to promote values like uniformity, predictability, and notice?[82]

Traditionally, these values might have justified the law-fact distinction. In the modern era, they determine it.[83] Yesterday, a matter would be best left to the court because it was one of law. Today, it is one of law because it is best left to the court.

Although these functionalist considerations cut different ways in different contexts, generality has become a dominant sorting principle.[84] Generality, and the institutional policies that underlay it, prompted two significant changes in the law-fact classification. First, the line between law and fact moved toward the "fact" end of the spectrum, with more law-application judgments classified as matters of law on the ground that they are generally applicable.[85] Second—and here is a countervailing development—the political decision implicit in selecting these principles of general applicability undermined judges' claim to dominance on what would otherwise be called questions of law. And so the tendency has arisen to distinguish between questions of law and questions of policy—a new cleavage not previously recognized as internal to the process of law application. While questions of law remain within the purview of judges, questions of policy belong to more accountable decisionmakers.[86]

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Up to this point, this Part has largely summarized ideas I present in greater detail in *Law, Fact, Form, and Function*.[87] That article illustrates the shift from the formalist to the functionalist approach using examples drawn primarily from the judge-jury divide. The effect of realist-functionalist thinking was even stronger outside the history-bound tradition of jury trials. Eventually, the notion that law-application conclusions were matters of fact came to be seen as an antiquated fiction, a vestige of the democratic

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82. *See, e.g.*, Mamiye Bros. v. Barber S.S. Lines, Inc., 360 F.2d 774, 777 (2d Cir. 1966); Breyer, *supra* note 78, at 380.

83. *See, e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 384-91 (1996); Merck Sharp & Dohme Corp. v. Albrecht, 587 U.S. 299, 316-17 (2019). This approach had its detractors, even among those who accepted its realist premises and functionalist objectives. *See, e.g.*, Louis L. Jaffe, *supra* note 10, at 244-46; Isaacs, *supra* note 10, at 5.

84. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 975 (2017); Merrill, *supra* note 10, at 976-77; KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 250 (1951); Isaacs, *supra* note 10, at 12.

85. Cooper, *supra* note 6, at 583; Pound, *supra* note 10, at 1213; Rosenberry, *supra* note 10, at 45. Still, the same institutional values dictated that some exercises of judgment could not be—ideally, would not be—formalized as "law" but would remain on the "fact" side of the line where they could be made on a case-by-case basis. Cooper, *supra* note 6, at 583. *See generally* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112 (2011) (considering this division and offering a prescription for ordering it).

86. *See, e.g.*, Pojanowski, *supra* note 41, at 87-76 (describing this view).

87. Proctor, *supra* note 36.

impulses that enshrined the jury in the Constitution. It was ill-suited to a century dominated by bench trials and administration.[88]

D. The Law-Fact Distinction in Administrative Law

At the same time that realism was deconstructing the law-fact distinction, it was also dissolving the lines between the legislative, executive, and judicial powers. As with the law-fact distinction, legal theorists and practitioners had long recognized a degree of analytical continuity between the three types of power.[89] The traditional solution to this problem was not to place strict limits on the functions each branch could perform, but instead to accord different legal significance to functionally similar acts, depending on who performed them.[90] Realism responded by highlighting the functional similarity of the acts and criticizing the inefficiency that came with according different legal statuses to them based on seemingly arbitrary formalities.[91] The country needed sensible alternatives to meet the demands of a new age.

The government's center of gravity was shifting to the Executive—or, more precisely, "the administration"—in response to two related demands.[92] First, there was a change in the philosophy of government, from one in which the "State . . . sought merely to guarantee the individual a maximum of freedom from coercive influences and a protection against the more obvious types of anti-social conduct" to one in which the State "concern[ed] itself more and more with the social and economic welfare of the nation."[93] Laws were no longer "self-operating," but instead required active administration by bodies exercising "skill or judgment in the applica-

88. *See, e.g.*, Mamiye Bros. v. Barber S.S. Lines, Inc., 360 F.2d 774, 777 (2d Cir. 1966); REDFORD, *supra* note 10, at 335; Cooper, *supra* note 6, at 590; Pound, *supra* note 10, at 19-20; Isaacs, *supra* note 10, at 7-8; *cf.* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332 n.19 (1979) ("[T]he petitioners in the present action would be entitled to a jury trial of the issues bearing on whether the proxy statement was [false] had the SEC action never been brought [but] the presence or absence of a jury as factfinder is basically neutral . . . .").

89. *See, e.g.*, THE FEDERALIST NO. 47, at 302-03 (James Madison) (Clinton Rossiter ed., 1961); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825); *see also* Rosenberry, *supra* note 10, at 33 ("At an early time it was recognized that in practice a complete separation of powers was not possible, and it soon became apparent that no satisfactory definition of executive, legislative, or judicial power could be made.").

90. *See infra* Parts II.A, III.A.2; *cf.* Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 742-43 (2022) (distinguishing "exclusive" and "nonexclusive" powers of each branch and proposing a separation-of-powers framework given this conception).

91. *E.g.*, Cuthbert W. Pound, *The Judicial Power*, 35 HARV. L. REV. 787, 789-90 (1922).

92. Pound, *supra* note 10, at 2.

93. Cooper, *supra* note 6, at 579; REDFORD, *supra* note 10, at 327; *see, e.g.*, Pound, *supra* note 10, at 3 (extolling a shift from "a condition where justice might well come after the event and take its own time to one in which the exigencies of economic life call for a swift-moving preventive justice").

tion of the national policy."[94] Second, and relatedly, the world had become more complicated.[95] It was difficult for Congress in general laws to provide for all contingencies and variations and equally difficult for the courts to accommodate them in its case-by-case applicative judgments.[96] The only "practical way" to confront them was through administration: law application on a broad scale.[97]

These ideas were not universally endorsed of course, and, more to the point, they found expression in a variety of sometimes dissonant prescriptions for structuring agencies and regulating their relationship with Congress and the courts.[98] The Administrative Procedure Act that consolidated this movement is not ideologically coherent but instead reflects a settlement of competing visions of the role of government.[99] Still, the premise that the powers are not intrinsically distinct, the political philosophy favoring administration, and functionalist observations about the complexities of the modern world all shaped a core thesis of that settlement: "Administrators could decide, but the courts would correct."[100] *What* "administrators could decide," and *how strictly* "the courts would correct" has been the subject of a century's worth of fierce debates and delicate recalibrations.[101]

94. Cooper, *supra* note 6, at 580; *see also* Pound, *supra* note 10, at 3 ("But life, which law is to govern is a complex thing, and modern law requires and possesses a diversity of instruments for the purpose."); Rosenberry, *supra* note 10, at 35 ("Administrative tribunals . . . came because there seemed to be no other practical way of carrying on the affairs of government and discharging the duties and obligations which an increasingly complex social organization made it necessary for the government to perform.").

95. Pound, *supra* note 10, at 3; Rosenberry, *supra* note 10, at 35, 40; *see also* Breyer, *supra* note 78, at 363 ("Complex modern social, economic and technical problems require governmental intervention . . . .")

96. Cooper, *supra* note 6, at 598; *see also* Mistretta v. United States, 488 U.S. 361, 372 (1989) (providing a more recent echo of this rationale).

97. Rosenberry, *supra* note 10, at 35; *see, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935) (noting "the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly"). *See generally* Vermeule, *supra* note 39, at 109 (describing a related administrative difficulty of "old statutes, new problems").

98. *See generally* Pojanowski, *supra* note 41 (describing a range of theories about the administrative state and its relation to the judiciary).

99. Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950); *see also* Sunstein & Vermeule, *supra* note 81, at 82 ("We have emphasized the Court's recognition . . . that the APA was a 'formula upon which opposing . . . forces have come to rest.'" (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 102 (2015)); Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. 1873, 1874 (2023) (describing the APA as a "carefully constructed, complex blend of codification, reform, and blueprint for the future").

100. REDFORD, *supra* note 10, at 327; *see also* Strauss, *supra* note 40, at 493 (noting the functionalist realities of the modern administrative state while recognizing the need for judicial review). *See generally* J. Joel Alicea, *Originalism, the Administrative State, and the Clash of Political Theories*, HERITAGE FOUND. (Apr. 24, 2025), https://www.heritage.org/sites/default/files/2025-04/HL1345_0.pdf [https://perma.cc/H3ZT-F8K3] (describing the views about "the nature of politics and . . . of human beings" that formed the administrative state).

101. *See* Breyer, *supra* note 78, at 363; Pojanowski, *supra* note 41, at 853-54.

All the while, courts were moving from the formalist to the functionalist approach to the law-fact distinction. Although theoretically compatible, these two movements at times worked against one another. The functionalist approach to the law-fact distinction *tended* to favor an expansion of the "law" category, but given the judicial dominance on questions of law, that expansion worked against the political-theoretical preference to have agencies decide more things. The functionalist approach ultimately reconciled the conflicting impulses by labeling some questions of law—specifically, those whose answers cannot be "found" but must be "made"—"questions of policy" and moving them back into the agencies' domain. But the process was not instantaneous.

Writing in 1950, Kenneth Culp Davis[102] remarked on a tension in administrative law much like the tension explored in this Article. That tension also arose from the conflation of two distinct approaches to drawing the line between law and fact.[103] One approach, which he called the "practical or policy approach," defined "law" and "fact" in light of policy considerations about how responsibility should be divided between agencies and courts.[104] The other approach, which he terms the "analytical, literal, or conceptual" approach, emphasized logical coherence and the ordinary meanings of the words "law" and "fact."[105]

Davis recognized that the central difficulty lay in how to classify and allocate questions involving "the application of legal concepts to undisputed or established facts" (that is, what I call "law-application conclusions").[106] Davis argued that such questions were "analytically" questions of law because "[e]very determination" of how the law applies to facts "refines the meaning of a legal concept."[107] The "practical" approach diverged from the "analytical" one by allowing institutional considerations—expertise and efficiency—to justify treating these exercises of legal judgment as factfinding and entrusting them to agencies.[108]

Davis's description of the two approaches illustrates the extent to which the formalist approach had lost its definition under the realist gaze. The "practical approach" is, roughly, what I call the functionalist approach. But the "analytical approach" is *not* the formalist approach. His "analytical category" of "law" sweeps in a lot more than law-finding, including the judgment decision-makers exercise to apply law to fact.[109] The formalist approach would classify that decision as one of "fact," not "law."

102. *See* Proctor, *supra* note 60, at 970-72 (describing Davis's influence).
103. Davis, *supra* note 42, at 564.
104. *Id.*
105. *Id.*
106. *Id.* at 560.
107. *Id.* at 564.
108. *Id.* at 569-71.
109. *See, e.g.*, *id.* at 572 (describing a question as "not only [one] of law but also of statutory interpretation").

Davis recognized a "long" tradition of ceding matters of judgment to the factfinder on the ground that law application presented a "question of fact."[110] But on Davis's account, this practice was a regrettable fiction—a classification "motivated" by the "practical approach," but "written in terms of the analytical, with a resulting appearance of illogicality."[111] According to Davis, courts would do well to acknowledge forthrightly the "analytical" nature of the questions (questions of law) and the "practical" considerations that motivated their reallocation to expert agencies.[112] His ideas were highly influential and have shaped jurisprudence through the present day.[113]

Davis's complaint reveals an important point about the relationship between the formalist approach and the functionalist approach: one *may*, and modern courts sometimes do, arrive functionally at roughly the same allocation of decision-making achieved by the formalist approach (allocating law-application judgment to the factfinding agency). But the difference in rationale matters. For one, the functional considerations are not constant across time and space. The arguments in favor of one institutional actor or another wax and wane as political conditions change.[114] Just as factfinding agencies' star was rising due to faith in their expertise, factfinding juries' star was falling due to declining faith in democracy,[115] and their fortunes could change once more. For another thing, the "analytical" assertion that the product of that judgment is "law" creates the appearance of ceding matters legislative and judicial to the agency when the court defers to its judgment. When functionalism dominated separation-of-powers jurisprudence, this was fine, but the modern Court has grown wary of ceding matters of law to agencies.

One way for the Court to square the circle would be to reject Davis's assertion that matters of judgment are "analytically" matters of law. But the realist-functionalist worldview, with its blurry, fluctuating lines, has remained an enduring feature of the Court's jurisprudence. The Court continues to assume that questions of law shade into questions of fact and that, all along the spectrum, law-appliers must make policy choices that are indistinguishable from the political decisions that produced the law they apply. The current Court may believe that the law is more determinate, but once it runs out, it's still a realist-functionalist world. And in that world, applying law to fact may involve lawmaking.

110. *Id.* at 565, 569-70.

111. *Id.* at 564.

112. *Id.* at 569.

113. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 465 (2024) (Kagan, J., dissenting) (recognizing Davis's influence on the scope of judicial review of agency action); Kisor v. Wilkie, 588 U.S. 558, 596 (2019) (Gorsuch, J., concurring in the judgment) (same).

114. *See* Pojanowski, *supra* note 41, at 853-54; Merrill, *supra* note 10, at 998-99.

115. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 129 n.6 (2015) (Thomas, J., concurring in the judgment); Proctor, *supra* note 36 (manuscript at 39-40).

The next two Parts trace the rise and persistence of the functionalist approach to the law-fact distinction. Across a range of doctrinal areas, they describe how that approach edged out the formalist approach that held sway during the first century of the administrative state, then show that the modern Court has adhered to the functionalist approach even as it has otherwise moved doctrine in a formal direction.

II. The Nondelegation Doctrine

This Part describes how the law-fact distinction interacts with the Court's approach to the nondelegation doctrine. From *Wayman* to *Whitman*, the Court's official line on delegations of "legislative power" has been and remains that Congress holds "legislative power" exclusively and may not give it to others, including agencies.[116] The "legislative power" includes, at its core, the power to make laws.[117] It is connected to the law-fact distinction insofar as it says something about what may be treated as "law" when a court or an agency applies law to fact.

The first Section of this Part explains how the formalist approach to the law-fact distinction reflects a commitment to treating as "law" only those pronouncements that are the product of an exercise of legislative power or derive from some other authoritative source such as nature or custom. "Law," so defined, would not include the decisions that agencies or courts make in the course of applying or implementing the law. Thus, the formalist approach to the law-fact distinction is compatible with a robust nondelegation doctrine.

The second Section shows that, as the administrative state grew, courts became more willing to treat applicative judgments and executive political decisions as sources of "law," even while maintaining the constitutional rule that Congress alone possesses the legislative power. The functionalist approach to the law-fact distinction has therefore required the Court to come up with a theory about why a delegation of *lawmaking* authority does not constitute a delegation of "legislative power."

The final Section observes that, while today's Court has grown uncomfortable with the logical tension at the heart of this theory, it has shown no sign of moving away from classifying the output of agencies' normative judgments as "law." This ambivalence has kept justiciable solutions to the delegation problem at bay.

116. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested [by Article I].").

117. *See Legislative*, 2 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755) (defining "legislative" as "law-giving").

Of course, even if lawmaking lies at the core of the legislative power, it may not be an exclusive function.[118] There are sources of law that do not go through Article I bicameralism and presentment.[119] Perhaps exercises of executive and judicial power produce law, too.[120] Moreover, "law" need not mean the same thing in every context. Even if agencies and courts are unable to make "law" in the constitutional sense when they exercise their law-application authority, their law-application decisions could be treated as "law" for purposes of procedural rules that do not need to incorporate the constitutional meaning of law. This Article takes no definitive position on these matters.[121] It merely points out that the Supreme Court has long acted on the premise that Congress possesses some measure of exclusive, nondelegable lawmaking authority, and that the modern, expansive understanding of "law" has prevented the Court from fully enforcing the rule that Congress may not delegate that authority to anyone else.

This Part contributes to scholarship on the nondelegation doctrine by separating a (potential) prohibition on executive lawmaking from the limit on the quantum of discretion Congress can confer on the Executive. Frequently, these are regarded as two sides of the same coin: an exercise of executive discretion becomes impermissible lawmaking when it is too unbounded.[122] This Part suggests that, whatever limits exist on the quantum of discretion Congress may confer on the executive, the Constitution may also restrain courts from treating the output of that discretion as law.[123]

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118. *Cf.* Wurman, *supra* note 90, at 758-803 (arguing that different government actors may perform the same functions using different powers); Gary S. Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 358 (2002) (same).

119. For example: treaties, state law, and common law.

120. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 281, 313-31 (2021).

121. Haley N. Proctor, Two Nondelegation Doctrines (unpublished manuscript) (on file with author) makes an originalist case against treating agency decisions as "law."

122. *See, e.g.*, Wurman, *supra* note 48, at 713 (quoting and agreeing with Professors Jack Goldsmith and John Manning that the President exceeds his power when his "actions implementing a statute cross a line from something that is reasonably incidental to a statutory command into something that looks more like new lawmaking"); Lawson, *supra* note 118, at 376 ("[T]he formulations [of the nondelegation doctrine] examined so far all reduce to the proposition that Congress must make whatever decisions are sufficiently important to the relevant statutory scheme that Congress must make them."); *see also* Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 989-1006 (2018) (arguing that nondelegation challenges should be considered on an as-applied basis rather than on a facial basis so as to allow for discretion where properly granted by Congress). One exception is Professor Chad Squitieri, who has proposed recognizing distinct "nondelegation doctrines" for each of Congress's powers. Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1258-90 (2021). His context-specific analysis would control the quantum of discretion Congress may confer on agencies but does not clearly speak to whether a court may treat the output of that discretion as "law." Another exception is Professor Philip Hamburger, who rejects significance as a measure of lawmaking. Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1098-1104 (2023). Hamburger argues, and this Article tentatively agrees, that executive actions cannot bind in the way that laws do. *Id.* at 1200.

123. This Article identifies a *potential* constitutional limit. A more comprehensive analysis of this limit forthcoming. *See* Proctor, No Law Without Delegation (unpublished manuscript) (on file with author).

A. The Formalist Approach: How Defining "Law" Narrowly Avoided Delegations of Lawmaking Power

A formalist definition of "law" begins with the Constitution's allocation of powers. The legislative power includes the power to make laws; the executive and judicial powers do not.[124] Officers and judges may exercise discretion in applying the law that Congress makes, but that discretion is not itself a lawmaking power.[125] To say that the legislative power resides exclusively with Congress is not merely to say what courts and agencies *may not* do; it is a claim about what they *cannot* do. Whatever else it may be, a pronouncement that goes beyond the legal norm enacted by Congress is not "law" because it is not the product of an exercise of legislative power.

Consistent with this view, early decisions concerning purported delegations of legislative power eschewed treating the product of executive discretion as "law." Lawyers for both parties in *The Brig Aurora*—widely regarded as the first nondelegation case to reach the Supreme Court[126]—treated presidential proclamations relating to trade embargos not as sources of "law," but instead as matters of "fact."[127] And although the Court's analysis of the delegation issue was sparse, it treated the act of Congress, and not the President's proclamation, as the source of the operative legal norm.[128]

Likewise, the Court's first extended (but ultimately inconclusive[129]) analysis of the nondelegation doctrine, in *Wayman v. Southard*, confirmed that "the law" is what "the legislature makes."[130] The question the Court mulled in that case was whether Congress could authorize federal courts to adopt rules "altering the modes of proceeding of their own officers, in

124. Hamburger, *supra* note122, at 1110-25 (distinguishing the legislative, executive, and judicial powers, respectively, as the power to "will binding rules," the "nation's lawful action, strength, or force," and the power to make "binding judgments about binding law"); *see, e.g.*, Sinking-Fund Cases, 99 U.S. 700, 761 (1879) (Field, J., dissenting).

125. Lawson, *supra* note 118, at 339.

126. *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 392-94 (2017); Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1087 (2021).

127. Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 385 (1813) (argument of Ingersoll) (referring to the proclamation as a "fact"); *id.* at 387 (argument of Law) (referring to the proclamation as "the evidence which should be admitted of a fact, upon which the law should go into effect"). Congress passed a law forbidding the importation of goods from Great Britain or France, and providing for the forfeiture of any articles imported in violation of the law. Non-Intercourse Act, ch. 24, 2 Stat. 528 (1809). The statute then provided that "the President of the United States be, and he hereby is authorized, in case either France or Great Britain shall so revoke or modify her edicts, as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation; after which the trade of the United States, suspended by this act, . . . may be renewed with the nation so doing . . . ." § 11.

128. *Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) at 388. Justice Johnson simply observed that the Court saw "no sufficient reason, why the legislature should not exercise its discretion in reviving the act . . . either expressly or conditionally, as their judgment should direct." *Id.*

129. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48-49 (1825).

130. *Id.* at 22. ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law.")

the service of executions issued on their own judgments."[131] Chief Justice Marshall begins his discussion of the question by distinguishing between a "legislative provision" and "the discretion" an officer exercises in applying and implementing it.[132] Congress may lay down a rule for execution of judgments[133] (a "legislative provision") but leave it to the officer to decide, for example, how to give notice of the execution ("discretion").[134] Because the notice decision is a matter of "discretion" rather than "legislation," Congress does not delegate legislative power when it leaves the decision to the officer. It follows that there is no delegation of legislative power when Congress merely transfers the discretion from the officer to the courts, *even* when Congress authorizes the courts to regularize the exercise of that discretion by prescribing notice rules.[135] Those rules may direct the otherwise discretionary conduct of the marshal, but they are not "law" in the sense of providing a rule of decision in an adjudication of private parties' rights.[136]

Marshall expresses uncertainty about "the exact limits within which the legislature may avail itself of the agency of" the "other departments" by enacting a law that "commit[s] something to the discretion" of its applier (whether executive or judicial).[137] At some point, too much discretion is too much. But one limit appears to be fixed: at no point does Marshall classify the output of that discretion as "law."[138]

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131. *Id.* at 47.

132. *Id.* at 44-45 ("The execution orders the officer to make the sum mentioned in the writ out of the goods and chattels of the debtor. This is completely a legislative provision, which leaves the officer to exercise his discretion respecting the notice. That the legislature may transfer this discretion to the Courts, and enable them to make rules for its regulation, will not, we presume, be questioned.").

133. Unfortunately, the word "execution" is a source of potential confusion here. The executive power is, at heart, the power to "execute" the law. Mortenson & Bagley, *supra* note 120, at 280. One duty the law charges officers with performing is executing judicial judgments. Officers execute this law by executing the judgments—two different senses of the word "execute." To avoid confusion, and to draw clearer parallels with the courts' role in *Wayman*, I refer to the process of executing the law as "applying and implementing" the law.

134. *Wayman*, 23 U.S. (10 Wheat.) at 44.

135. *Id.* at 44-45. "Discretion," here, is not synonymous as law-application judgment. Suppose Congress provided only that notice must be "adequate," and the executing officer decides to achieve notice by affixing a paper to the property on which he proposes to execute the judgment. There may be an element of law-application judgment in his conclusion that this method of notice is "adequate," but there is also an element of political decision in his choice among multiple adequate methods. *See* Wurman, *supra* note 48, at 711 (describing how the executive "filled in details" of statutes). As used by Marshall, "discretion" captures both the law-application judgment and the political decision. *See also* Lawson, *supra* note 118, at 338-39 (using discretion in a similar way); *cf.* Squitieri, *supra* note 21, at 636 (arguing that the recognition of discretion enables formalists to accept a role for virtue ethics in administration).

136. For a similar account of *Wayman*, see *Department of Transportation v. Ass'n of American Railroads*, 575 U.S. 43, 82 (2015) (Thomas, J., concurring in the judgment).

137. *Wayman*, 23 U.S. (10 Wheat.) at 46; *see also id.* at 43 ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.").

138. *See, e.g.*, *id.* at 45-46 (describing them as "rules for [the] regulation" of the officer's "discretion" in contradistinction to the state "law" from which the regulation departs).

To the contrary, Marshall suggests that if a procedural rule which Congress authorized someone else to make had the status of "law," then there *would be* a delegation of legislative power.[139] This comes when Marshall addresses the suggestion that Congress incorporated state law governing judgment execution into federal law dynamically, such that the content of federal law would vary with the content of state law.[140] He rejects that construction of the act, noting that "if [the act] adopts future State laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the State legislatures the power which the constitution has conferred on Congress."[141] The passage is ambiguous, but one possible reading is that there is a difference between regulating "modes of proceeding" according to state law and regulating them according to judicial discretion. A constitutional rule prohibiting Congress from authorizing someone else to decide something legislatively (i.e., by enacting a law) would not necessarily prohibit Congress from authorizing someone else to decide it by other means (i.e., by regularizing discretion with a rule that directs the conduct of a government agent).[142]

Wayman confirms that Congress may, within limits, confer discretion, but it suggests that the product of that discretion would not be "law." Other decisions from the nineteenth century likewise hold that Congress may confer discretion on executive officers or judges, and that they may regularize their discretion by promulgating rules and regulations, but decline to give those rules and regulations the status of "law."[143]

139. *Id.* at 48. Marshall did not decide that such an arrangement would be unconstitutional but accepted *arguendo* counsel's contention that such power "is incapable of delegation." *Id.*

140. *See, e.g.*, Conformity Act of 1872, ch. 255, 17 Stat. 196 (June 1, 1872) (incorporating state procedural law dynamically); *see also* Jam v. Int'l Fin. Corp., 586 U.S. 199, 216 (2019) (Breyer, J., dissenting) (describing the difference between "static" and "dynamic" incorporation).

141. *Wayman*, 23 U.S. (10 Wheat.) at 48.

142. The Court's analysis is speculative and hypothetical. It assumes for the sake of argument a construction of the statute it ultimately rejects and a construction of the Constitution on which it declines to take a position. *See id.* at 47 ("But the objection which gentlemen make to this delegation of legislative power seems to the Court to be fatal to their argument."). Other federal statutes do incorporate state law dynamically, for example, 18 U.S.C. § 13 (2024), and I take no position here on whether and when these laws implicate the nondelegation doctrine. *See generally* United States v. Sharpnack, 355 U.S. 286 (1958) (rejecting a nondelegation challenge to the Assimilative Crimes Act); In re Adams, 4 Pick. 25 (Mass. 1826) (rejecting, in dicta, a nondelegation challenge to a federal statute authorizing States to arrange their respective militias).

143. *See, e.g.*, Morrill v. Jones, 106 U.S. 466, 467 (1883) ("The secretary of the treasury cannot by his regulations alter or amend a revenue law."); United States v. Eaton, 144 U.S. 677, 688 (1892) ("It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in in such manner as to become a criminal offense punishable under . . . the act.").

In *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 254 (1835), the Court (Justice Story) held that the Secretary of the Treasury had authority to, by regulation, "require, authorize, allow or admit any affidavits sworn before state magistrates" for purpose of proving claims against the United States that he was empowered to settle. *Bailey* was a criminal prosecution for the statutory crime of false swearing in support of such a claim. *Id.* at 251. The regulations in question did not

In this way, the formalist approach to the law-fact distinction goes hand-in-glove with a principled enforcement of the nondelegation doctrine. The next Section shows that when the line between law and fact blurs, it becomes more difficult to enforce a norm against executive lawmaking.

B. The Rise of the Functionalist Approach: How Realist Conceptions of "Law" Strained a Commitment to Nondelegation

As the modern administrative state grew, much about the Supreme Court's nondelegation jurisprudence remained unchanged. The Court continued to insist that Congress may not delegate its legislative powers, but to reaffirm that Congress may authorize other branches to exercise discretion in applying or executing the law it enacts.[144] The Court also continued to share Chief Justice Marshall's sense that specifying the outer limits of permissible discretion is "a subject of delicate and difficult inquiry . . . into which a Court will not enter unnecessarily."[145] Modern courts have almost always avoided the need to second-guess Congress by requiring it to provide no more than an "intelligible principle" to guide the exercise of law-application discretion.[146] This came to be known as the "intelligible principle test."

Despite this continuity, the turn of the century brought something new: the Court began to treat decisions made in the course of law applica-

supply the "law" for the prosecution but rather bore on a question of fact: whether the defendant had, by swearing to an affidavit before a state officer, given a false oath. *Id.* If the state officer lacked authority, the affidavit was a nullity and, *arguendo*, not "within the provision of the act." *Id.* at 253. Thus, *Bailey* did not treat the Treasury regulation as "law." *See also* Caha v. United States, 152 U.S. 211, 218-20 (1894) (distinguishing *Bailey* and *Eaton* on the ground that *Bailey* was "not a case in which the violation of a mere regulation of a department is adjudged a crime"); *In re* Kollock, 165 U.S. 526, 533-35 (1897) (same); *cf.* Hamburger, *supra* note 122, at 1118-19 (noting that legislative and judicial powers bind in different ways, but concluding that the executive power "did not include the power to bind" at all).

144. *Compare Wayman*, 23 U.S. (10 Wheat.) at 42-43 ("It will not be contended that Congress can delegate to Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."), *with* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 405-07 (1928) ("The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.").

145. *Wayman*, 23 U.S. (10 Wheat.) at 46; *see, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) (exemplifying this reasoning).

146. FCC v. Consumers' Rsch., 606 U.S. 656, 673 (2025) (quoting *J.W. Hampton*, 276 U.S. at 409). Conventional wisdom holds that the Supreme Court has enforced the limits of Congress's discretion-conferring power only twice, both times in 1935. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 332 (1999); Ilan Wurman, *supra* note 122, at 976.

tion or execution as "law."[147] In making this move, the Court may have been reacting to a sense that, irrespective of their formal status, agency actions affect private property rights much in the way laws do.[148] In any event, for the first time, agency regulations could supply rules of decision in cases concerning "the primary behavior of parties outside the walls of the issuing agency."[149] The Office of Legislative Counsel of the United States Senate captured this shift in a 1926 memo that summarized the Court's recent holdings as follows: "The authority to make rules, says the court, is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."[150] By this point, it was "easy to see that, without admitting it, the court ha[d] modified the doctrine that legislative power cannot be delegated, by distinguishing such power from another kind of lawmaking power which it calls the power to make administrative rules and regulations" that courts would treat as law.[151]

This development alligned with the functionalist approach to the law-fact distinction. Like the functionalist approach to the law-fact distinction, the nondelegation doctrine now contemplates that the judgment a law-ap-

147. *See, e.g.*, United States v. Grimaud, 220 U.S. 506, 515-17 (1911). *Grimaud* seems to have signaled the shift. In *Grimaud*, defendants were charged with grazing sheep on public lands without a permit, in violation of a regulation promulgated by the Secretary of Agriculture. *Id.* at 514. Initially, an evenly divided Court affirmed a lower court decision holding that the statute in question violated the nondelegation doctrine. *Id.* at 506. Then, the Court granted rehearing and reversed. *Id.* at 523. It distinguished *United States v. Eaton*, described *supra* note 143, on the ground that the statute at issue in *Eaton* was not clear enough in attaching criminal penalties to violations of regulations. *Id.* at 518-19. After *Grimaud*, Congress had a blueprint for signaling to the judiciary which regulations ought to be treated as "law." *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493-526 (2002). Later, the Supreme Court began to presume that agency rules were binding. Erika Lietzan, *Petition Power*, 74 AM. U. L. REV. 107, 142 (2024) (discussing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)).

148. *See, e.g.*, Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 418-22 (1942) (holding that a regulation nominally binding only licensing officers had "force of law" in the sense of "controlling" the rights of regulated parties). Thank you to Emily Bremer for suggesting this explanation.

149. Beau J. Baumann, *The Force of Law after* Kisor, 42 PACE L. REV. 24, 39 (2021) (internal quotation marks omitted). Treating something as "law" is not necessarily the same thing as giving it the "force of law." Something has "force of law" if it is legally binding. *Id.* at 25. In the nineteenth-century decision *United States v. Bailey* (discussed *supra* note 144), the Secretary's deputization of state officers to take affidavits had something like the force of law in the sense that it bound treasury officers to accept affidavits given before state officers. 34 U.S. (9 Pet.) 238, 254 (1835). In the nineteenth century, it did not follow that the regulations could be treated as "law" for purpose of a binding judgment disposing of a private party's life, liberty, or property. *See Eaton*, 144 U.S. at 688 (making this distinction); *Caha*, 152 U.S. at 218-20 (same).

150. Beau J. Baumann, *The Turney Memo*, 97 NOTRE DAME L. REV. REFLECTION 170, 181 (2022) (quoting Memorandum from C.E. Turney, Office of Legislative Counsel of the United States Senate, Memorandum on Constitutionality of Provisions of Air Commerce Act of 1926 Delegating Regulatory Powers to Secretary of Commerce (July 1, 1929)).

151. *Id.* at 181-82; *see, e.g.*, *Columbia Broad. Sys., Inc.*, 316 U.S. at 422 (describing a regulation as "an exercise of the delegated legislative power").

plier exercises in applying the law may itself have the status of "law."[152] As Justice Scalia explained in his dissent in *Mistretta*:

> The whole theory of lawful congressional "delegation" is . . . that a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.[153]

By treating exercises of discretion as "law," the functionalist approach to the law-fact distinction provided cover for Congress to retreat from specificity.[154] If a court confronted with a highly general statute were to continue to draw the line between law and fact where the norm enacted by Congress ended, as the formalist approach to the law-fact distinction requires, the predictability and efficacy of regulatory measures would depend on Congress's ability to specify as a matter of law how regulated parties should act. Vague, general statutes would impose intolerable uncertainty on regulated parties and fragment federal regulatory programs. By contrast, if Congress could authorize agencies to fill in laws' generalities—especially with public rules—they could mitigate both risks.[155] Courts' willingness to treat agency actions as sources of "law," therefore, reduced the political costs of enacting indeterminate statutes. Congress, in turn, accepted the invitation to enact laws with ever more "general provisions," leaving it to agencies and the courts "to fill up" ever more important "details."[156] The result was a thinning of the *statutory* law that can be "found" in any given case.

Generality in lawmaking, in turn, created strong incentives to treat agency pronouncements as law: rulemaking in lieu of "ad hocery" promotes rule-of-law values like uniformity and predictability.[157] Thus, mod-

152. Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 25 (1983) ("[*A*]*ny* of the proposed formulae for limiting legislative delegations acknowledges that considerable law-making power could be properly conferred upon an administrative agency.").

153. Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

154. *See* Emily S. Bremer, *Power Corrupts*, 41 YALE J. ON REGUL. 426, 430-31 (2024) (arguing that "scholars, courts, and Congress," rather than agencies, drove "'the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking'" (quoting Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376)).

155. *See generally* Lisa Schultz Bressman & Kevin M. Stack, *Regulatory Settlement, Stare Decisis, and* Loper Bright, 100 N.Y.U. L. REV. 1799, 1807-12 (2025) (studying legal stability in agency rulemaking).

156. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825); *see, e.g.*, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 679 (2020).

157. Syncor Int'l Corp. v. Shalala, 127 F.3d 90 (D.C. Cir. 1997); *see, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 202 (1947); *Chenery*, 332 U.S. at 217 (Jackson, J., dissenting). Even after *Grimaud*, Congress did not immediately resort to authorizing extensive agency lawmaking. *See* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 94-98 (2022); *see also* Bremer, *supra* note 99, at 1885 ("[W]hen the APA was enacted . . . [m]any agency rules were internally focused, 'lunch hour' regulations, which attended to the smallest details of

ern nondelegation jurisprudence and the functionalist approach to the law-fact distinction are mutually reinforcing.

The impact of functionalist thinking is not limited to agency rulemaking. The paradigmatic case of lawmaking involves a lawmaker promulgating a *general* standard of conduct *before* a law-applier applies it in a particular case.[158] Because the theoretical justification for executive lawmaking depends on the officer's exercise of judgment and discretion in law *application*, however, agencies have been permitted to make law through adjudication as well as rulemaking.[159]

In *SEC v. Chenery Corp.* ("*Chenery II*"), the Supreme Court wrote that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[160] While the Court may not have intended to announce an "absolute rule" of agency choice,[161] its words have become what is known as the *Chenery II* doctrine: "[A]gencies may make law or policy through either rulemaking or adjudication, as long as their governing statutes do not explicitly state otherwise."[162]

The justification here is the same justification that gave rise to delegations in the first place: in adjudications, agencies must apply the law contained in statutes or regulations. Sometimes, statutes or regulations do not supply a rule that is specific enough to meet the facts of the case, and the agency must exercise discretion to bridge the gap. Sometimes, it is good policy to articulate a general principle that will guide its exercise of discretion in like cases. And sometimes, it is desirable to hold the agency to that principle in future cases. In this way, new law is born.

Chenery II exposes a central paradox of the functionalist approach. It is troubling that regulated parties may be subject to a rule of "law" that could not be derived from preexisting law "through a process that could reasonably [be] described as 'interpretation.'"[163] Yet functionalist thinking

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an agency's operations and affected the public only indirectly."). "It was not until the 1960s and '70s—pushed by scholars, courts and Congress—that agencies shifted from adjudication to rulemaking as the preferred tool for developing administrative policy." Bremer, *supra* note99, at 1886; *see also* Merrill & Watts, *supra* note147, at 546-49 (describing a push for more agency rulemaking); Lietzan, *supra* note147, at 141-43 (describing the move toward binding rules at the FDA).

158. Gary S. Lawson & Joseph Postell, *Against the* Chenery II *"Doctrine"*, 99 NOTRE DAME L. REV. 47, 63 (2023). *See generally* John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 298-303 (2016) (considering the nature of legislative power as compared to judicial power, including a discussion about whether the lawmaking power is necessarily "general" and "prospective").

159. *See* Matthew C. Stephenson, *Embedded Rules*, 39 YALE J. ON REGUL. 59, 59-61 (2021); M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383, 1394 (2004). The conclusion that adjudication is a natural venue for making law is precisely the opposite of the conclusion one might reach on a more formal account of delegation. *See* Lawson & Postell, *supra* note 158, at 53-61.

160. 332 U.S. 194, 203 (1947).

161. Lawson & Postell, *supra* note 158, at 49.

162. *Id.* at 48.

163. Stephenson, *supra* note 159, at 62; *see* Lawson & Postell, *supra* note 158, at 89-90.

about the law-fact distinction denies that there are clear lines between law declaration and law application, and courts are reluctant to say how much discretion is too much.[164] Courts have opted for functional (and practically nonexistent) accommodations like the principle that agencies making law in adjudications may not "abuse discretion through things like unfair surprise."[165] Thus, doctrines that courts developed to promote predictability have sometimes underwritten agency practices that diminish predictability.

In sum, the doctrines that facilitate modern agencies' generous and flexible policymaking powers depend upon the core premises of the functionalist approach to the law-fact distinction: there is no clear line between declaring law and exercising judgment in applying it; determining what the law is and deciding how it applies to a given set of facts both require political decision; and rule-of-law values favor regularizing exercises of policy-laden discretion by articulating general principles that will govern exercises of discretion in like cases. The next Section shows that these premises remain operative, even as the Court has grown suspicious of the agency discretion they underwrite.

C. The Persistence of the Functionalist Approach: How Realist Conceptions of "Law" Hinder a Revitalization of the Nondelegation Doctrine

Formalist members of the Court have criticized the intelligible principle test as too lax in its application.[166] Yet the Court has repeatedly reaffirmed it.[167] The doctrine's tenacity and the prevailing reform proposals alike show the enduring influence of the functionalist approach to the law-fact distinction despite the Court's turn towards formalism.

The twenty-first century dawned with a premonition of a strengthened nondelegation doctrine, when the D.C. Circuit held that the Clean Air Act unconstitutionally delegates legislative power to the Environmental Protection Agency.[168] Yet the Supreme Court reversed in *Whitman v. American Trucking Associations*.[169] In an opinion by Justice Scalia, a formalist,[170] the Court adhered to the modern approach to the nondelegation

164. Monaghan, *supra* note 152, at 26.

165. Lawson & Postell, *supra* note 158, at 87; *see* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-95 (1974); *see also* Daniel T. Deacon, Chenery II *Revisited*, 92 GEO. WASH. L. REV. 1050, 1091-93 (2024) (describing the D.C. Circuit's test for whether retroactive application of a new rule works a "manifest injustice").

166. *See supra* note 35; *see also* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment) (arguing that Congress may not skirt its responsibility of making "hard choices" by giving only vague delegations to agencies).

167. FCC v. Consumers' Rsch., 606 U.S. 656, 680-81 (2025).

168. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

169. 531 U.S. 457, 471-76 (2001).

170. *See generally* William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107 (2017) (describing a tension in Justice Scalia's

doctrine, reaffirming its realist-functionalist premises about law, fact, and power.[171]

In a concurrence, Justice Thomas cast doubt on the intelligible principle test in explicitly formalist terms.[172] He later revisited the intelligible principle test in another concurrence that declares, definitively, that "the formulation of generally applicable rules of private conduct . . . requires the exercise of legislative power."[173] He rejected the intelligible principle test as inadequate not solely because it allows Congress to confer significant discretion on agencies, but also because it allows Congress to authorize administrators to formulate rules that courts will then treat as "law."[174]

Unlike earlier opinions criticizing the doctrine, Justice Thomas's opinion gestured toward traditional conceptions of law and fact. He recognized "the discretion inherent in" law application[175] and acknowledged that Congress may confer on administrators authority to exercise that discretion together with the authority to find facts.[176] But that discretion "does *not* comprehend the discretion to formulate generally applicable rules of private conduct."[177] Consistent with the formalist law-fact distinction, then, Justice Thomas insisted that the President's legitimate law-application discretion can be distinguished from the rule of law he applies.[178] Because the "rules" Congress authorized Amtrak to promulgate in that case gave "content to private railroads' statutory duty," the "arrangement raise[d] serious constitutional questions."[179]

Justice Thomas's approach to the nondelegation doctrine in these separate writings is an exception to the rule that the functionalist law-fact distinction has thus far weathered the formalist revolution. Proof of that rule culminates in Justice Gorsuch's dissenting opinion in *Gundy v. United States* and its aftermath.[180]

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jurisprudence that stems from a methodological formalism); Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014) (making a similar point).

171. *Am. Trucking Ass'ns*, 531 U.S. at 474-75.

172. *Id.* at 487 (Thomas, J., concurring).

173. Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment); *see also* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 681 (2026) (Thomas, J., dissenting) (citing *Ass'n of Am. R.R.s*, 575 U.S. at 73, 74, 76, 80 (Thomas, J., concurring in the judgment)).

174. *Ass'n of Am. R.R.*s, 575 U.S. at 72 (Thomas, J., concurring in the judgment); *see also* Learning Res., Inc., 146 S. Ct. at 681 (Thomas, J., dissenting) (arguing that only Congress may make law that regulates private conduct).

175. *Ass'n of Am. R.R.s*, 575 U.S. at 70 (Thomas, J., concurring in the judgment).

176. *Id.* at 78-81.

177. *Id.* at 70.

178. *See also id.* at 83 (rejecting a realist reading of Chief Justice Marshall's statement in *Wayman v. Southard* about the "difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts").

179. *See id.* at 91.

180. 588 U.S. 128, 149-79 (2019) (Gorsuch, J., dissenting). It is also evident in the divide between Justice Thomas and Justice Gorsuch in *Learning Resources*. *See* 146 S. Ct. at 669-70 (Gorsuch, J., concurring) (criticizing Justice Thomas's theory of the nondelegation doctrine).

Herman Gundy, a sex offender, challenged his conviction for failure to register under the Sex Offender Registration and Notification Act (SORNA) on the ground that Congress had unconstitutionally delegated to the Attorney General the authority to decide whether offenders like Gundy (i.e., those who committed their offenses before SORNA passed) had to register.[181] By a vote of 4-1-3, the Court upheld his conviction. The three dissenters (Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas) would have held that SORNA violates the nondelegation doctrine.[182] Justice Alito upheld the conviction but expressed sympathy for the more robust version of the nondelegation doctrine outlined in the dissent.[183] Justice Kavanaugh, who took no part in deciding *Gundy*, seemed tentatively to endorse the dissenters' approach in a separate statement,[184] giving good reason to expect that the intelligible principle test was not long for this world.

The *Gundy* dissent is formalist in its vision of the separation of powers. It proclaims that "each of th[e] vested powers ha[s] a distinct content," and that the content of the legislative power is the power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated."[185] But because it accepts the functionalist premise that "law" includes some judgments agencies and courts make in the course of applying enacted law, it goes on to concede that a measure of lawmaking by the Executive is permissible.

For example, Justice Gorsuch writes that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'"[186] He traces this principle to *Wayman*, but seems to overlook a key premise in Marshall's reasoning: that exercises of the detail-filling discretion would not have the status of law.[187]

Elsewhere in the opinion, the dissent seems to recognize that exercises of delegated discretion do not always produce "law." Justice Gorsuch notes that, in addition to granting the Executive lawmaking power over small matters, Congress "may make the application of [a] rule [formulated by Congress] depend on executive fact-finding."[188] But even here, the functionalist approach to the law-fact distinction confuses matters. As Profes-

181. *Id.* at 134 (Kagan, J., plurality opinion).

182. *Id.* at 149 (Gorsuch, J., dissenting).

183. *Id.* at 148-49 (Alito, J., concurring in the judgment).

184. Paul v. United States, 589 U.S. 1087, 1087 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

185. Gundy v. United States, 588 U.S. 128, 153 (Gorsuch, J., dissenting) (internal quotation marks omitted); *see also* Squitieri, *supra* note 21, at 633-34 (describing Gorsuch as a separation-of-powers formalist).

186. *Gundy*, 588 U.S. at 157 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)). *But see* Hamburger, *supra* note122, at 1101 (disputing Gorsuch's reading of *Wayman*); *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 83 (2015) (Thomas, J., concurring in the judgment) (offering a different account of *Wayman*).

187. *Gundy*, 588 U.S. at 157-58.

188. *Id.* at 158.

sor Tara Grove has demonstrated, "fact-finding" in the nineteenth-century cases on which Justice Gorsuch relies usually meant drawing a law-application conclusion.[189] For example, in *The Brig Aurora*, Congress conditioned its embargo on the President's law-application conclusion that France or Great Britain had "so revoke[d] or modif[ied] her edicts, as that they shall cease to violate the neutral commerce of the United States."[190] Drawing these conclusions sometimes required an exercise of law-application judgment, and the President could regularize that judgment by announcing rules that would govern its exercise.[191] That is why Gorsuch ultimately calls this nominally "fact-finding" role, "permissible lawmaking."[192]

On the *Gundy* dissent's account, then, delegation remains a matter of degree.[193] That may explain why a more robust version of the nondelegation doctrine has failed to take root despite the fact that five sitting justices have expressed a desire to strengthen it.[194]

In the years since *Gundy*, the Court has repeatedly avoided nondelegation questions in merits cases,[195] and repeatedly denied petitions raising plausible challenges.[196] Then, in 2025, it rejected a nondelegation challenge to FCC fee-setting based on a straightforward application of the intelligible principle test.[197] The Chief Justice, who had joined the *Gundy* dissent, and Justice Kavanaugh, who had expressed sympathy for it,[198] joined the majority. Justice Kavanaugh wrote separately to defend the intelligible principle test as a device that "respects the President's Article II authority to

189. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 NYU L. REV. 1908, 1918 (2015). Grove uses the term "mixed question of law and fact." *Id.*

190. Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 383-84 (1813).

191. *See, e.g.*, Letter from George Washington, President, to Edmund Randolph, Secretary of State (Apr. 1, 1794) (directing his cabinet, in executing a different trade embargo, to prepare "rules or principles that will meet cases as they shall occur which will save trouble at the same time that it will be a means of facilitating business"), founders.archives.gov/documents/Washington/05-15-02-0387 [https://perma.cc/4ZGN-6V33]. *Cf.* F. Andrew Hessick & Carissa Byrne Hessick, *Facts, Policy, and Discretion*, 59 U.C. DAVIS L. REV. 1581, 1587, 1609-27 (2025) (arguing that law-appliers may regularize exercises of discretion by announcing policies that will apply across cases).

192. *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting).

193. *See also* Mistretta v. United States, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting) (describing the nondelegation inquiry as "a question of degree").

194. *See* Allstates Refractory Contractors, LLC v. Su, 144 S. Ct. 2490, 2490-91 (2024) (Thomas, J., dissenting from the denial of certiorari).

195. *See, e.g.*, Haaland v. Brackeen, 599 U.S. 255, 296 (2023); SEC v. Jarkesy, 603 U.S. 109, 121 (2024); *see also* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 679 (2020) (refusing to consider a nondelegation challenge because no party had raised one).

196. *See, e.g.*, Paul v. United States, 589 U.S. 1087 (2019) (Kavanaugh, J., statement respecting the denial of certiorari); *Allstates Refractory Contractors*, 144 S. Ct., at 2490.

197. FCC v. Consumers' Rsch., 606 U.S. 656, 680-91 (2025). *See generally* Erika Lietzan, *User Fee Programs*, 76 ADMIN. L. REV. 375, 383-89 (2024) (discussing the history of constitutional challenges to agency fee-setting).

198. *Paul*, 589 U.S. at 1087 (Kavanaugh, J., statement respecting the denial of certiorari).

execute the laws."[199] Even Justice Gorsuch's dissent primarily litigates the application of that test and charts no new ground in reforming it.[200]

Despite invoking the Framers' vision of separated powers, then, the *Gundy* dissent ultimately accepts a premise of more recent vintage: that administrative judgment, once lawfully conferred, may produce law. In this way, the dissent demonstrates the lasting gravitational pull of the functionalist law-fact distinction and its incompatibility with the current Court's separation of powers formalism.

* * *

When the Court perceived a sharp, formal divide between law and fact, executive decisions were confined to the "fact" side of the line. Decisions on this side of the line were not trivial because the category of "fact" included exercises of judgment involved in applying the law. When the Court began to classify those exercises of judgment as "law," it also had to admit that lawmaking was inherent in executive power. This broke down an important barrier around delegations of legislative power, and the modern Court—committed as it is to the functional approach to the law-fact distinction—has not yet found a way to confine congressional delegations to their historical perimeters.

III. Judicial Review

The previous Part explains that the Supreme Court's understanding of the law-fact distinction has influenced its doctrines about what executive officers may decide in the first instance. This Part explains how the Court's understanding of the law-fact distinction shapes its review of those executive decisions.

Limitations on federal courts' jurisdiction and equitable powers circumscribed judicial review of administrative action in the nineteenth century. Forms of proceeding rather than the law-fact distinction typically determined the scope and intensity of review.[201] But as Section III.A shows, where those forms of proceeding provided for deferential review of executive factfinding, they generally also required deferential review of executive law-application conclusions. And they foreclosed judicial review of political decisions. In this way, they reflected the formalist approach to the law-fact distinction.

As Congress transferred more and greater functions to administrative agencies at the turn of the century, it also gave new power to courts, invit-

199. *Consumers' Rsch.*, 606 U.S. at 699-704 (Kavanaugh, J., concurring).

200. *Id.* at 719-25 (Gorsuch, J., dissenting).

201. Bamzai, *supra* note 84, at 944-64; MASHAW, *supra* note 4, at 4; Merrill, *supra* note 10, at 952-53.

ing them to engage in more direct oversight of agency decision-making.[202] As Professor Thomas Merrill has shown, the prevailing model was one of "appellate review," with courts reviewing agency decisions much in the way that appellate courts review trial court decisions in civil litigation.[203] Consistent with that model, the law-fact distinction became "[t]he key variable" in determining the standard of review.[204]

Section III.B demonstrates that the Court's approach to that law-fact distinction under the appellate model has been functionalist. On the fact end of the spectrum, where questions are particular and concrete, agencies have claim to dominance by virtue of their technical expertise. As questions become more general, they become more law-like, and judges' claims become strongest. As questions become more general still—less subject to statutory text and precedent—one enters the realm of policy, and here, considerations of democratic accountability move the ball back into the agencies' court. These countervailing forces, together with the absence of clear lines, have created instability in judicial-review practices.[205]

The modern Court has tried to insist on greater statutory formalism in selecting standards of judicial review. But as Section III.C explains, the persistence of the functionalist approach to the law-fact distinction has muddled its classification and allocation rules on the frontiers between fact and law and policy.[206]

A. The Formalist Approach

Judicial review of executive action during the nineteenth century was limited, but it sometimes turned on the law-fact distinction, and when it did, the Court understood that distinction in formal terms that reflected constitutional allocations of power. This understanding manifested itself in the judiciary's narrow definition of "law," and in its treatment of "political questions." The next two Sections describe each in turn.

1. At the Frontier of Law and Fact: Judgment as Fact

Consistent with the formal approach to the law-fact distinction, nineteenth-century courts held that, when Congress vested the officers with power to decide some matter of fact, it made their law-application judgments conclusive. As Justice Story explained in *Martin v. Mott*, "[w]henever 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

202. Merrill, *supra* note 10, at 942-43.
203. *Id.* at 940.
204. *Id.*
205. *See infra* Section III.B.
206. *See infra* Section III.C.

of those facts."[207] This rationale extended not only to that officer's account of the facts, but also to the conclusion he drew from those facts. For example, when Congress authorized the President to call forth the militia in cases of "imminent danger of invasion," the Court held that "the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons" and not examinable in a judicial proceeding.[208] Whether there is an "invasion" within the meaning of the statute is no mere question of historical fact. It is a question of what conclusion follows from applying the meaning of the legal term "invasion" to the factual circumstances of the day.[209] The Court recognized that it was a conclusion that depended upon judgment as much as it did upon evidence.[210] Even so, the Court characterized the decision it was treating as "conclusive" as one of "fact."[211]

Some nineteenth-century forms of action gave courts authority to review executive action only for conformity with the law.[212] In those contexts, courts confined themselves to correcting "misconstruction[s] of the law" and refrained from reviewing either the officer's factfinding *or* his law-application judgment.[213] Justice Field summarized the judiciary's approach to conclusive agency factual determinations in these cases as follows:

> If [officers] err in the construction of the law applicable to any case, . . . their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, *for mere errors of judgment upon the weight of evidence* in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President.[214]

207. 25 U.S. (12 Wheat.) 19, 31-32 (1827).

208. *Id.* at 29-30; *see also* Vanderhayden v. Young, 11 Johns. 150, 157-58 (1814) ("It is a general and sound principle, that whenever the law vests any person with a power to do an act, and constitutes him judge of the evidence on which the act may be done, and, at the same time, contemplates that the act is to be carried into effect, through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is, *quoad hoc*, a judge.").

209. *See also* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 285 (1855) (holding that an officer's determination on a question of "authority" is conclusive).

210. *Mott*, 25 U.S. (12 Wheat.) at 31 ("Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof . . . .").

211. *Id.* at 32.

212. Bamzai, *supra* note 84, at 959; *see also* Wurman, *supra* note 48, at 707-09. In light of the appellate model that has come to dominate, *see infra* Section III.B.2, it is tempting to think of this as courts exercising de novo review on questions of law. But a better way to think of it is that courts exercised independent judgment to discern the binding law under which they would resolve the case before them. *See* Phillip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1206-09 (2016).

213. *See, e.g.*, Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 86 (1871); Shepley v. Cowan, 91 U.S. 330, 340 (1875); Marquez v. Frisbie, 101 U.S. 473, 476 (1879); Quinby v. Conlan, 104 U.S. 420, 425 (1881); Whitcomb v. White, 214 U.S. 15, 15-17 (1909); *see also* Forbes v. Discoll, 4 Dakota 336, 31 N.W. 633, 643 (1887) (analyzing *Quinby*).

214. *Shepley*, 91 U.S. at 340 (emphasis added).

This method of review observed a divide between law, on the one hand, and fact and law-application conclusion, on the other.

Crucially, deference in these cases did not rest on a general unwillingness to review executive legality. To the contrary, courts exercised independent judgment on questions of law even as they treated the officer's application of that law to facts as conclusive. Justice Field's formulation makes this structure explicit: courts stood ready to "annul" executive decisions resting on legal error, while declining to review judgments "upon the weight of evidence."[215] Executive judgment did not constitute or displace law; it operated beneath it.[216]

The flip side of this deference is that when judicial review was plenary, agency law-application judgments supplied no "law" under which the court could adjudicate the controversy. By way of illustration, consider the judiciary's handling of a series of nineteenth-century statutes that authorized railroads to cut timber on public lands.

Using language that will be familiar to those who followed recent decisions concerning "waters of the United States,"[217] Congress granted railroads "the right to take, from the public lands *adjacent to* the line of said road . . . timber necessary for the construction of said railroad."[218] Companies sometimes ranged more than twenty miles from the line of their road in search of timber, and when the United States concluded that the land from which they took timber was not "adjacent" to the line, it would sue for trespass or conversion or prosecute under a statute forbidding cutting timber on public lands.[219] Trial in such cases proceeded before a jury.[220]

As the Supreme Court observed, the statutory term "adjacent" was "of more or less uncertain meaning."[221] The Eighth Circuit therefore concluded that the question whether a given distance (in that case, twenty-five miles) was near enough to make the land "adjacent" was a question for the jury.[222] It recognized that drawing a law-application conclusion would require a judgment, namely, "whether the right accorded by the statute was fairly exercised as congress intended it should be, or whether, by reason of the distance from which the timber in question was drawn, the defendant

215 *Id*.

216. *Id.*; *see also Mott*, 25 U.S. (12 Wheat.) at 31 (noting that the President's order calling forth the militia was "in strict conformity with the provisions of the law").

217. *See* Sackett v. EPA, 598 U.S. 651, 657-59 (2023).

218. An Act Granting to Railroads the Right of Way Through the Public Lands of the United States, ch. 152, 18 Stat. 482 (Mar. 3, 1875) (emphasis added); *see* Act of June 8, 1872, ch. 354,17 Stat. 339.

219. *See, e.g.*, United States v. St. Anthony R.R. Co., 192 U.S. 524, 542-43 (1904); Stone v. United States, 167 U.S. 178, 180-181 (1897).

220. *St. Anthony R.R.*, 192 U.S. at 536.

221. *Id.* at 539.

222. Bacheldor v. United States, 83 F. 986, 988-89 (8th Cir. 1897).

should be regarded as a trespasser."[223] That judgment belonged to the fact-finder.

Not long after, the Supreme Court repudiated the Eighth Circuit's decision in an opinion that held, *as a matter of law*, that land twenty miles distant was not adjacent.[224] At first glance, the Supreme Court's treatment of "adjacent" may seem to erase the formalist distinction between law and fact by resolving a fact-laden question as a matter of law.

But this reading confuses a substantive assertion about the law for a conceptual one.[225] The Court interpreted "adjacent" to mean "in proximity, contiguous or near to, the line of the road."[226] It acknowledged that this definition remained "uncertain as a measure of distance," meaning that applying the term to distances that were neither clearly adjacent nor clearly not adjacent would require an exercise of judgment.[227] But "no one . . . would say [lands twenty miles off] were adjacent to the railroad."[228] This conclusion—though contestable, and perhaps mistaken—did not foreclose the possibility that drawing a law-application conclusion would require an exercise of judgment in other cases: "It is very difficult to determine just where twilight ends and night begins, but it is easy enough to distinguish noon from midnight."[229]

The Supreme Court disagreed with the Eighth Circuit not because it thought *all* questions of adjacency were questions of law, but because it believed that the case before it (more than twenty miles) was outside the range of reasonable judgment, i.e., it was covered by the law itself such that the law-application step was syllogistic. Whether that conclusion was correct is a separate question. What matters here is that the Court justified its intervention on the ground that no scope for judgment existed—not on the ground that law-application judgment is itself law. The Court's disagreement was therefore substantive, not conceptual. It did not deny that in closer cases, the law might "run out," in which case questions of judgment might properly pass to the jury.

This is all consistent with the formalist approach. What does it have to do with judicial review? All the time that it was wrestling with this slippery concept of adjacency, the Supreme Court had at hand a "rule" from the Secretary of the Interior that would have made the statute considerably

223. *Id.*

224. *St. Anthony R.R*, 192 U.S. at 540-42. In *St. Anthony R.R.*, the parties stipulated to the distances of the lands from which the timber was cut, so the historical facts were undisputed. *Id.* at 526 (statement of the case).

225. Proctor, *supra* note 36 (manuscript at 9-10, 14-15) (describing the difference between substantive and conceptual claims about the law).

226. *St. Anthony R.R.*, 192 U.S. at 537.

227. *Id.*

228. *Id.*

229. *Id.* at 539.

more manageable. The Court even approved of the rule. Yet it declined to treat it as "law" for the case.

The Secretary had written:

> As far as sound discretion will warrant executive officers to go until an authoritative decision by the courts, to hold that, under this phrase, material may be taken from the tier of [survey] sections through which the right of way extends, as immediately adjoining the right of way, and perhaps an additional tier of sections on either side, as within the idea of "adjacency." . . . I think it wiser and safer to pursue such a rule, subject, as it is, to review by the courts, than to leave the matter open to the varying notions of different officers or the necessities of the companies.[230]

The Court found "much to be said in favor of this view of the statute," and did not disapprove it.[231] But neither did the Court adopt it to displace the "necessarily somewhat vague and uncertain" content of the statutory term "adjacent."[232] The Court's reasoning admits of several readings, but the best explanation is that the Court viewed the Secretary's guidance not as an interpretation of the statute, nor as an independent source of law, but as a reasonable way to structure the judgment involved in executing the statute.[233] So understood, the Secretary's rule could direct officers, but it would not direct a jury applying the law in a de novo proceeding.[234]

In sum, the formalist approach manifests itself in judicial review of agency action when a court that is restrained from reviewing executive findings of fact also declines to second-guess law-application conclusions. This means that, when the law requires judgment in its application, that judgment belongs to the agency. Still, the agency's exercise of judgment does not create "law" that courts will apply in de novo cases. In those cases, where no binding agency determination governs, the responsibility for law-application judgment passes to the judicial factfinder. None of this is to suggest that courts uniformly or consistently adhered to this approach, or that functional considerations were absent from nineteenth-century doctrine. But judicial review prior to the APA at least sometimes reflected this approach, and recovering it offers a way of respecting executive judgments without converting them into law.

230. *St. Anthony R.R.*, 192 U.S. at 538 (quoting Letter from William F. Vilas, Secretary of the Interior, to Augustus Hill Garland, Attorney General (Jan. 10, 1889)).

231. *Id.*

232. *Id.* at 539.

233. *Cf.* Wurman, *supra* note48, at 707 (describing Alexander Hamilton's practice of instructing revenue collectors on the law).

234. *See generally* Comment, 7 YALE L.J. 138 (1897) (considering whether rules, when "promulgated become a part of the law itself and consequently enforceable by the courts, or whether they remain merely rules of the Executive to his subordinates expressing his wishes as to their conduct and so enforceable only by him"). Thank you to my student, Joshua Robe, for bringing this comment to my attention.

2. At the Frontier of Fact and Policy: Political Decision as Fact

Deference to agency law-application judgment was confined to cases in which courts were required to treat agency findings of fact as conclusive. When review was plenary, courts—often juries—would find facts and draw law-application conclusions de novo.[235] Even then, however, matters of political decision remained out of bounds.

The classic expression of the rule concerning political decisions comes from *Marbury v. Madison*:

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.[236]

Chief Justice Marshall's dictum is taken as the seed for the modern political question doctrine, but Professor Grove has connected it to a distinct nineteenth-century doctrine that bears little resemblance to conventional portrayals of the modern one.[237] On Grove's account, the modern doctrine requires courts to dismiss cases that involve political questions; the traditional doctrine required courts to treat the political branches' answers to certain questions as conclusive and to proceed to adjudicate legal questions on the basis of those determinations.[238]

Whatever the merits of this account of the modern doctrine,[239] it is with the traditional doctrine that this Article is concerned. Unlike Grove's, this Article distinguishes between law-application judgments (to which Congress could assign conclusive force) and genuine political decisions (to which courts deferred because they lay beyond judicial authority altogether).[240]

The traditional political question doctrine required courts to treat the political branches' answers to political questions as settled "facts" to which they would apply the law in the course of resolving the parties' contro-

235. This was true even when administrative agencies had already drawn a law-application conclusion. *See* John F. Duffy, *Jury Review of Administrative Action*, 22 WM. & MARY BILL OF RTS. J. 281, 283-84, 287-88 (2013).

236. 5 U.S. (1 Cranch.) 137, 166 (1803).

237. Grove, *supra* note 189, at 1911.

238. *Id.* at 1916.

239. *See* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 460 & n.4, 485-86 (2017) (noting that the Court has "never held" that the political question doctrine limits its jurisdiction, and arguing that even the modern doctrine is best understood to consist primarily of a principle of "non-judicial finality," in accordance with Grove's rendition of the traditional doctrine).

240. *Cf. id.* at 460 (dividing political question cases into "two categories": those that involve "applying law to fact" and those that would require courts to "control political discretion with respect to military matters").

versy.[241] For example, courts treated the political branches' decision about who was sovereign over a given piece of territory as a "fact."[242] Of such determinations, Marshall observed:

> They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to the tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.[243]

Treating recognition as a "fact" is not an acceptance of the executive's empirical claim that one country or another actually exercises control over the territory, but an acceptance of a political determination. Such "facts" differ from law-application conclusions described above in that they involve an exercise of politically conferred discretion, rather than simple judgment about how a legal rule applies to factual circumstances.[244] Courts could not review political decisions in any case because "there exists, and can exist, no power to control that discretion."[245]

In both types of cases, courts treated executive conclusions as unexaminable "facts." But the rationale differed. Courts deferred to law-application conclusions because Congress had made executive factfinding conclusive to some extent, and drawing a law-application conclusion was part of that finding.[246] Courts deferred to political decisions because they involved an exercise of political power in which courts had no share.[247] Provided that the political decision was within the bounds of the law, it simply became a "fact" of the world within which courts adjudicated cases and controversies, and they treated it as such.

Grove does not distinguish law-application conclusions from political decisions but treats them together under the heading of the traditional political question doctrine. The distinction is irrelevant to Grove's argument about institutional allocation because courts treated both types of determinations as "fact" and did not dismiss cases that implicated them for want of jurisdiction. And, admittedly, the distinction between the two is not al-

241. Grove, *supra* note 189, at 1916.

242. *Id.* at 1917; *see also* Harrison, *supra* note 239, at 461-68 (collecting examples of political question cases concerning sovereignty decisions).

243. United States v. Palmer, 16 U.S. 610, 634 (1818); *see* Foster v. Neilson, 27 U.S. 253, 307-09 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. 51 (1833); Kennett v. Chambers, 55 U.S. 38, 50-51 (1852); United States v. Holliday, 70 U.S. 407, 419 (1865).

244. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803) ("[T]he President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.").

245. *Id.* at 166; *see also* Harrison, *supra* note 239, at 481 (drawing a similar principle from *Marbury*).

246. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31-32 (1827).

247. 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES § 557 (1910).

ways clear.[248] In *Martin v. Mott*, for example, President Madison's factual conclusion that an invasion was imminent was a conclusive law-application conclusion; the decision to call forth the militia also involved an unexaminable political decision. Certainly, a sense of the political stakes colored Justice Story's assertion that Congress had made his law-application conclusion conclusive.[249]

Nevertheless, the distinction may matter when it comes to figuring out which types of determinations will bind the court in otherwise de novo proceedings (like *Mott*). A court will accept law-application conclusions only when Congress has protected them by, for example, "constitut[ing] [the executive factfinder] the sole and exclusive judge of the existence of [certain] facts."[250] There may be limits on Congress's power to do this, as when the Constitution secures to a party a right to have an Article III factfinder determine the existence of certain facts.[251] Political decisions, by contrast, are by their nature beyond the reach of judicial power.[252] They may be so by virtue of statutory design—as when an actor makes a choice as to which the statute is "indifferent"[253]—or constitutional allocation—as when the President recognizes a foreign sovereign's control over particular territory.[254]

Keeping political decisions out of cases and controversies reflects the formalist approach because it responds to the Constitution's allocation of political powers. Treating executive political decisions as "fact" rather than "law" also preserves the norm that law is made through an exercise of legislative power.[255] Finally, the traditional political question doctrine is consistent with the formalist law-fact distinction because it groups political discretion and law-application judgment—the two normative elements of agency decision-making—under the "fact" heading.

B. The Rise of the Functionalist Approach

As the administrative state grew, the procedures through which agencies applied and implemented federal law became more intricate. Congress

248. The blurriness may explain how *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), came to be misunderstood. *See* Grove, *supra* note 189, at 1924-29 (discussing *Luther*).

249. *Mott*, 25 U.S. (12 Wheat.) at 31.

250. *Id.* at 32.

251. *See, e.g.*, SEC v. Jarkesy, 603 U.S. 109, 135-140 (2024).

252. United States v. Palmer, 16 U.S. 610, 634 (1818); *see also* Harrison, *supra* note 239, at 505 (contrasting a doctrine conferring finality on executive law-application conclusions—which transfers a traditional judicial function to a political actor—with a doctrine limiting courts' ability to "go beyond requiring compliance with the law and require or forbid some conduct that is itself legally indifferent").

253. Harrison, *supra* note 239, at 505.

254. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 14, 19 (2015) (observing that "the text and structure of the Cosntitution grant the President the power to recognize foreign nations and governments," and concluding that this power is "exclusive" to the President).

255. *See supra* Section II.A.

began to fashion judicial review provisions on an appellate model, with deference to agency factfinding.[256] Under President Franklin D. Roosevelt, the Attorney General's Committee on Administrative Procedure consolidated disparate administrative practices into proposed legislation that became the Administrative Procedure Act.[257] The Act establishes uniform "minimum procedural requirements for two principal types of agency action: rulemaking and adjudication."[258] And it adopts the appellate model for judicial review of rulemaking and adjudication.[259] Under the appellate model, courts review agency decisions in the same way an appellate court reviews trial court decision.[260]

The appellate model works due to the functional overlap between executive and judicial power: both involve application of law to fact.[261] Agencies apply law in the first instance, while courts check their work in the way that an appellate court checks the work of a trial court. But agencies differ from trial courts in that they also make political decisions.[262] Thus, while the appellate model of judicial review uses the familiar appellate units of "fact" and "law," it also brings political decision-making ("questions of policy") under judicial purview to some extent.[263]

The influence of the functionalist approach is evident all along the frontiers of law, fact, and policy. A decision's proximity to "law" strengthens the court's claim to make it, while a decision's proximity to "fact" or "policy" strengthens the agency's claim.[264] Consequently, the line that describes the strength of judicial review is roughly parabolic along an axis of generality: courts apply deferential review at both extremes—concrete facts and high-level policy—but engage in more searching review in the middle, where legal principles are at stake.[265] The next two subsections examine the junctures where judicial expertise in law meets agency expertise in fact and policy, respectively.

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256. Merrill, *supra* note 10, at 953-71; *see, e.g.*, Hepburn Act, Pub. L. No. 59-337, § 5, 34 Stat. 584, 590 (1906) (providing that a proceeding to enforce an order of the Interstate Commerce Commission "shall proceed in all respect like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated").

257. Bremer, *supra* note 99, at 1874.

258. *Id.*

259. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 494 (1951); 5 U.S.C. § 706(2) (2024) (default standard-of-review provision).

260. Merrill, *supra* note 10, at 941-42.

261. *See* Emerson, *supra* note 6, at 766; Cooper, *supra* note 6, at 580.

262. *See supra* Section I.A.

263. *See* Peter L. Strauss, *"Deference" Is Too Confusing–Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1156-59 (2012); Emily S. Bremer, *Vacatur Within the Appellate Model of Judicial Review*, 136 YALE L.J. (forthcoming 2026).

264. *See, e.g.*, *Universal Camera Corp.*, 340 U.S. 474, 477 (1951) ("Want of certainty in judicial review of Labor Board decisions partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review.").

265. Isaacs, *supra* note 10, at 12. *Cf.* Davis, *supra* note 42, at 588-91 (discussing the ambivalent relationship between generality and deference).

1. At the Frontier of Law and Fact: Judgment as Law

Under the appellate model of judicial review, the standard of review for "questions of fact" is substantial evidence review (or something like it).[266] Courts frequently apply this standard of review to law-application conclusions, as well. Much of what we think of as agency findings of fact are, in reality, law-application conclusions. That is because, when an agency states its findings of fact, it does so in the form of conclusions situated in the law.[267] The decision that originated substantial evidence review for agency actions,[268] and the decision that provided one of the canonical formulations of substantial evidence review,[269] both reviewed law-application conclusions, rather than pure findings of historical fact, for substantial evidence.[270]

Consistent with the formalist approach, many early twentieth-century decisions classified law-application conclusions as matters of "fact."[271] By mid-century, courts and scholars alike had concluded that at least some law-application conclusions actually present questions of law, though that conclusion did not always translate into the more searching review associated with legal questions under the appellate model.[272]

The Court first began to associate law-application conclusions more closely with questions of law at the turn of the twentieth century. In *Bates & Guild Co. v. Payne*,[273] the Court held that "where the decision of questions of fact is committed by Congress to the judgment and discretion of

266. Section 706 expressly requires "substantial evidence" review in formal proceedings only. 5 U.S.C. § 706(2)(E) (2024). Other agency actions must be set aside if they are, inter alia, "arbitrary, capricious, [or] an abuse of discretion." § 706(2)(A). But courts have long imported something like "substantial evidence" review into § 706(2)(A). *See* Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Res., 745 F.2d 677, 683-84 (D.C. Cir. 1984) ("When the arbitrary or capricious standard is performing the function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense . . . ."). *See generally* Magill, *supra* note 159, at 1429 & n.151 (describing "a debate in the courts and among scholars about whether the substantial evidence test is more or less skeptical of agency decisionmaking than the arbitrary-and-capricious test").

267. Jaffe, *supra* note 10, at 243; *see* Alfred Long Scanlan, *Judicial Review Under the Administrative Procedure Act—In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME L. REV. 501, 531 (1948) (noting that deferential review on "mixed questions" is "merely another ramification of the substantial evidence rule").

268. ICC v. Union Pac. R.R. Co., 222 U.S. 541, 541 (1912) (per Merrill, *supra* note 10, at 962, the first use of the "substantial evidence" standard in review of agency action); *see* Ray A. Brown, *The Federal "Administrative Procedure Act"*, 1947 WIS. L. REV. 66, 86.

269. *Universal Camera Corp.*, 340 U.S. at 474.

270. *ICC*, 222 U.S. at 547 ("mixed questions of law and fact"); Brief for Petitioner at 37, *Universal Camera Corp*., 340 U.S. 474, (No. 50-40) (deciding whether the employer acted with a "motive proscribed by the [National Labor Relations] Act").

271. Stephenson, *supra* note 27, at 116 n.50.

272. *See supra* text accompanying notes 110-112; *see, e.g.*, NLRB v. Marcus Trucking Co., 286 F.2d 583, 591 (2d Cir. 1961).

273. 194 U.S. 106 (1904).

the head of a department, his decision thereon is conclusive."[274] This sounds like the formulation that, in the nineteenth century, served to shield executive law-application conclusions.[275] But the Court continued: on "*mixed questions of law and fact*, or of law alone," his action merely "will carry with it a strong presumption of its correctness."[276] The "courts will not ordinarily review it," but "they may have the power and will occasionally exercise the right of so doing."[277]

Professor Aditya Bamzai identifies this case as a step toward the *Chevron* doctrine because the Court deferred to the Postmaster General on what it acknowledged may have been a question of law.[278] But *Bates* is also significant because it grouped so-called "mixed questions" (i.e., law-application conclusions) with questions of law rather than questions of fact for the purpose of determining the standard of review. In doing so, it opened the door not only for extending the deference traditionally accorded on law-application conclusions to questions of law—as in *Chevron*—but also for extending the more searching review traditionally associated with questions of law to law-application conclusions, as functional considerations dictated.[279]

The give-and-take on "mixed questions" is evident in the convoluted jurisprudence on deference in the years immediately before and after the APA's enactment, and all the way up until 1984, when the *Chevron* doctrine pushed law-application conclusions securely into the agencies' wheelhouse.[280] Professor Matthew Stephenson has argued that the variability of the Court's jurisprudence in this period has been overstated.[281] The illusion arises in part from the switch between the formalist label for mixed questions (question of fact) and the functionalist one (question of law).[282] But it also arises from the conflation of substantive and conceptual statements about the law.[283]

For example, in *NLRB v. Hearst Publications*, the Court considered the question whether the "newsboys who distribute[d]" "four Los Angeles daily newspapers" were "employees" of the newspaper's publishers within the meaning of the Wagner Act.[284] Although the Court insisted that "questions of statutory interpretation . . . are for the courts to resolve," it deferred to the NLRB's law-application conclusion that the newsboys before

274. *Id.* at 109.
275. *See supra* Section III.A.1.
276. *Bates*, 194 U.S. at 109 (emphasis added).
277. *Id.* at 110; *see* Smith v. Hitchcock, 226 U.S. 53, 58 (1912).
278. Bamzai, *supra* note 84, at 967.
279. *See infra* Section III.C.2.
280. Bamzai, *supra* note 84, at 976-97; Breyer, *supra* note 78, at 365-67; Davis, *supra* note 42, at 575.
281. Stephenson, *supra* note 27, at 114-28, 144-49.
282. *Id.* at 116 n.50.
283. Proctor, *supra* note 36 (manuscript at 9-10).
284. 322 U.S. 111, 113 (1944).

it were employees.[285] But three years later, in *Packard Motor Car Co. v. NLRB*, it reviewed the same sort of conclusion—this time, whether foremen are "employees"—de novo.[286]

These decisions seem difficult to reconcile.[287] Stephenson has argued that they can be reconciled if one recognizes that the Court's answer to the "pure question of law" was "enough to decide the case" in *Packard* but not in *Hearst*.[288] In other words, just as the Court took the question of adjacency from the jury in *St. Anthony Railroad* because no one could reasonably conclude that lands twenty miles from the line of the railroad were "adjacent,"[289] the Court took the question of status from the agency in *Packard* because no one could reasonably conclude the foremen at issue in that case were not "employees." This is a *substantive* claim that the law dictates a single law-application conclusion on the facts of the case. They were employees "as a matter of law." Contemporaneous *conceptual* claims that the "mixed question" on which the Court deferred to the agency in *Hearst* was a "question of law"[290] create the appearance that the Court is taking an inconsistent approach to questions of law.[291]

The practice of deferring law-application conclusions to the agency in *Hearst* was consistent with the formalist approach, but the rationale differed. In the nineteenth century, the Court might have deferred to the agency's law-application conclusion on the ground that it was a determination of fact that Congress had committed to the agency. But in modern parlance, these questions were "questions of law" that courts nevertheless handed over to agencies because functional considerations favored doing so.[292] In a detailed analysis of cases from this period, Professor Gary Lawson and Stephen Kam have shown that the Court's choice to defer or not to defer *generally* broke along the law-declaration/law-application line, just as the formalist approach would have done.[293] But not always. Sometimes, the Court opted not to defer even when drawing a law-application conclu-

285. *Id.* at 124, 130-31; *see* Schwartz, *supra* note 10, at 17-18; Gray v. Powell, 314 U.S. 402, 411 (1941).

286. 330 U.S. 485 (1947).

287. Lawson & Kam, *supra* note 47, at 21; *see also* Vermeule, *supra* note 39, at 107 (arguing that *Hearst* "exemplifies the Court's inability, over time, to sustain a clear distinction between 'pure' and 'mixed' questions of law in controversial cases at the moving frontier of administrative law"); Davis, *supra* note 42, at 576-77 (contrasting *Hearst* with *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946)).

288. Stephenson, *supra* note 27, at 123 n.87. *But see* Lawson & Kam, *supra* note 47, at 20-21.

289. *See supra* Section III.A.

290. Davis, *supra* note 42, at 573.

291. *See, e.g.*, Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (identifying "two lines of Supreme Court decisions" about questions of law "which are analytically in conflict").

292. Davis, *supra* note 42, at 581-94.

293. Lawson & Kam, *supra* note 47, at 9; *see also* Stephenson, *supra* note 27, at 105 (arguing that pre-*Chevron* cases established a presumption that agencies could apply imprecise statutory terms to particular situations).

sion called for an exercise of judgment.[294] And when the Court opted not to defer, it did so on institutional grounds that reveal the influence of the functionalist law-fact distinction.[295]

Eventually, the functionalist arguments for deferring mixed-questions-as-questions-of-law led courts to defer even pure questions of law to agencies under the *Chevron* doctrine. In more recent debates over the *Chevron* doctrine, functionalist defenses of deference still gain much of their force by eliding pure questions of law with mixed questions.[296] Indeed, in her *Loper Bright* dissent, Justice Kagan acknowledges that mixed questions constitute a "substantial part of [*Chevron*'s] domain."[297]

We turn to that domain in the next section. Here, the *Chevron* doctrine serves as one example of the influence of the functionalist approach at the frontier of law and fact. That approach blurs lines and varies the strength of review on both sides based on institutional considerations.

2. At the Frontier of Law and Policy: Law as Political Decision

Chevron illustrates the difficulty of distinguishing law-application conclusions from political decisions. With a formalist approach to the law-fact distinction, the risk of confusion would be confined to the "fact" end of the spectrum.[298] Under the functionalist approach, however, the confusion bleeds into law. And on the "law" end of the spectrum, the consequences for allocation loom large.

Agency decisions on "questions of policy" are subject to arbitrary-and-capricious review. The strength of arbitrary-and-capricious review has varied over the years, but the basic requirement is that an agency's political decision must be informed and rational on its own terms.[299] *Chenery I* facilitates this on-its-own-terms review by requiring courts to sustain political decisions only on "the grounds upon which the agency acted in exercising its powers."[300] This is a departure from the appellate process on which it is

294. Lawson & Kam, *supra* note 47, at 21-23.

295. *Id.* at 19-23; *see also* Davis, *supra* note 42, at 581-84 (explaining how the comparative qualification of the agency and of the court inform judicial deference).

296. *See, e.g.*, Stephenson, *supra* note 27, at 181-95 (arguing that the "*Gray* doctrine" would apply to many of the examples Justice Kagan collects in her *Loper Bright* dissent); Kisor v. Wilkie, 588 U.S. 558, 566-67 (2019) (collecting hard cases that also mostly involve law application).

297. 603 U.S. 369, 469 (2024) (Kagan, J., dissenting); *see also* Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1897-98 (2015) (explaining that *Chevron* "teach[es] that agencies have a particular role to play in" mixed questions of law and fact); Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1469-70 (2020) (explaining that "many cases follow [a] basic pattern," wherein the "real question [is] not about the linguistic meaning of the term; it [is] about how to implement that meaning in the relevant context").

298. *See supra* Section III.A.2.

299. Pojanowski, *supra* note 41, at 866, 879-80, 892-93 (describing different strengths of review); *see also* Proctor, *supra* note 58, at 376 n.53 (discussing how arbitrary-and-capricious review subjects agency political decisions to judicial purview).

300. SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 95 (1943).

modeled. Appellate standards of review contain no category for questions of policy,[301] and they permit appellate courts to uphold defensible trial court conclusions irrespective of the decisionmaker's actual reasoning.[302] The difference reflects special separation-of-powers concerns that arise when courts review agencies' answers to questions of policy.[303]

Agencies answer questions of policy by investigating facts. Courts reviewing agency action under the arbitrary-and-capricious standard look for gaps in evidentiary support, failure to consider contrary empirical data, or unreasoned leaps from the evidence to political decision.[304] The doctrine demands a form of rational empiricism: agencies must explain their decisions in terms that not only reflect coherent political priorities (normative) but also align with the record (factual). If these sound like the indicia of reasonableness for law-application conclusions, that is because they are. It is a reflection of this similarity that modern administrative law nominally allocates questions of fact and policy in the same way. Law-application conclusions and political decisions alike are subject to arbitrary-and-capricious review,[305] and the "ordinary remand rule" means that courts dissatisfied with either will remand the matter to the agency.[306]

Because they rest on a blend of facts and normative considerations, there is blurriness between political decisions and law-application conclusions that require an exercise of judgment.[307] In *Chenery I* itself, the decision under review might have been characterized as a law-application conclusion rather than a political decision.[308] But the similar treatment of questions of fact and policy means that the allocation-related stakes of drawing the line between fact and policy are fairly low.

301. They do, however, contain a category for discretionary decisions: abuse of discretion. Highmark Inc. v. Allcare Health Mgmt. Sys., 572 U.S. 559, 564 (2014). Sometimes appellate courts apply this standard to judgment-laden law-application conclusions. *See, e.g.*, *id.* But sometimes they use it to review choices that are more analogous to agency political decisions. *See, e.g.*, United States v. Clarke, 573 U.S. 248, 256 (2014). Still, the difference in the political content of those decisions matters and shapes courts' review of agency policymaking.

302. *See Chenery I*, 318 U.S. at 81.

303. Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 114-15 (2023).

304. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).

305. Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Res., 745 F.2d 677, 683-84 (1984).

306. *See generally* Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014) (explaining that under *Chenery I*, courts remand questions of fact and policy alike to the agency if the agency's stated reasons to not support its answers).

307. *See supra* Sections I.A, III.A.2.

308. *See Chenery I*, 318 U.S. at 94 (describing the question before the agency as "what is 'detrimental to the public interest or the interest of investors or consumers' or 'fair and equitable' within the meaning of §§ 7 and 11 of the Public Utility Holding Company Act of 1935"). The Court concluded that the Commission's action was not "controlled by established judicial principles"—that is, preexisting law—and so the choice of a rule was a political one. *Id.* at 90; *see also* NLRB. v. Metro. Life Ins. Co., 380 U.S. 438, 441-44 (1965) (treating identification of an "appropriate" bargaining unit as "discretionary").

The functionalist approach, however, does not confine the blurriness to the fact/policy frontier. Its realist premise—that answering "questions of law" sometimes entails lawmaking—creates a new blurry frontier: between law and policy. Once the act of "interpreting" a statute is recognized as partly an act of political choice, the allocation question resurfaces in a new form: when should an agency, rather than a court, interpret?[309]

In *Chevron v. Natural Resources Defense Council, Inc.*, the Supreme Court answered that the agency should make the choice if "the court determines Congress has not directly addressed the precise question at issue."[310] The Court was noncommittal about what the agency was doing within the statutory gap. It selected the sphynx-like word "construction"; construction (as a nominalization of "to construe") may be a synonym for interpretation, or it may (as a nominalization of "to construct") suggest that the agency is building something new.[311] The strategic ambiguity clouded the boundaries of the doctrine and enabled courts to treat interpretations, law-application conclusions, and political decisions alike as appropriate objects of deference.[312]

Thus, what began in *Bates* as an effort to subdivide and allocate "mixed questions" between agencies and courts matured in *Chevron* as an assertion that some questions of law are really questions of policy.[313] Even if run-of-the-mill "mixed questions" occupy a substantial part of *Chevron*'s domain, it is the specter of political decision-making that looms largest in rationalizing the expansion of judicial deference. The year before *Chevron* was decided, Professor Henry Monaghan published an influential article called Marbury *and the Administrative State*, which offers the clearest rationale for the form of deference that followed.[314] It posits that when agen-

309. Stephenson, *supra* note 27, at 107-08; Wurman, *supra* note 48, at 700-01; Strauss, *supra* note 263, at 1159; Scalia, *supra* note 10, at 516.

310. 467 U.S. 837, 842-43 (1983). I put *Chevron* in the "functionalist" era, but the doctrine that emerged from it shows signs of the Court's formalist turn, insofar as it replaced a "statute-by-statute" determination of "who decides" in the gap with a categorical presumption that Congress intended the agency to decide. Scalia, *supra* note 10, at 516; Stephenson, *supra* note 27, at 111. *See generally* Lawson & Kam, *supra* note 47, at 3-4 (arguing that the doctrine itself was an invention of lower courts).

311. Herz, *supra* note 297, at 1891.

312. Numerous scholars have noted that the *Chevron* doctrine conflated difficult questions of interpretation with political decisions. *See, e.g.*, Lawson & Kam, *supra* note 47; Herz, *supra* note 297, at 1871; Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1086-87 (2016); Solum & Sunstein, *supra* note 297, at 3; Wurman, *supra* note 48, at 703; Duffy, *supra* note 30, at 550; Stephenson, *supra* note 27, at 106 n.19, 177 n.280 (collecting additional examples). This Article adds to this scholarship the distinct category of law-application conclusions—treated by some as "interpretation" and others as "policymaking." The distinction between law-application conclusions, on the one hand, and difficult questions of interpretation or political decisions, on the other, may not have mattered under the *Chevron* regime, but it will be significant under *Loper Bright*. *See infra* Section III.C.2.

313. *See, e.g.*, Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 5.

314. Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 1 (1983); *see* Waterkeeper All. v. EPA, 853 F.3d 527, 538 (D.C. Cir. 2017) (Brown, J., concurring).

cies act within the gaps of statutes, they are exercising a delegated lawmaking power.[315] The role of the judiciary, on Monaghan's account, is merely to police the legal boundaries around the political decision, and otherwise to apply the "law" that political decision produces.

By invoking *Marbury*, Monaghan's article harks back to the traditional political question doctrine of the nineteenth century.[316] But there are three key distinctions. First, the "political decisions" category includes not only genuine matters of choice—which policy?—but also the judgement-laden questions of law application used to rationalize deference on "questions of law" in the first place.[317] Second, the agency's political decision becomes "law" rather than "fact."[318] Third, whereas the agency's decision would have been unexaminable under the traditional political question doctrine, it is subject to arbitrary-and-capricious review under the APA.[319]

When political decisions remained on the fact side of the line, they did not significantly alter the balance of power between the judiciary and the executive. Opening the door to deference on questions of law exposes the judiciary's core function to encroachments by the agency. Because the judiciary oversees the invasion, the *Chevron* doctrine was never fully stable. As the Court would later lament in *Loper Bright*, "we have spent the better part of four decades imposing one limitation on *Chevron* after another."[320]

The result is like a sailboat tacking into the wind. Having asserted judicial control over some law-application conclusions on the ground that they were questions of law, the Court handed some of them back to the agencies, together with some pure questions of law, on the ground that they implicated political decisions. But not completely. Courts still assess whether those decisions are unreasonable or arbitrary and capricious. From a functionalist perspective, this is all to the good: judicial review proceeds by minutely adjusting its sails to the institutional breezes.[321]

315. Monaghan, *supra* note 314, at 26, 29.

316. *See supra* Section III.A.2. The resemblance is especially strong in this turn-of-the-century account of the political question doctrine:

> [It is a] well-known and well-established principle . . . that it is not within the province of the courts to pass judgment upon the policy of legislative or executive action. Where, therefore, discretionary powers are granted by the Constitution or by statute, the manner in which those powers are exercised is not subject to judicial review. The courts, therefore, concern themselves only with the question as to the existence and extent of these discretionary powers.

2 WILLOUGHBY, *supra* note 247, at 999.

317. *See supra* Section III.B.1; Monaghan, *supra* note 314, at 29 ("Administrative application of law is administrative *formulation* of law whenever it involves elaboration of the statutory norm."); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 469 (2024) (Kagan, J., dissenting).

318. Solum & Sunstein, *supra* note 297, at 1465.

319. Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011); *see* Duffy, *supra* note 30, at 554 (discussing the confusing road to *Judulang*).

320. *Loper Bright*, 603 U.S. at 404.

321. For an account of how these adjustments reflected contemporaneous political developments, see Pojanowski, supra note 41, at 853-54.

C. The Persistence of the Functionalist Approach

The Court's turn to formalism in the judicial review context has been, first and foremost, statutory in nature. Gone are the days when even then-Professor Scalia endorsed a "judicial attitude . . . of benign disregard" toward the text of the APA.[322] Beginning with the Court's insistence in *Vermont Yankee Nuclear Power Corp. v. Natural Resrouces Defense Council, Inc.*[323] that courts not add to the APA's procedural requirements, and culminating in its return in *Loper Bright Enterprises v. Raimondo*[324] to Section 706's standard of review for questions of law, the Court has reoriented its jurisprudence to focus on the text of the APA and other administrative statutes.[325]

Behind these formal statutory holdings is an equally formal understanding of the Constitution's allocation of governmental powers.[326] The vision that has gradually come into focus is sharper and higher contrast.[327] Separation-of-powers formalism has sometimes found expression in constitutional holdings—on the removal power, say[328]—but they have thus far remained largely in the background of jurisprudence concerning judicial review.[329]

The Court's formalist instincts have yielded a statutory jurisprudence that sees clearer, more stable boundaries marking out the provinces of Congress, agencies, and courts on matters of administration. But often, the lines it draws are founded on realist premises. The influence of the functionalist approach to the law-fact distinction remains evident along the frontiers of law and fact and policy.

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322. Scalia, *supra* note 10, at 345.

323. 435 U.S. 519, 525 (1978).

324. 603 U.S. at 391-92 (2024). The Court in *Chevron* appears not even to have considered Section 706. Duffy, *supra* note 30, at 542.

325. *See* Sunstein & Vermeule, *supra* note 81, at 55; *see also* Pojanowski, *supra* note 41, at 900-01 (describing an approach to administrative law that is constitutionally modest and respectful of legislative judgments about how to allocate power).

326. Glicksman & Levy, *supra* note 39, at 1090; Pojanowski, *supra* note 41, at 900; Metzger, *supra* note 39, at 7; Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 4-5.

327. *See, e.g.*, Biden v. Nebraska, 600 U.S. 481, 505-06 (2023); Seila Law LLC v. CFPB, 591 U.S. 197 (2020); Stern v. Marshall, 564 U.S. 462, 484 (2011); Clinton v. New York, 524 U.S. 417, 448 (1998); INS v. Chadha, 462 U.S. 919 (1983).

328. *See, e.g.*, *Seila Law,* 591 U.S. at 197.

329. *See, e.g.*, *Loper Bright*, 603 U.S. at 391-92 (shifting from constitutional principles to statutory grounds for decision); *see also* Glicksman & Levy, *supra* note 39, at 1105 n.75; Pojanowski, *supra* note 41, at 900 (arguing that the Court's "separation of powers interventions have been weak on practical consequences, even if they are occasionally strong on rhetoric").

1. At the Frontier of Law and Fact: Expanded Mixed Question Review

The influence of the modern law-fact distinction is especially marked in the context of judicial review of agency law-application conclusions. The Court continues to regard so-called "mixed questions" as questions that straddle the law-fact divide. To the extent that the Court's formalist disposition has influenced its approach to mixed questions, it has prompted the Court to classify them *categorically*—but as "questions of law," rather than as "questions of fact". This classification differs from the one a formalist approach would yield.

A series of recent decisions interpreting the Immigration and Nationality Act (INA) exemplify this trend. The INA gives the Attorney General authority both to remove noncitizens and to grant relief from removal.[330] Judicial review of his decisions (which he makes by way of the Board of Immigration Appeals) is limited.[331] Section 242(a) of the Act strips courts of jurisdiction to review "any final order of removal against an alien who is removable by reason of having committed" a crime.[332] The Act then provides an exception to the jurisdiction strip: courts may review "constitutional claims or *questions of law* raised upon a petition for review filed with an appropriate court of appeals."[333]

In *Guerrero-Lasprilla v. Barr*, the Court held that the phrase "questions of law" in Section 242(a)(2)(D) includes "the application of a legal standard to undisputed or established facts."[334] Then, in *Wilkinson v. Garland*, the Court confirmed that its holding in *Guerrero-Lasprilla* extended to *all* questions of law application.[335]

There are signs of the formalist times in these decisions. They emphasize statutory text rather than policy arguments about institutional competency.[336] To the extent that they consider policy, the policy arguments wear formalist garb. In particular, the Court eschews the case-by-case approach to classifying mixed questions in favor of a categorical rule: all mixed questions are questions of law. In doing so, it expresses a formalist's distaste for line-drawing and standards.[337]

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330. Patel v. Garland, 596 U.S. 328, 331 (2022).

331. *Id.*

332. 8 U.S.C. § 1252(a)(2)(B)(i), (C) (2024).

333. § 1252(a)(2)(D) (emphasis added).

334. Guerrero-Lasprilla v. Barr, 589 U.S. 221, 225 (2020).

335. Wilkinson v. Garland, 601 U.S. 209, 218-19 (2024).

336. *Guerrero-Lasprilla*, 589 U.S. at 227-28, 230-32; *see also Patel*, 596 U.S. at 338-39, 346 (interpreting a neighboring provision of the INA). *But see Guerrero-Lasprilla*, 589 U.S. at 245-46 (Thomas, J., dissenting) (accusing the majority of departing from the text in pursuit of purpose).

337. *See, e.g.*, *Wilkinson*, 601 U.S. at 225 (rejecting a rule that "would require a court of appeals evaluating its jurisdiction to determine in every instance whether a particular legal standard presented a primarily factual or primarily legal inquiry"—a "complex line-drawing exercise"); *see also Patel*, 596 U.S. at 340-43 (rejecting the Government's argument that "judgment" in the statute refers to discretionary judgments, though on textual rather than policy grounds).

The decisions' treatment of mixed questions, however, comports with the functionalist law-fact distinction.[338] The decisions hold, contra the formalist approach, that questions of law application may be grouped with questions of law declaration on the "law" side of the law-fact divide.[339]

The jurisprudential commitment to the functionalist approach is so thorough that it seems that no party or justice even considered the possibility that mixed questions might fall entirely on the "fact" side of the law-fact divide. In its search for evidence about the meaning of the term "question of law," the Court looked to a neighboring provision that it called the "zipper clause."[340] The "zipper clause" refers to "[j]udicial review of *all questions of law and fact*, including interpretation and *application of* constitutional and *statutory provisions*."[341] According to the Court, that provision supported the conclusion that Congress considered questions about the "application of" a statute to be "questions of law." The Court explained that "there are three possibilities: Congress either used (1) 'questions of law,' (2) 'fact,' or (3) the combination of both terms to encompass mixed questions."[342] The Court dismissed the second possibility out of hand: "Even the Government does not argue that Congress used 'questions of fact' *alone* to cover mixed questions."[343] Neither did the dissent suggest that "questions of fact" *alone* could cover mixed questions.[344] This back-of-the-hand treatment shows just how far the Court remains from embracing a formalist approach to the law-fact distinction.

One potential formalist defense of these decisions would be that the law never runs out, and thus law-application conclusions follow mechanically from a court's articulation of the legal rules. But in *Guerrero-Lasprilla* and *Wilkinson*, the Court reached its decision without even considering whether a pre-existing rule of law *dictated* a specific law-application conclusion on the undisputed facts of the cases before it.[345] The categorical rule it announced in *Wilkinson* is necessarily conceptual rather than substantive: it treats law-application conclusions as matters of law even when

338. *Guerrero-Lasprilla* and *Wilkinson* also rest on a substantive canon with functionalist origins: "the presumption favoring judicial review of administrative action." *See Guerrero-Lasprilla*, 589 U.S. at 242-44 (Thomas, J., dissenting) (criticizing the presumption).

339. *See, e.g.*, Davis, *supra* note 42, at 565.

340. *Guerrero-Lasprilla*, 589 U.S. at 230.

341. 8 U.S.C. § 1252(b)(9) (2024) (emphasis supplied by *Guerrero-Lasprilla*).

342. *Guerrero-Lasprilla*, 589 U.S. at 231.

343. *Id.*

344. *Id.* at 241 n.4 (Thomas, J., dissenting). Instead of treating mixed questions categorically as questions of fact, the dissent would have treated the mixed question before the Court as unreviewable both because mixed questions are a distinct category not captured by the term "question of law," *id.* at 238-40, and because the particular mixed question at issue was fact-intensive, *id.* at 237-38; *see also id.* at 246 ("But the application of a statute does not always involve applying facts to a legal standard, nor is it necessarily analogous to the equitable and fact-intensive due-diligence inquiry."). The same justices (plus the Chief) dissented in *Wilkinson*, in an opinion that emphasized how far along the law-fact continuum the decision in question fell. Wilkinson v. Garland, 601 U.S. 209, 232-33 (2024).

345. *Guerrero-Lasprilla*, 589 U.S. at 236; *Wilkinson*, 601 U.S. at 225.

drawing them is not an exercise in deduction, but instead demands an exercise of fact-bound judgment.[346] Thus, in *Wilkinson*, the question whether a noncitizen's removal would result in "exceptional and extremely unusual hardship" was a "question of law," though it required an immigration judge "to closely examine and weigh a set of established facts."[347] In fact, the mixed question was so "factual" nature that the Court required the Third Circuit to defer to the immigration judge's conclusion on remand.[348]

Also telling is the Court's statement that in *Guerrero-Lasprilla* that interpreting "questions of law" "to exclude mixed questions would effectively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard."[349] The statement is inaccurate, and both it and the attitude it displays toward judicial review rest on a functionalist conception of law and fact.

Even if courts were to limit their review to law declaration, the Board would not be able to evade review merely by "*announc[ing]* the correct legal standard." It would have to *apply* the proper legal standard, too. Reviewing the Board's decision to confirm that it applied the proper legal standard is not the same as reviewing its application of law to fact. Determing whether the Board applied the proper legal standard would mean asking whether the Board "could" reach a given law-application conclusion. Reviewing the Board's application of law to fact, by contrast, would mean saying that it "should" reach a given law-application conclusion. The former scenario involves only law declaration. The Court merely confirms that the correct legal norm is at work, the Board retains whatever judgment is inherent in law application, and that judgment is unreviewable. In deciding what law-application conclusion the Board *should* reach, however, the reviewing court exercises that judgment independently and (depending on the strength of review) replaces the Board's judgment with its own.

Reviewing only the Board's law declaration would be much the same as reviewing the sufficiency of a complaint on a motion to dismiss, an activity long understood to present only questions of law.[350] When a court decides whether a complaint states a claim, it does consider the relationship between given facts and a legal standard, but it merely asks whether an essential law-application conclusion is "plausible," not inexorable.[351] In doing so, it decides that a law-applier *could* find in favor of the claimant if the claimant proves the facts alleged, not necessarily that it *must*.[352]

346. *See, e.g.*, *Wilkinson*, 601 U.S. at 225 ("Mixed questions of law and fact, *even when they are primarily factual*, fall within the statutory definition of 'questions of law.'" (emphasis added)).

347. *Id.* at 221.

348. *Id.* at 225.

349. *Guerrero-Lasprilla*, 589 U.S. at 229-30.

350. FED. R. CIV. P. 12(b)(6).

351. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

352. *See* Strauss, *supra* note 263, at 1150-51.

The *Guerrero-Lasprilla* Court recognized the analogy between Section 1252(a)(2)(D) and Rule 12(b)(6), but it incorrectly characterized the inquiry on a motion to dismiss as "whether a given set of facts *meets* a particular legal standard."[353] Answering *that* question at least sometimes requires an exercise of law-application judgment. And in "Suits at common law," the Seventh Amendment likely bars courts from exercising such judgment on a motion to dismiss (or a motion for summary judgment, for that matter).[354] The Court's confusion on this point stems from the loss of a definite line between the law and law-application conclusions.

Confusion aside, there is no doubt that limiting review to genuine questions of law (mixed questions excluded) narrows its scope. The Court took it for granted that a review-narrowing interpretation of "questions of law" would strike the reader as unlikely.[355] The Court's presumption further reveals the dominance of the functionalist law-fact distinction in modern thinking about judicial review. A Congress informed by a century of functionalist jurisprudence may well have intended to sweep mixed questions into "question of law" when it added Section 252(a)(2)(D) in 2005.[356] If so, though, Congress was reacting to judicial decisions premised on a realist mainstay: that law acquires meaning through application.[357]

The INA cases show that, in otherwise formalist hands, the realist premise that law-application involves lawmaking results in an aggrandizement of judicial power at the expense of executive discretion. A similar phenomenon may occur at the frontier of law and policy, as the next Section shows.

2. At the Frontier of What and Policy?

One way that formalism manifests itself in modern administrative-law jurisprudence is in the Court's approach to statutory interpretation. Over the course of the 2010s, *Chevron* deference gradually receded from the Court's docket as the Court wielded textualist tools to unearth determinate

353. *Guerrero-Lasprilla*, 589 U.S. at 227 (emphasis added).

354. U.S. CONST. amend. VII; *see* Proctor, *supra* note 36 (manuscript at 42-43).

355. *Guerrero-Lasprilla*, 589 U.S. at 229-30. The Court's affirmative case for its interpretation of the phrase "questions of law" reaches no further than the conclusion that nothing "in the language of the statute . . . suggests that 'questions of law' excludes the application of law to settled facts." *Id.* at 228. What tips the scales for the Court is the observation that excluding review of law application would create such a significant barrier to judicial review. *Id.* at 230.

356. *See Guerrero-Lasprilla*, 589 U.S. at 231-34 (discussing the "statutory history and relevant precedent," which supports the inference that the enacting Congress understood the term "question of law" expansively).

357. *See id.* at 227-28 (collecting a series of decisions using the "law" label imprecisely). In *INS v. St. Cyr*, which prompted Congress to enact Section 1252(a)(2)(C), the Court characterized "erroneous application or interpretation of statutes" alike as "errors of law." 533 U.S. 289, 302 (2001).

statutory answers to regulatory questions.[358] This case-by-case statutory formalism paved the way for a sort of law-and-fact formalism. More questions could be answered "as a matter of law" in the formalist sense that a pre-existing legal norm supplied an answer that foreclosed either law-application judgment or policy discretion.[359] Claims that something was true "as a matter of law," then, were consistent with the formalist conception of "law."

Then, the Supreme Court overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*.[360] Henceforth, "courts need not and under the APA may not defer to an agency interpretation of the law simply because the statute is ambiguous."[361] The implication of the decision for questions of law is clear: courts must answer them independently. But because the scope of "questions of law" is unclear in modern administrative-law jurisprudence, the *reach* of the Court's no deference rule remains unclear, too.[362]

One can say with a high degree of confidence that *Loper Bright* preserves deferential arbitrary-and-capricious review of political decisions that statutes delegate to the agency. The Court acknowledges that a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion."[363] In such cases, "the role of the reviewing court under the APA is, as always, to . . . effectuate the will of Congress . . . by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries."[364] Thus, agencies still answer questions of policy with limited judicial oversight.

Loper Bright's implications for law-application judgments are more ambiguous.[365] On the one hand, the decision directs the courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[366] The conclusion that "an agency has acted within its statutory authority" sure sounds like a law-application conclu-

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358. Pojanowski, *supra* note 41, at 888; *see also* Scalia, *supra* note 10, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists."). Also indicative of the Court's formalist bent: the proliferation of rules that complicated the *Chevron* inquiry. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 409 (2024).

359. *See, e.g.*, American Hospital Ass'n v. Becerra, 596 U.S. 724, 727 (2022).

360. 603 U.S. at 412.

361. *Loper Bright*, 603 U.S. at 413.

362. Proctor, *supra* note 58, at 383-85; Stephenson, *supra* note 27, at 102.

363. *Loper Bright*, 603 U.S. at 394; *see* Kristin E. Hickman & Amy J. Wildermuth, *Harmonizing Deference After* Loper Bright, 100 N.Y.U. L. Rev. 1924, 1968-83 (2025) (offering a nuanced interpretation of this exception).

364. *Loper Bright*, 603 U.S. at 395.

365. *See generally* Erika Lietzan, *FDA Resilience After* Loper Bright, 79 SMU L. REV. (forthcoming 2026) (considering *Loper Bright*'s implications for the different analytical components of agency decisionmaking).

366. *Loper Bright*, 603 U.S. at 412.

sion. If so, then the Court's call for "independent judgment" would appear to foreclose deference to any judgment an agency must exercise in determining what actions a statute authorizes or prohibits.

On the other hand, the Court relies on Section 706 to overturn *Chevron*. That provision subjects agency "findings" and "conclusions" (presumably including law-application conclusions) to arbitrary-and-capricious review.[367] Moreover, the Court seems to have viewed *Hearst*-style deference on "factbound" questions as consistent with the APA's directive that "[t]he reviewing court shall decide all relevant questions of law."[368] And at least some of the statutes it cites as examples of statutes that "delegate[ ] discretionary authority to [the] agency" involved terms, like "appropriate" or "reasonable," that are "flexibl[e]" in their application and so require a measure of law-application judgment.[369] The Court also relies on longstanding principles of judicial review,[370] and those longstanding principles contemplate that Congress may "delegate" law-application judgment, as well as political decision, to the agency.[371] Consistent with this understanding, Justice Kavanaugh has warned against "over-read[ing] *Loper Bright*" and failing "to respect the line that Congress has drawn."[372] And the next term, in an opinion by Justice Kavanaugh, the Court reversed the D.C. Circuit for failing to defer to the Surface Transportation Board's judgment about how the statutory term "detailed" applied to the facts of the federal project for which it was preparing an environmental impact statement.[373]

The Court's statutory formalism offers one way to reconcile these two strands of the Court's opinion. If the law is highly determinate, then it usually provides a single right answer in any given case.[374] That being so, the court's independent act of law declaration mechanically settles the question "whether an agency has acted within its statutory authority."[375] Drawing a law-application conclusion may be a distinct function, but in *most*

367. 5 U.S.C. § 706(2)(A).

368. *See Loper Bright Enters.*, 603 U.S. at 462 (Kagan, J., dissenting); Stephenson, *supra* note 27, at 162-63.

369. *Loper Bright*, 603 U.S. at 395; *see supra* Section III.B.1 (discussing *Hearst*).

370. *Loper Bright*, 603 U.S. at 391-92.

371. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31-32 (1827).

372. 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).

373. *Seven Cnty. Infrastructure Coalition v. Eagle Cnty*, 605 U.S. 168, 181 (2025) ("Of course, the meaning of 'detailed' is a question of law to be decided by a court[, b]ut what details need to be included . . . does not turn on the meaning of 'detailed,'—instead, it involves primarily issues of fact."). Another recent decision—*McLaughlin Chiropractic Assoc. v. McKesson Corp.*—gives further reason to believe that *Loper Bright* "is not a full pendulum swing . . . to 'judicial supremacy.'" *See Leading Case:* McLaughlin Chiropractic Assoc. v. McKesson Corp., 139 HARV. L. REV. 398, 398-99 (2025).

374. *See* Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. 983, 983 (2025); Pojanowski, *supra* note 41, at 888; Metzger, *supra* note 39, at 41.

375. *Loper Bright*, 603 U.S. at 412.

cases, there is no room for law-application judgment to which a court could defer.[376] The National Environmental Policy Act—at issue in the environmental impact statement decision—is exceptional because of the degree of deference the law demands to agencies' judgments about how to analyze environmental impacts.[377]

Yet *Loper Bright* bears at least two marks of the functionalist approach to the law-fact distinction. First, as noted, it could be read to classify some or all mixed questions as questions of law.[378] Although this may be a byproduct of a statutory formalism that reduces the process of drawing law-application conclusions to a syllogistic exercise, the opinion's ambiguity is, itself, a sign of the Court's functionalist disposition. The ambiguity arises from the Court addressing itself almost exclusively to the judiciary's law-declaration function rather than its dispute-resolution function.[379] Thus, we know the Court believes that "statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning,"[380] but we do not know whether it believes that they provide a single, best *answer* to the question the parties' dispute has placed before the court. So long as courts understand statutes to be highly determinate, not much turns on the distinction. But the complexities of administration are likely to produce uncertainty, especially in lower courts.[381] In such cases, it may really matter whether agencies get deference on law-application judgments.

Second, the opinion is functionalist insofar as it treats agency political decisions as a source of "law" rather than "fact."[382] Specifically, the Court expresses the view that when Congress delegates decisions to an agency, agency determinations may "*give* meaning" to the law a court must ap-

376. *See supra* Section III.A.1 (discussing manifestations of this belief in nineteenth-century decisions). Where would that leave *Hearst*, object of the Court's indifferent approval? *Hearst* was the case in which the law supposedly stopped short of the facts, requiring some law-application judgment about whether the newsboys were "employees." *See supra* text accompanying notes 284-286. It seems unlikely that the *Loper Bright* Court would agree with the *Hearst* Court that "employee" supplied no determinate answer. In principle, though, the Court seems to recognize that there may be situations in which "the best reading of the statute" leaves room for judgment in its application. In those situations, courts should defer to the agency's exercise of that judgment, at least where Congress has evinced its intention that courts should defer. *Loper Bright*, 603 U.S. at 695; Moctezuma-Reyes v. Garland, 124 F.4th 416, 420-21 (6th Cir. 2024) (concluding that broad terms confer discretion on the agency only when Congress evinces an intent that the agency exercise the judgment that inheres in their application).

377. In a footnote, the Court entertains serious doubts about whether agency compliance with NEPA is even judicially reviewable. *Seven Cnty. Infrastructure Coal.*, 605 U.S. at 179, n.2.

378. *See supra* Sections III.B.1, III.C.1 (explaining why this is functionalist).

379. *Cf.* Gary Lawson, *Life, the Universe, and the Judicial Power*, 48 HARV. J.L. & PUB. POL'Y 107, 108 (2025).

380. *Loper Bright*, 603 U.S. at 400.

381. Gary Lawson, *"Then What?": A Framework for Life Without* Chevron, 60 WAKE FOREST L. REV. 57, 69-84 (2025).

382. Mila Sohoni, Chevron*'s Legacy*, 138 HARV. L. REV. FORUM 66, 73 (2025) ("*Loper Bright* too is premised on the proposition that Congress can delegate the power to make legally binding rules and policies to agencies, even those of the sort that regulate private rights and liabilities in serious, far-reaching ways."); *see supra* Section III.B.2 (explaining why treating political decisions as a source of law is functionalist).

ply.[383] Tellingly, the Court cites Monaghan's *Marbury and the Administrative State* to describe how courts should review agency answers to questions of policy.[384] Monaghan regards statutory gaps as delegations of *lawmaking* power instead of mere applicative judgment or executive discretion that a formalist would treat as "fact."[385]

At first glance, *Loper Bright* seems to banish deference from the domain of law. But by treating agency law-application judgments and political decisions alike as sources of "law," and allowing deference to at least some of these, the Court invites it right back in.[386] Whether agencies or courts gain more by classifying agency judgments and political decisions as "law," though, remains to be seen. So long as they bear that title, the decisions remain vulnerable to commandeering by judges who feel bound to exercise independent judgment on questions of law unless Congress has clearly (and constitutionally) delegated them to the executive.

* * *

Across time, courts have had good reasons to defer to, or even to treat as conclusive, officers' and agencies' factfinding, law-application judgment, and political decisions, even as they provide a critical safeguard against unlawful executive action. The formalist approach to the law-fact distinction supported this balance by drawing a line between the judicial and executive domains at the frontier of pre-existing law. Courts exercised independent judgment to "say what the law is," while respecting Congress's decisions to vest the executive with discretion to say whether and how it applied under particular circumstances. As the functionalist approach blurred the lines between law, fact, and policy, judicial review increasingly depended on ad hoc, era-specific adjustments to keep courts and agencies in their respective lanes. A modern Court that favors clear rules and determinacy has sought to stabilize judicial review practices, but that project has been hindered by its failure to recover the formalist tools that once allowed courts to respect executive discretion without transforming judgment into law.

IV. Law, Fact, and Power

Parts II and III have shown that the Court's contemporary administrative-law jurisprudence mixes formalism with functionalism. As Profes-

383. *Loper Bright*, 603 U.S. at 394 (emphasis added).

384. *Id.* at 395.

385. *Id.*; *see also supra* Sections II.B, II.C (explaining that the view that agencies exercise lawmaking power is functionalist).

386. Thomas W. Merrill, Comment, *The Demise of Deference—And the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 231(2024); Adrian Vermeule, *The Old Regime and the* Loper Bright *Revolution*, 2024 SUP. CT. REV. 235, 238; *see* Sohoni, *supra* note 382 (manuscript at 67) (collecting commentary "predict[ing] that from the ashes of *Chevron* deference there will rise, phoenix-like, a new regime in which agencies will continue to possess discretion, receive deference, and command respect").

sors Adrian Vermeule and Pojanowski have both pointed out, *Crowell v. Benson*[387] offers a cautionary tale about the stability of such an approach.[388] This Part begins by considering *Crowell*'s lessons. It then identifies signs that a similar fate awaits the current Court's jurisprudence, as Vermeule has predicted.[389] It concludes that if the Court is committed to revitalizing a formal separation of powers, then it should revitalize the formalist approach to the law-fact distinction, too.

A. From Crowell *to* Jarkesy

It is fitting that J.B. Knudsen injured himself while splicing boat cables.[390] Out of his injury would grow a legal effort to interweave opposing doctrinal threads, producing a compromise doomed to fail under tension.[391]

Letus Crowell, a Deputy Commissioner of the U.S. Employees' Compensation Commission, ordered the boat's owner, Charles Benson, to compensate Knudsen, and Benson sued to enjoin the order's enforcement.[392] The statute under which Benson sued purported to make the deputy commissioner's findings of fact—"supported by evidence and within the scope of his authority"—final and thus not subject to reconsideration in a proceeding challenging that order.[393] Benson argued, among other things, that this arrangement violated the Fifth Amendment's Due Process Clause and Article III's Vesting Clause.[394]

The Court's decision in the case is perhaps best known as the source of the constitutional- and jurisdictional-fact doctrines. "Constitutional facts" are facts the review of which "is deemed to be necessary to enforce a constitutional right properly asserted."[395] "Jurisdictional facts" are facts that "underl[ie] the authority of executive officers."[396] The categories overlapped in *Crowell*: the limits Congress placed upon the officer's authority were also the limits that brought its legislation into conformity with the Constitution. For example, the factual question whether Benson employed Knudsen at the time of his accident determined not only Benson's liability (ordinary fact), but also whether the U.S. Employees' Compensation Commission had jurisdiction over the case (jurisdictional fact), and whether its

387. 285 U.S. 22 (1932).

388. ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 28-29 (2016); Pojanowski, *supra* note 41, at 898.

389. Vermeule, *supra* note 386, at 239.

390. Mark Tushnet, *The Story of* Crowell*: Grounding the Administrative State*, *in* FEDERAL COURTS STORIES 359, 359 (Vicki C. Jackson & Judith Resnick, eds. 2010).

391. VERMEULE, *supra* note 388, at 25-29.

392. *Crowell*, 285 U.S. at 36.

393. *Id.* at 47.

394. *Id.* at 37.

395. *Id.* at 46, 60.

396. *Id.* at 58.

order satisfied substantive due process (constitutional fact).[397] The Court mostly avoided Benson's constitutional questions by interpreting the statute to authorize de novo review of "constitutional facts" and "jurisdictional facts."[398]

Realist/functionalist thinking punctuates *Crowell*'s reasoning. When the Court insisted that "the judicial power" would be "sap[ped]" without de novo review of findings of fact "wherever fundamental rights depend, as not infrequently they do depend, upon the facts," its reasoning was decidedly realist: "finality as to facts becomes in effect finality in law."[399] And functionalist reasoning is evident in the Court's conclusion that leaving ordinary questions of fact to the agency is permissible because it secures to employers and employees "a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."[400]

Had the Court followed its instincts to their logical conclusion, it might have despaired of line-drawing altogether. A fully realist Court would perhaps have felt impelled to subject *all* findings of fact to more searching review on the ground that all give shape to the law.[401] Or perhaps, acknowledging the balance of functional arguments, it would have conceded that "Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department."[402]

As it was, the Court was not fully committed and, in some confusion, imported the concepts of constitutional and jurisdictional fact from an era of more formal thinking about law and governmental power. There was a mismatch between those concepts and the Court's reasoning for adopting them.[403] *Crowell*'s justification for de novo review rested on the need to protect the Court's authority over the law writ large.[404] But the doctrines it invoked had been designed to serve a different purpose: to check executive

397. *Id*. at 36. The other factual question was whether the injury occurred "upon the navigable waters of the United States," such that it fell within Congress's regulatory jurisdiction, and the Court's admiralty jurisdiction. *Id.* at 55.

398. *Id.* at 46. This construction enabled Benson to prevail without prevailing in his constitutional challenges*. Id.* at 65.

399. *Id.* at 57. *Cf.* Merrill, *supra* note 10, at 975 ("In effect, by conceding the 'fact' part of the regulatory process to the agencies, and reserving the 'law' part for the courts, judges would be assigning themselves the more exalted and important function.").

400. *Crowell*, 285 U.S. at 46.

401. *Id.* at 57.

402. *Id.* at 56-57; *see* VERMEULE, *supra* note 388, at 28.

403. Pojanowski, *supra* note 41, at 898; Merrill, *supra* note 10, at 943; Monaghan, *supra* note50, at 248.

404. VERMEULE, *supra* note 388, at 27

overreach[405] and to protect rights to life, liberty, and property[406] in individual cases.

The Court's fleeting embrace of conceptual categories gave way to a functionalist consensus that favored administrative expertise on *all* matters of fact.[407] Much of the decision is no longer good law,[408] yet there is a sense in which it is a pivot upon which much of the modern administrative state turns. It blessed protected agency factfinding on matters of private right,[409] and as its befuddling "constitutional" and "jurisdictional" reservations fell away, agencies came to realize an expansive factfinding authority that the Court has only recently begun to rein in.[410]

In many ways, *Crowell* is a mirror image of *Bates*.[411] Where *Bates* required deference on questions of law that the Court considered to be adjacent to the agency's factual domain, *Crowell* required independent judgment on questions of fact that the Court considered to be adjacent to the court's legal domain. *Bates* placed a factual gloss over legal determinations; *Crowell* placed a legal gloss over factual ones. And both were vulnerable to countervailing institutional considerations that eventually pushed review in the opposite direction: *Bates* gave way to *Chevron*, then *Loper Bright*; *Crowell* gave way to *Atlas Roofing*, then *Jarkesy*.[412]

We think of *Bates* and *Chevron* and *Loper Bright* as being decisions about "law," and *Crowell* and *Atlas Roofing* and *Jarkesy* as being decisions about "fact." But really, all six are skirmishes in a century-long war over that muddy middle ground where the streams of law and fact mix with the

405. Monaghan, *supra* note50, at 249; *see also* Rosenberry, *supra* note 10, at 45 ("No doubt administrative agencies can be kept within the field of their jurisdiction by the courts, because if they act in excess of their jurisdiction their acts are void.").

406. The factual questions that the courts took up in the due process cases related to the question of whether a private right was, in truth, at stake. Justice Brandeis, lead dissenter in *Crowell*, supported using the jurisdictional-fact doctrine for this purpose. Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922). And no doubt these considerations also animated the decision in *Crowell*. *See, e.g.*, *Crowell*, 285 U.S. at 60. But as the language quoted above the line reveals, the Court's rationale was mixed.

407. VERMEULE, *supra* note 388, at 29-32; Merrill, *supra* note 10, at 977; *see, e.g.*, Davis, *surpra* note 42, at 559 (dismissing *Crowell* as of "little interest except as history"); Brown, *supra* note 268, at 86 (dismissing *Crowell* as "dogma" that the Court was unlikely to adhere to).

408. VERMEULE, *supra* note 388, at 29-32.

409. *Crowell*, 285 U.S. at 51.

410. VERMEULE, *supra* note 388, at 31-33. The form of factfinding that *Crowell* implicated most directly is factfinding in formal adjudications. The Court made little headway against formal agency adjudication until *Jarkesy*. Glicksman & Levy, *supra* note 39, at 1096; Richard H. Fallon, Jr., *Non-Article III Federal Tribunals: An Essay on the Relation Between Theory and Practice*, 99 NOTRE DAME L. REV. 1691, 1715 (2024); *see supra* text accompanying notes 1-4. Factfinding in agency rulemaking—even rulemaking that produces generally applicable rules of private conduct—is not subject to any of *Crowell*'s constraints. VERMEULE , *supra* note 388, at 32-33. And informal adjudication—the "most common method[] of agency decisionmaking"—has its own set of much-neglected rules. Bremer, *supra* note 154, at 428.

411. *See supra* text accompanying notes 273-279.

412. *See* Breyer, *supra* note 78, at 365-66; REDFORD, *supra* note 10, at 326.

grit of political decision.[413] Jarkesy, it is true, was fighting to have a jury decide "pure" questions of fact. But his jury rights were a casualty of the *Crowell* Court's sense that only *some* factual questions—those that most obviously blend with law—deserve an Article III forum. Today's Court changed course. But so well entrenched is the functionalist idea that law-application conclusions bear a closer relationship to "law" than to "fact" that the Court did not even pause to consider whether subjecting Jarkesy to the SEC regulations it recited might violate the jury-trial right it was reinstating. How stable will this new compromise be?

B. Past Is Prologue

Crowell's dualist quality—fleeting yet foundational—is attributable to the fact that it stood with its feet in two different eras.[414] Functionalism was ascendant, so its functionalist assertions of agency power lived on, while its formalist limitations passed away.[415] Its legacy is a study in what happens when the Court tries to have it both ways. Theoretically ambivalent allocations of authority quickly and consequentially become uncalibrated.

It is easy to see how the current blend of formalism and functionalism risks doctrinal overreach, though of a different sort than followed in the wake of *Crowell*. A robust nondelegation doctrine would insist that Congress, and only Congress, may say "what the law shall be."[416] Plug the functionalist definition of "law" into that rule, and you get a duty of legislative specification that has no obvious foothold in the Constitution.[417] *Loper Bright* insists that the judiciary gets the final word on "what the law is."[418] Plug the functionalist definition of "law" into that rule, and you get an intensity of judicial scrutiny that is at odds with the Administrative Procedure Act and perhaps the Constitution's division of authority between President and judiciary.[419]

Crowell's other lesson, however, is that formalism tempered with functionalism tends to become more functionalist over time.[420] A Court confronted with the infeasibility of requiring Congress to legislate in a way that eliminates the need for law-application judgments may well abandon its efforts to revitalize the nondelegation doctrine. And a Court confronted with the degree of normative judgment involved in law-application may

413. *See* VERMEULE, *supra* note 388, at 29 (noting overlap between *Crowell*'s arguments for deference on facts and *Chevron*'s argument for deference on law, many of which sound in policy-related competencies).

414. Vermeule, *supra* note 39, at 109.

415. VERMEULE, *supra* note 388, at 28-34.

416. United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634 (1818).

417. *Cf.* Johnson v. United States, 576 U.S. 591, 607 (2015) (Thomas, J., concurring).

418. Marbury v. Madison, 1 5 U.S. (1 Cranch) 137, 177 (1803).

419. *See, e.g.*, Wurman, *supra* note 48, at 716-22.

420. Pojanowski, *supra* note 41, at 898.

chip away at a rule that so-called "questions of law" (which it understands to include some law-application judgments) demand independent judicial review.

The Court's turn to the major questions doctrine may reflect such a compromise. The doctrine requires Congress to speak clearly if it wishes to authorize agencies to make decisions with major political, economic, or social significance.[421] It does not prevent Congress from delegating significant lawmaking authority, but it makes it more difficult for Congress to do so. Long latent in the Court's jurisprudence, the major questions doctrine rose to prominence in the wake of *Gundy*,[422] and offered a way to avoid the practical difficulties of enforcing a robust nondelegation doctrine.[423]

Those difficulties were on display in *FCC v. Consumer's Research*.[424] If one accepts the realist premise that lawmaking inheres in law application and implementation, as the current Court does, then enforcing the nondelegation doctrine requires the Court to answer the how-much-is-too-much questions courts feel institutionally ill-equipped to answer.[425] The major questions doctrine sidesteps these problems by cutting statutory delegations down to size and raising the costs of delegating.[426] But the solution is incomplete: there remain numerous statutes that clearly authorize agencies to adopt regulations that provide rules of decision in cases—even criminal cases—where life, liberty, and property are at stake.[427]

On the judicial review front, *Loper Bright*—with its recognition that Congress may allow agencies to "give meaning" to laws, and its command that courts maintain "due respect for the views of the Executive Branch"[428]—has its own escape hatches built in.[429]

Compromise is appearing in other ways, too. In *Bondi v. VanDerStok*, the Court considered whether the Gun Control Act's provisions governing the sale of "firearm[s]"[430] apply to the sale of weapon parts kits—collections of components that can, with varying amounts of effort and additional

421. West Virginia v. EPA, 597 U.S. 697, 721 (2022).

422. *Id.* at 723.

423. Vermeule, *supra* note 386, at 268.

424. *See, e.g.*, Transcript of Oral Argument at 60-61, 170-71, FCC v. Consumers' Rsch., 606 U.S. 656 (2025) (No. 24-354).

425. Mistretta v. United States, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting).

426. This term, for example, the majority opinion in *Learning Resources v. Trump* avoided the need to address the nondelegation doctrine by instead invoking the major questions doctrine to hold that the President lacked statutory authority to impose tariffs. 146 S. Ct. 628, 646 (2026). For opinions discussing this connection between the major questions doctrine and the nondelegation doctrine, see NFIB v. OSHA, 595 U.S. 109, 124-25 (2022) (Gorsuch, J., concurring); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764-65 (2021) (per curiam); Biden v. Nebraska, 600 U.S. 481, 510 (2023) (Barrett, J., concurring) (citing Cass Sunstein, *There Are Two 'Major Questions Doctrines'*, 73 ADMIN. L. REV. 475, 483-84 (2021)).

427. *See, e.g.*, United States v. Pheasant, 157 F.4th 1119. 1119-20 (9th Cir. 2025) (Bumatay, J., dissenting).

428. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 394, 403 (2024).

429. Sohoni, *supra* note 382, at 76-77.

430. 18 U.S.C. §§ 922(t), 923(a), (i) (2024).

parts, be assembled to create an operational firearm.[431] The statute defines "firearm" as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive."[432] The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) promulgated a rule treating weapon parts kits as "firearms" if they are "designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive."[433] Manufacturers and hobbyists challenged the rule under Section 706 of the APA, arguing that it was "in excess of [ATF's] statutory . . . authority," and the lower courts largely agreed.[434]

Rather than engaging with the interpretive question as *Loper Bright* seems to demand, the Court reframed the challenge as a "facial" one that could succeed only if the challengers proved that the rule was unlawful in all of its applications.[435] That atypical[436] move shifted the inquiry from whether the agency had correctly interpreted the statute, to whether *any* weapon parts kit captured by the agency's rule could qualify as a "firearm" under the Act.[437] So framed, the challenge could fail even if the agency's rule swept well beyond the statute's meaning. The Court thus avoided the task of independently reviewing the agency's interpretation of the law under *Loper Bright*.[438]

To be sure, the Court engaged in independent statutory interpretation to conclude that some kits qualify as firearms under the Gun Control Act.[439] But it declined to "untangle exactly how far [the statutory definition] reaches,"[440] which is precisely the inquiry necessary to assess the validity of ATF's rule. One plausible explanation for the Court's reticence is that it perceived (I think wrongly[441]) that the statutory definition of "firearm" requires law-application judgment in borderline cases. At some

431. 604 U.S. 458, 461-63 (2025). I am of counsel at Cooper & Kirk PLLC, which represented respondents in *VanDerStok*. I was not, however, involved in the case, and the views I express here are my own.

432. 18 U.S.C. § 923(a)(3) (2024).

433. 27 C.F.R. § 478.11 (2026). The rule similarly expounded the statutory definition of "frame or receiver"—deemed a firearm under the statute—to include weapons parts that may be assembled to create a frame or receiver. *VanDerStok*, 604 U.S. at 465. For present purposes, I focus on the "firearm" definition.

434. *VanDerStok*, 604 U.S. at 466.

435. *Id.* at 467.

436. *See id.* at 494-96 (Thomas, J., dissenting) (criticizing the Court's approach); *id.* at 515-16 (Alito, J., dissenting) (same).

437. *Id.* at 468.

438. The Court cites *Loper Bright* once, but not to justify independent review of the *agency*'s interpretation. Instead, it cites *Loper Bright* to explain its decision to use a separate, longstanding agency interpretation as evidence that respondents "novel[ ]" interpretation of the Gun Control Act was incorrect. *Id.* at 480-81.

439. *Id.* at 468-77.

440. *Id.* at 473.

441. I am inclined agree with Justice Thomas and the Fifth Circuit that the statutory definition of firearm does not reach weapon-parts kits at all. *Id.* at 507-10 (Thomas, J., dissenting); *VanDerStok v. Garland*, 86 F.4th 179, 181 (5th Cir. 2023).

point, a kit's parts will lie so far from the end-state product that they can no longer qualify as a "weapon" that is "readily" adaptable to fire projectiles—a classic heap-of-sand problem.[442] Having perceived these "difficult questions,"[443] the Court may have been intimidated by *Loper Bright*'s implication that the judgments they supposedly demand are matters "of law" that courts must (usually) decide independently. But whatever the motivation, the Court's facial-challenge gambit creates a form of "super-deference" that the government is trying invoke as a substitute for *Chevron*'s deference machine.[444]

Critics have been quick to highlight the tension between the major questions doctrine and *VanDerStok*, on the one hand, and the formalist principles the Court professes, on the other.[445] The tension is there because the decisions reflect a compromise, necessitated by functionalist conceptions of law that lie deep in administrative-law jurisprudence. And they may be a sign that the formalist "revolution" will not achieve all of its aims and may even, like *Crowell*, unravel.[446]

The unraveling should trouble more than separation of powers formalists. Robust review of agency answers to mixed questions, *VanDerStok*-style super-deference, attaching criminal penalties to regulatory infractions—these are problems that would presumably trouble many functionalists. Functionalists favor subtle, context-sensitive adjustments.[447] In formalist hands, functionalist compromises often result in overcorrection.

C. But Which Past?

If the Court is committed to a more formal approach to the separation of powers and statutory interpretation, then there may be another way for

442. *VanDerStok*, 604 U.S. at 473 ("Start with a heap of sand and begin removing grains; at some point, a heap no longer exists.").

443. *Id.*

444. Will Yeatman & Charles Yates, *Update on VanDerStok "Deference"*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 30, 2025), https://www.yalejreg.com/nc/update-on-vanderstok-deference [https://perma.cc/7CW8-GL3C]; *see also VanDerStok*, 604 U.S. at 516 (Alito, J., dissenting) ("[T]his extension of *Salerno* would represent a huge boon for the administrative state.").

445. *See, e.g.*, Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 541-43 (2023); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1039-43 (2023); Thomas W. Merrill, Essay, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, HOOVER INST. 2, 12-13 (Nov. 13, 2023); Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J.F. 693, 725-26 (2022); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 465-468 (2021); Will Yeatman & Charles Yates, *Is* VanDerStok *an Accidental Landmark*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 4, 2025), https://www.yalejreg.com/nc/is-vanderstok-an-accidental-landmark [https://perma.cc/C8VE-LKLS].

446. Vermeule, *supra* note 386, at 269-70.

447. *See supra* Section III.B.2. *Cf.* Sohoni, *supra* note 382, at 66 (noting that *Loper Bright* disappointed expectations that the Court would take an incremental approach to reforming judicial review).

it to avoid *Crowell*'s fate. The Court can look past *Crowell* to an era when a more formal approach to the law-fact distinction also prevailed. Implementing the formalist law-fact distinction in administrative law would require the Court to do three things.

Treat only determinate rules as "law." First, the Court should treat only rules of decision that can be derived from a statute (or some other authoritative source of law outside the mind of the law-applying decisionmaker)[448] as "law." A court that has "faith in the autonomy and determinacy of the law,"[449] as the current Court seems to have,[450] will have an easier time confining "law" to findable rules. In their hands, law supplies a robust set of legal norms to be found, which promotes rule-of-law values like predictability and uniformity and relieves judges of the need to make or review normative judgments about technical matters beyond their ken. This, in turn, reduces the pressure judges might otherwise feel to stabilize the regulatory landscape by "making law" or to improve the regulatory landscape's quality by deferring to expert agencies.

But the move does not require the Court to believe that the law is fully determinate. The "law" may stop short of the facts, necessitating an exercise of judgment to draw a law-application conclusion. Confronted with that situation, a Court committed to formalism must resist the urge to supplement. It must have faith, instead, in the ability of agencies to make sound choices on a case-by-case basis, and in the ability of the political process to correct indeterminacies when their costs grow too high.

It helps that this prescription concerns only the law that courts apply in adjudications involving life, liberty, or property. This definition of "law" would not have to constrain the array of norms that structure administration. Agencies' ability to control officers' conduct through rules, without courts treating those rules as "law," will safeguard many of the rule-of-law values otherwise threatened by indeterminacy. But where those safeguards fail, it will be up to Congress rather than the courts to supply the deficit.

In *Neoclassical Administrative Law*, Pojanowski diagnosed that "*Crowell*'s distinction between review of law and policy was unstable only so long as it rested on the interpretive antiformalism that dominated at the time" and in the years that followed.[451] That is true. Interpretive antiformalism deprived authoritative sources of law of their determinacy and so produced pressure for courts to look elsewhere for "law." But the other problem was that the functionalist approach to the law-fact distinction insisted on filling large gaps with "law." One virtue of the formalist approach to the law-fact distinction is its ability to digest indeterminacy, where it

448. Other sources might include constitutions, treaties, or common law. Because we are dealing here with administrative law, this discussion focuses on statutes as authoritative sources of law.

449. Pojanowski, *supra* note 41, at 897.

450. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 408-09 (2024).

451. Pojanowski, *supra* note 41, at 898.

arises, without deputizing law-appliers as law-makers. This is important because a century of judicial tolerance for congressional delegations has yielded some truly indeterminate statutes.

The capacity to accommodate indeterminacy also inoculates the formalist approach to the law-fact distinction against Vermeulean charges of naiveté.[452] Determinacy is a jurisdictional limit—marking where courts may speak authoritatively—rather than a metaphysical claim. Formalism, in this sense, merely insists that we reserve the conventional label of "law" for whatever answers statutes determinately give.[453]

Treat agency choices as "fact," not "law." Second, the Court should treat the products of agency choice—whether law-application judgment or political decision—as matters of "fact." This is a corollary to the first prescription. Because agencies lack the legislative power, their choices are not authoritative sources of law. Thus, courts cannot treat them as law for purposes of the law-fact distinction. Within the law-fact binary, then, they must be "fact."

Placing law-application judgment and political decision within a factual framework shows that treating them as something other than law does not leave them unchecked. When an agency takes an action, that action is a fact. But its legal significance—the force it exerts within the world—still depends on whether it was done with authority, pursuant to proper procedures, and is substantively rational.[454] Moreover, agency rules continue to guide conduct and structure enforcement, even if they do not supply "law" in adjudications. Exercises of executive judgment and discretion, then, remain subject to political control (by Congress), internal discipline (by higher-ups within the executive branch), and rationality- and legality-forcing forms of review (by the courts).

As facts, they cannot supply rules of decision, but this does not prevent Congress from vesting meaningful discretion in agencies. If there is to be rule under which a person might be deprived of life, liberty, or property, Congress must enact it as law. But laws attach consequences to facts, and Congress may provide that an executive action—for example, a presidential proclamation—is one "fact" upon which the law's operation depends.[455] This enables Congress to choose between constraining courts by vesting law-application judgment in the executive, and constraining agencies by allowing courts (and juries) to exercise law-application judgment independently.[456] And even when Congress does not legislate conditionally, agency exercises of discretion have a real impact on the world. A head

452. Vermeule, *supra* note 39, at 111.

453. Proctor, *supra* note 36 (manuscript at 5).

454. 5 U.S.C. § 706(2) (2024); *see also* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 (1936) (describing review when a legislature makes its agent's findings of fact conclusive).

455. The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch.) 382, 388 (1813).

456. *See, e.g.*, Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28 (1827).

of department's instructions to inferior officers about the meaning of a statute may make the difference in whether a private party is cleared out of port,[457] receives a government benefit,[458] or even faces prosecution.[459]

Because it treats agency choices as "fact" rather than "law," the formalist approach to the law-fact distinction would be compatible with a highly deferential judicial posture towards genuine political decisions, in line with Pojanowski's neoclassical framework.[460] But it would also facilitate a less "modest" stance on the nondelegation doctrine than a neoclassicist adopts. The urge to be "faint-hearted"[461] about strict limits on who may engage in lawmaking is less pressing when one can tolerate a degree of discretion in law-application without giving ground on the exclusivity of Congress's lawmaking authority.[462]

Still, highly indeterminate laws would both create intolerable uncertainty for regulated parties and diminish regulatory efficacy. As a practical matter, then, Congress would need to take up some of the lawmaking slack. This may seem unrealistic today, but statutory indeterminacy is evidence that Congress responds to judicial incentives. We live in a world where the Court has permitted the administrative state to relieve Congress of much of its lawmaking burden at low political cost. If the Court were to revoke that permission, the practical consequences of regulatory uncertainty and fecklessness could reshape congressional behavior again.

Account for law-application judgment. Third, the Court would have to acknowledge the third analytical component of legal reasoning—the law-application conclusion—and be prepared to cede it to the agency when Congress directs and the Constitution permits. Some statutory provisions, like Section 706, will identify this analytical component by name ("conclusion" or "mixed question of law and fact"). Others may refer only to "fact" or "finding." Courts need to be more attuned to the possibility that these words encompass law-application conclusions, and that those conclusions may rest on normative judgments where the law "runs out."[463]

Distinguishing law-application judgment from "law" is important for the reasons already given. It is likewise important to distinguish law-application judgment from political decision. The formalist approach to the law-fact distinction treats both as "facts," but because there can be multiple factfinders, the distinction between law-application conclusion and politi-

457. *See supra* note 191.

458. *See, e.g.*, Act. of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95, 95.

459. United States v. St. Anthony R.R. Co., 192 U.S. 524, 537-38 (1904).

460. Pojanowski, *supra* note 41, at 893-94.

461. *Id.* at 895.

462. This would also allow the Court to reconcile its command that the judiciary must "respect" congressional delegations of authority to agencies with a serious commitment to treating delegations of legislative power as unlawful. *See* Sohoni, *supra* note 382, at 76 (arguing that it would be "uncommonly silly" for the Court to hold both positions at the same time).

463. *See, e.g.*, Seven Cnty. Infrastructure Coal. v. Eagle County. 605 U.S. 168, 182-83 (2025).

cal decision may have allocative consequences. For example, law-application conclusions implicate the jury trial right, while political decisions implicate limits on judicial competency. Although the limits these considerations impose on congressional allocation choices is beyond the scope of this Article, they likely create different defaults: at least in adjudications that implicate the jury trial right, executive law-application conclusions are presumptively subject to judicial review (really, jury review), while political decisions are not.

Distinguishing political decisions from law-application conclusions will also help courts recognize that there may be occasions when it is appropriate to defer to the factfinder (agency or jury) even though a statute does not expressly confer a policymaking choice. A court that finds the law to be highly determinate will rarely encounter such occasions, but experience suggests that they will arise.[464] When they do, acknowledging law-application judgment offers an alternative to "making law" or fabricating a delegation of policymaking authority.

These three prescriptions can be summarized in tabular form as follows:

Table 1. Allocation of Decision Authority

What	**Who**	**How**
Law	Judge	Identify determinate rules of decision supplied by statute.
Law-Application Conclusion	Executive or Judicial Factfinder	Apply determinate legal standards to found facts. May involve an exercise of judgment where law underdetermines outcome. Does not produce law.
Political Decision	Executive	Make discretionary decisions where Congress has authorized choice. Subject to political and rationality-forcing controls.

464. Lawson, *supra* note 381, at 82.

D. An Illustration

To see how these prescriptions would work in practice, consider the Court's recent decision in *McLaughlin Chiropractic Assoc. v. McKesson Corp*.[465] The Telephone Consumer Protection Act (TCPA) requires businesses to include opt-out notices on unsolicited advertisements sent to a "telephone facsimile machine."[466] After McKesson faxed McLaughlin Chiropractic an unsolicited advertisement that omitted an opt-out notice, McLaughlin Chiropractic brought a private enforcement action under the TCPA.[467] The district court certified a class that included all recipients of noncompliant McKesson faxes, including those who received faxes through an online fax service rather than a physical fax machine.[468] While the action was pending, the Federal Communications Commission (FCC) ruled in an unrelated proceeding that "an online fax service is not a 'telephone facsimile machine'" within the meaning of the TCPA.[469] The Hobbs Act authorizes pre-enforcement review of FCC rulings in the courts of appeals.[470] In McLaughlin Chiropractic's enforcement action, the district court held that a pre-enforcement proceeding under the Hobbs Act was the exclusive means of reviewing FCC orders, which meant that it was bound by the FCC's conclusion concerning online fax services. The district court decertified the class, and McLaughlin Chiropractic went home with a $6,000 judgment.[471]

Reviewing that decision, the Supreme Court held that "[t]he Hobbs Act does not preclude district courts in enforcement proceedings from independently assessing whether an agency's interpretation of the relevant statute is correct."[472] To the extent that the statute determined the status of online fax services, their status is a question of law that courts adjudicating enforcement actions should answer independently under *Loper Bright*.[473]

The Court clarified, however, that this is just a default: Congress "can easily" "preclude judicial review in enforcement proceedings," as it has done for other regulatory enforcement regimes.[474] Because the Court held that the Hobbs Act did not preclude judicial review, it did not have to work out the implications preclusion would have in an enforcement action.[475]

465. 606 U.S. 146 (2025).
466. 47 U.S.C. § 227(b)(1)(C), (2)(D) (2024).
467. *McLaughlin Chiropractic*, 606 U.S. at 150.
468. *Id.* at 150.
469. *See In re* Amerifactors Financial Group, LLC, 34 FCC Rcd. 11950, 11953 ¶ 11 (2019).
470. 28 U.S.C. § 2342(1) (2024).
471. *McLaughlin Chiropractic*, 606 U.S. at 150-51.
472. *Id.* at 152.
473. *Id.* at 155.
474. *Id.* at 157.
475. *See id.* at 158 n.5 (acknowledging that preclusion "could potentially rise to the level of a constitutional due process problem").

Those implications depend on what kind of thing the agency has decided—law, fact, or something else—so the formalist approach to the law-fact distinction can help to structure the analysis.

The first prescription set forth in Section IV.C would require a court adjudicating an enforcement action to treat as "law" only those rules of decision it could derive from the TCPA, irrespective of whether an alternative or supplemental rule is embodied in an agency rule. That is because a statute protecting the agency rule from judicial review cannot transform that rule into "law" for purposes of an adjudication in which a court issues a binding judgment affecting life, liberty, and property.[476] The agency rule may be unreviewable, but the law must come from the statute.

The second prescription would require the court to treat any lawful agency choice embodied in the rule as a "fact." A statute barring judicial review of the agency's choice in the context of that enforcement action would make the fact of the agency's action final and conclusive. But conclusive of what? If the statute reaches online fax services, then the agency's conclusion that online fax services are *not* "telephone facsimile machines" would be immaterial. In this situation, there simply is no choice for the agency to make. If, on the other hand, the statute underdetermines the status of online fax services, then drawing a law-application conclusion that an online fax service is not a "telephone facsimile machine" would require a measure of judgment. The question, then, is whether a statute precluding judicial review of FCC's rule would make the judgment reflected in that rule conclusive in an enforcement action.

The answer would depend on statutory design. Consider two alternative designs. Congress might require opt-out notices on unsolicited advertisements sent over any "telephone facsimile machine" designated by the FCC. If so, an FCC rule that omits online fax services might be susceptible to challenge on a variety of substantive and procedural grounds but nevertheless be conclusive in an enforcement action. That is because the fact that the statute makes relevant is the fact of FCC's designation. By contrast, if Congress required opt-out notices on unsolicited advertisements sent over "telephone facsimile machines" (as it did in TCPA), then the fact that FCC has excluded online fax services from its definition of "telephone facsimile machines" seems, once again, to be immaterial. That is because the fact the statute makes material is the fact of online fax service's status, not the fact of the FCC's designation. In short, the agency's action creates

476. *See* PDR Network LLC v. Carlton & Harris Chiropractic, 588 U.S. 1, 9-10 (2019) (Thomas, J., concurring) ("If the [Hobbs] Act truly precluded the district court from even reaching the text of the TCPA and instead required courts to treat FCC interpretations of the TCPA as authoritative, then the Act would trench upon Article III's vesting of the judicial power in the courts. . . . And to the extent the Hobbs Act requires courts to give force of law to agency pronouncements on matters of private conduct without regard to the text of the governing statute, the Act would be unconstitutional for the additional reason that it would permit a body other than Congress to exercise the legislative power.").

a "fact," but statute determines what role, if any, that fact plays in the enforcement action.

The third prescription would require the Court to recognize that law application involves a third ingredient in addition to law and fact: the law-application conclusion. In places, *McLaughlin Chiropractic* seems to treat the FCC's order concerning online fax services as nothing more than an interpretation of the TCPA.[477] But it really announces a law-application conclusion concerning internet fax services. It may be the case that the conclusion follows mechanically from an interpretation of the statute. But what if drawing that conclusion requires a measure of judgment? *McLaughlin Chiropractic* is clear that the Hobbs Act does not require courts adjudicating enforcement actions to accept interpretations embodied in agency rules, but it is silent on the Hobbs Act's implications for law-application conclusions (and political decisions, for that matter). As explained above, their status would be a matter of statutory design, and there may be constitutional limits on Congress's ability to make executive law-application judgments conclusive. Analysis of those constitutional limits is beyond the scope of this Article. The point of this illustration is to show how the inquiry should proceed under the prescriptions outlined above. *McLaughlin* is incomplete because it leaves open the question how courts should proceed when what the agency has done is something more than interpretation.

These three moves would bring the Court's jurisprudence in line with the formalist law-fact distinction. But a word of caution: they would bring the Court's jurisprudence in line with *the law* only if the law incorporates a formalist law-fact distinction. Sometimes, it may not.[478] Defending the formalist law-fact distinction as a feature of positive law is a project of future work.[479]

Conclusion

The administrative state's realist-functionalist foundations are well known. Other scholars have persuasively traced various features of administrative law to a belief that the law is indeterminate and a willingness to blur legislative, executive, and judicial powers in service of institutional goals. The Court's turn toward formalism reflects a dissatisfaction with those premises, but not yet a stable alternative.

By breaking executive and judicial decision-making into its constituent analytical components, this Article has identified two underappreciated features of administrative-law jurisprudence: courts have systemati-

477. *See, e.g.*, *McLaughlin Chiropractic*, 606 U.S. at 151-152, 159.

478. *See supra* note 356.

479. *See generally* Haley Proctor, *No Law Without Delegation* (unpublished manuscript) (on file with author) (defending the formalist law-fact distinction on positive grounds).

cally moved the law-fact line in the direction of fact, and they have come to conflate law-application judgment with political decision. Together, these moves generated a persistent dilemma: wring extreme determinacy out of regulatory statutes or accept agency lawmaking. Much of modern doctrine surrounding nondelegation and judicial review can be understood as an effort to manage, rather than resolve, this dilemma.

This Article offers a friendly amendment to existing formalist critiques of the administrative state, including those issuing from the Court itself. First, it shows that formalism does not require courts to reclaim all "mixed questions" as "questions of law." Properly understood, a formalist approach permits Congress to allocate some law-application judgment to factfinders, whether judicial or executive. Calls to treat something as a question of law ought to be framed as claims about the determinacy of enacted legal norms, not as categorical objections to allocating judgment away from judges.

Second, this Article has questioned the need to equate law-application judgment with political decision. The equation followed from treating the product of law-application judgment as "law." Treating the discretion law-appliers exercise as political allowed agencies (with their expertise and accountability) to get back in on the game once matters of law application moved to the "law" side of the law-fact divide. But once "law" is confined to authoritative rules of decision, the exercise of judgment need not be described as political in order to legitimate its allocation to agencies. Like juries, agencies can exercise judgment without making law.

The payoff is not merely conceptual. Recovering a formalist law-fact distinction rejects the false choice that has driven much of recent doctrine. Courts need not oscillate between aggressive judicial supremacy and improvised forms of deference, nor must Congress choose between hyper-specific legislation and delegations of lawmaking power. Congress can vest discretion in agencies without courts treating its product as law. And courts can defer to the exercise of that discretion without abdicating the judicial duty to say what the law is.